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Five to Four: Why do Bare Majorities Rule on Courts

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1. WHY ASK?

Why, in most appellate courts, are important issues of law settled by majority-decision? Why, when judges disagree, do they use the same simple method of "counting heads" that is used in electoral and legislative politics? Some scholars call this the problem of "judicial majoritarianism,"[1] though that phrase is also used (by Barry Friedman and others) to describe the inclination of judges to fall in with majorities in the wider society.[b] In this paper I am not interested in "judicial majoritarianism" in Friedman's sense. What I want to address is the decision-procedure used internally in our appellate courts.

Judges vote when they disagree and—as we all know—many important U.S. Supreme Court cases are settled by a vote of 5-4 on the, even when the court is reviewing legislation and deciding whether to overturn the result of a majority-vote among elected representatives. Consider, for example, *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010), which overturned a piece of federal legislation, the Bipartisan Campaign Reform Act of 2002. The judicial vote to overturn it was 5-4; the legislative votes to enact it were 240–189 in the House of Representatives and 60-40 in the Senate. Majorities, everywhere you look. This leads to my question: Why is bare majority-decision[2] [c] —I am going to abbreviate it as MD—why is MD an appropriate principle to use in an institution that is supposed to be curing or mitigating the defects of majoritarianism? Of course, it is not only in constitutional cases that majorities rule in court. It is pretty much universal among multi-member judicial panels, in private law

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[1] Guha Krishnamurthi, Jon Reidy, Michael J. Stephan, and Shane Pennington, *An Elementary Defense of Judicial Majoritarianism*, 88 TEXAS LAW REVIEW 33, 33-4 (2009).

[2] By way of definition, I shall say that MD is a decision procedure which determines the outcome of a binary choice—yes or no, petitioner versus respondent—by designating a set of individual voters and choosing the option favored by a majority of those voters, even if it is only a bare majority (such as 50%+1). Note that MD, so defined, differs slightly from the method used for elections in a "first past the post" electoral system: that method selects the candidate who secures more votes than any other candidate, whether he receives more than 50% or not. But MD is more or less exactly the method used in most parliaments and congresses to make legislative decisions.

appeals as well as in public law, at least in our tradition. It's just how judges do it. But that is not an answer; it is an indication of how pervasively the question arises.

So: why is MD used in judicial decision-making? And why do people put up with it? Let me say at once that my pressing these questions is not intended as a way of discrediting judicial decision-making, not even on questions of judicial review. (There are ample grounds for opposing judicial review of legislation whatever decision-procedure judges use.)[d] Even for those favor judicial review, the absence of a clear theory of judicial MD constitutes a gap in our understanding of our most important legal institution.

I think my question is worth asking, for several reasons. First, it is worth asking simply out of interest. MD in court is something we take for granted, but it would be interesting to know whether this practice has ever been made the focus of explicit justificatory argument in the history of the modern judiciary. I suspect the answer is "no," and I wonder why that has been the case, especially in light of the theoretical attention—much of it critical—that is paid to MD in democratic settings. When we consider electoral or representative institutions, we ask questions about the justification of MD all the time and we devote a lot of effort to elaborating and discussing the answers. Is the justification of MD in democratic politics epistemic? I mean: is MD an appropriate decision-procedure to use because it promises to get us more often to the right answer (e.g., to the election of good representatives or right legislative choices)?[e] Or is it appropriate only as a fair procedure, i.e., one that respects the principle of political equality (one person, one vote)?[f] Is MD in electoral or legislative contexts just "natural" in some sense that does not require justification? Do we use it simply because it's efficient?[g] These are good questions to ask about voting in elections and in legislatures. They are good questions too when we turn our attention to courts.

Here's a second reason. Often defenders of judicial review say they are opposed to majoritarianism as such. But because they seem to have no trouble with MD in court, that can't really be their position. It must be *democratic* majoritarianism they are opposed to, not judicial majoritarianism. Opportunistically, however, they will

sometimes seize on certain difficulties with majoritarian decision-making as such, in order to discredit *democratic* majoritarianism. Whether or not they are disingenuous in this, we ought to take these difficulties seriously. So, for example, many critics of democratic majoritarianism allege that MD can lead to incoherent decision-making (e.g., through Arrow's paradox). If this is so, then maybe it is also true of appellate courts using MD (unless there I something about courts that keeps their decision-making within the parameters where the paradox does not arise). Dan Farber and Philip Frickey pointed this out in their excellent study *Law and Public Choice*: they said that if we think (for reasons associated with social choice paradoxes) that "chaos and incoherence are the inevitable outcomes of majority voting, then appellate courts ... are equally bankrupt. ... If we accept the thesis as to legislatures, we are left with nowhere to turn."[3] Justifying a given decision-procedure is partly a matter of answering what can be said against its use; so we ought to investigate whether what is said against MD in other contexts can be said against its use in court and if so, whether such criticisms can be answered.

Our question is also worth asking—and this is my third point—because we can imagine other decision-rules for judicial settings and it might be worth considering why these are (mostly) dismissed out of hand for decision-making among judges on appellate courts.[4] For a long time the practice of trial by jury proceeded on the basis that unanimity was required to convict a criminal defendant. Nowadays in most jurisdictions, a majority verdict is sufficient, but it still must be a heavy supermajority—something like 10 to 2. A bare majority is never sufficient (except for grand juries). Why is nothing similar envisaged for disagreements among judges rather than jurors? One might imagine a supermajority rule for judicial review. Actually, imagination is not necessary: the

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[3] DANIEL FARBER AND PHILIP FRICKEY, LAW AND PUBLIC CHOICE 6 (1991). See also Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARVARD LAW REVIEW 802, 811-31 (February 1982), for a fine discussion of the application of Arrow's paradox and other decision-theory difficulties to judicial decision-making. .

[4] Of course some decisions on the Supreme Court, like the decision to hear a case at all, are made on the basis of something less than a majority: four votes are sufficient to grant certiorari. For a discussion, Richard Revesz and Pamela Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PENNSYLVANIA. L. REV. 1067 (1987-1988). Revesz and Karlan discuss the relation between "the Rule of Four" and the Court's use of MD to discuss the merits of a case, but they refrain from any focus on the judicial use of MD itself.

Constitution of the State of Nebraska ordains that the state's "Supreme Court shall consist of seven judges."

> A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges.[5]

It seems like a good rule. So why is that not the decision-procedure on the Supreme Court of the United States?[6]

There ought to be more written on this because MD seems to be accepted *explicitly* in our political community as the basis for appellate judicial decision-making. Other legal systems—like most civil law systems—present only a consensus judgment and do not allow the public expression of dissenting opinions.[h] In these systems, judges don't appear to vote. But presumably there is often dissensus in their private deliberations, and maybe MD (or something like it) is used behind closed doors to determine what will be the consensus position.[7] Yet the public does not perceive the

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[5] THE CONSTITUTION OF NEBRASKA, Article V, section 2. The supermajority requirement was enacted in 1920. See http://nebraskalegislature.gov/laws/articles.php?article=V-2&print=true . See also the discussion in *Mehrens v. Greenleaf*, 119 Neb. 82, 227 N.W. 325, Neb., (1929) at 328:

> a legislative act is always presumed to be within constitutional limitations unless the contrary is clearly apparent—a rule consistently followed by this court. However, the people, ever alert, and jealous of their vested rights, in 1920 adopted as an amendment to the Constitution of our state, as an additional safeguard, the following provision (art. 5, § 2): "No legislative act shall be held unconstitutional except by the concurrence of five judges"—five-sevenths of the membership of the court as then and now composed.

The Constitution of North Dakota is even more stringent: it requires four out of five justices to strike down legislation (Article VI, section 4).

[6] See Jed Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GEORGIA LAW REVIEW 893 (2003), for an account of possible strategies that might be used to install a supermajority requirement. (I am most grateful to Sujit Choudhry for this reference.)

However, translating the Nebraska rule to the federal context would be difficult. In Nebraska, all challenges to legislation are heard by the state's Supreme Court, so the default position (in the absence of a supermajority) is that the legislation stands. In a system which allowed challenges up through a hierarchy of courts, the use of a supermajoritarian decision-procedure would be more complicated. If a federal district court struck down the statute, would a supermajority be needed in the appellate court above to uphold that decision or to overturn it: what would the default position be?

[7] I am grateful to Pasquale Pasquino for letting me see an unpublished and untitled paper by him, presented at the Collège de France in June 2010, which deals with this. See also the comments of MONTESQUIEU, THE SPIRIT OF THE

judges as voting; they don't perceive the outcome as depending upon counting heads. In contrast, in common law systems we do. And in the United States, the fact that courts use MD is the crucial assumption on which the whole politics of judicial appointments turns. This is particularly so because many areas of constitutional decision are potentially unsettled —abortion, of course, is the best-known example. The issue may be decided by MD one year, but justices of Supreme Court come and go, and partisans hope that a bare majority on one side of a given issue may be replaced in time by a bare majority on the other side.[8] So, for example, since 1973, it has been an important feature of Presidential politics to try to secure judicial appointments to the Supreme Court that—on the assumption of MD—will either secure (for a while) or overturn *Roe v. Wade*. The matter is always on a knife-edge and pro-choice advocates are vividly aware that one or two conservative appointments might upset the 5-4 balance on which they rely. In this sense, MD explicitly frames the politics of judicial nomination and confirmation. Oddly, though, despite its explicit presence as a frame, the use of MD in court is never itself made a topic of argument. In abortion politics, for example, no pro-life faction ever argues that anti-abortion legislation in the states should be protected from federal review by a Nebraska-style rule. No pro-choice faction ever argues that a supermajority should be required to overturn a precedent of long standing. People just assume MD and argue around it.

There is one last reason I want to mention for our interest in this question. As I shall shortly show, there is very little in the law review literature addressing the question that I have posed. (The few exceptions will be discussed in section 3.) But there is a considerable literature on other aspects of judicial decision-making.[i] Scholars talk frequently about how judges, individually, should approach the exercise of their power on multi-member courts. When a judge disagrees with her colleagues, should she defend her

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LAWS 157 (Cohler, Miller, and Stone eds., 1989), 76 (Bk. VI, ch. 4): "In monarchies the judges assumer the manner of arbiters; they deliberate together, they share their thoughts, they come to an agreement; one modifies his opinion to make it like another's; opinions with the least support are incorporated into the two most widely held. This is not in the nature of a republic." (Bk. 6, Ch. 4)

[8] Consider the anguished closing lines of Justice Blackmun's concurrence in *Planned Parenthood v. Casey*: "I am 83 years old. I cannot remain on this Court forever…."

position in the way that people defend their interests or in the way a member of a political party defends a plank in the party platform, or in some other way? There are debates about whether judges ought to trade votes, compromise, log-roll, and so on.[j] There is also a literature on the relation between judges' voting and the reasons they give in their opinions. Should judges vote only on outcomes (and is that the vote that should be decisive) or should we be seeking consensus or a majority on the various reasons that justify their votes?[9] These are important questions of institutional design.[k] But it is not clear that they can be answered without some sense of why MD is thought appropriate for the judiciary in the first place.

2. WHEN DID JUDGES START VOTING?

This section (presently incomplete) will be devoted to a brief history of the use of MD in courts. It will address the following matters:

- No mention of judicial MD in Article III of the Constitution or the Judicature Act. I guess judicial MD must be part of the "unwritten constitution."[10]

- Maybe the status of MD is like what Richard Fallon and others say about stare decisis—simply assumed in the very notion of an Article III court.[l]

- Nothing in state constitutions, as far as I can see, except that the first New York State Constitution provided for something like judicial review in a "council of revision' and envisaged such council using MD: "And that all bills which have passed the senate and assembly shall, before they become laws, be presented to the said council for their revisal and consideration; and if, upon such revisal or consideration, it should appear improper to the said council, *or a majority of them*, that the said bill shall become a law of this State, that they return the same, together with their objections … to the senate or house of assembly…," whereupon their objections could be overridden only by a two-thirds majority.[m]

- House of Lords (and UK Supreme Court) versus US Supreme Court on "the opinion of the court"

- Pasquale Pasquino on the difference between courts which persevered with the fiction that the judicial decision was the king's and so had to be univocal and those that did not.[n]

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[9] See, e.g., Lewis Kornhauser and Larry Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIFORNIA LAW REV. 1 (1993).

[10] This is how it seems to be regarded in AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 358-9 (2012).

- When did there start to be enough dissents to pose a problem that would have to be solved by MD—I mean situations in which there was more than one dissent in a panel consisting of more than three judges? [o]

- Are bare-majority decisions given less weight as precedents? Larry Alexander has suggested that this is so, citing *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1511 (1996)."[p]

- Different doctrines of MD:
    a. The view of the majority binds the minority: the minority accept the majority view and act on it subsequently as if it were their own.[q]
    b. The view of the majority binds the parties and counts as the decision of the Court, but minority judges may continue to dissent.
    c. The view of the majority binds the parties, but the minority maintain the right to act on their view of the law: cf. the closing sentence of Justice Scalia's dissent in *Dickerson v. United States* 530 U.S. 428, 465 (2000): "I dissent from today's decision, and, until §3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant's confession was voluntary."[r]

3. WHO HAS WRITTEN ON THIS QUESTION?

The question has not been widely discussed in the law review literature. I may be wrong, but I don't think there is any article-length treatment of judicial MD.[11] I have occasionally raised the matter in discussions of judicial review, challenging defenders of that practice to explain why a supposedly counter-majoritarian institution uses this method of majority-voting. In "The Core of the Case against Judicial Review," I said that the topic is one that "I have never, ever heard a defender of judicial review introduce … into discussion himself or herself, let alone undertake to explain why it is a good idea."[s] And in a more recent piece I said that after years of raising this question—why do judges use simple majority-decision among themselves to determine whether to overturn statutes passed by majoritarian institutions?—"I have long since given up any expectation of an honorable answer."[t] A couple of people have attempted to respond to these provocations and I will discuss their answers in a moment.

Some have misinterpreted my challenge. It is not itself intended to discredit judicial review; it is not supposed to add anything to the critique that already exists. One

[11] Shugerman, *supra* note 6, comes closest; but even his long article is mainly an argument that we should insist on a 6-3 supermajority, not really an elaboration of the reasons for our present bare-majority rule.

set of authors (Krishnamurthi et al.) have said that "[i]f Waldron's intuition is correct, and defenders of judicial review cannot justify the use of judicial majoritarianism, then judicial review might also be without justification."[12] And their response was to show that that conclusion wouldn't follow.[13] They were right about that. A failure to explain why courts use majoritarian decision-making would not undermine judicial review. It would just leave us with a puzzle. Obviously courts have to use some method of decision; and maybe MD is as good as any other; perhaps it doesn't need justification. (I'll deal with this possibility early on in section 4.) However, by leaving the matter there they really didn't answer the question. I just wanted to know what the justification is for majority-decision on courts. Krishnamurthi et al. don't provide anything in the way of a justification—though they gesture in certain directions as to where a justification may be found.

Recently, our colleague Ronald Dworkin offered the following as an answer to the question "Why, if majority rule is not intrinsically fair, is it appropriate on final appellate courts like the Supreme Court, which decides many very important cases by a 5-4 vote?" I am going to quote his answer at length:

> The choice among checks on majoritarian procedures must of course depend on which options are available. Judicial review is an available option for checking legislative and executive decisions. It is also an available option for checking judicial review itself through a hierarchal system of appellate courts. But of course judicial review is not available to check the decision of the highest appellate court; if it were the court would not be the highest. It does not follow that if the judges in this series of reviews disagree the disagreement should be settled by a vote among them. A Supreme Court's 5-4 decision might overrule the unanimous decisions of

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[12] Krishnamurthi et al., *supra* note 1, 33. They go on to say: "In light of this, we aim to answer Waldron's challenge. Specifically, we will demonstrate that Waldron's challenge exposes no new problem regarding judicial review."

[13] More particularly they wanted to rebut two points they thought I was making: "Waldron's challenge to provide an elementary defense of judicial majoritarianism may proceed from one of two distinct claims. First, Waldron may be simply suggesting that judicial majoritarianism effectively makes courts functionally equivalent to legislatures—thereby undermining the need for judicial review. Alternatively, Waldron may be suggesting that majoritarian decisionmaking … is inconsistent with prevailing justifications of judicial review" (ibid., 33-4).

> a great many more judges on lower courts. But the head-counting procedure does hold on the Supreme Court itself, and it makes perfect sense to ask what alternatives, beyond judicial review, are available. We can easily imagine some. Constitutional courts might give more votes to senior judges because they have more experience. Or more votes to junior judges because they are likely better to represent popular opinion. The Supreme Court does give each justice an equal vote, but it also gives some justices much more power than others in shaping constitutional law. When the Chief Justice is in the majority, he decides the often crucial question who will write the opinion for the Court; when he is not the senior justice in the majority does. No vote decides that issue. The Court's practice of adopting majority rule for the verdict itself can sensibly be challenged. But since judicial review is logically not an option at that stage, the choice of a majority decision procedure hardly suggests that that procedure is intrinsically fairer than a different process that includes judicial review.[14]

All this is interesting. But I don't see any explanation here of why bare-majority-decision is the appropriate procedure—or even *an* appropriate procedure—to use. As far as I can tell, Dworkin does not even want to claim that it is: much of his account entertains possibilities for judicial decision-making that are at odds with MD (e.g., more weight to be accorded to the views of some justices than others). Dworkin does make an important point when he says that there is nothing inconsistent about (i) opposing the use of MD-standing-alone in the legislative context in light of the availability in that context of MD-complemented-by-judicial-review and yet (ii) embracing MD-standing-alone in the context of the highest court, where (by definition) MD-complemented-by-further-judicial-review is unavailable. That's a fair point. But it only takes care of an *ad hominem* argument of inconsistency. It provides no affirmative explanation of why MD-standing-alone is an appropriate procedure for courts to use.

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[14] Ronald Dworkin, *Response*, 90 BOSTON UNIVERSITY LAW REVIEW 1059 (2010).

The only other scholarly engagements with this issue that I am aware of[15] are by Akhil Amar, in a very recent book titled *America's Unwritten Constitution*,[u] by Jed Shugerman, in an article arguing for a supermajority rule,[v] and by our NYU colleague, Rick Hills, in a very thoughtful couple of paragraphs in a 2002 essay.[16]

Amar notes that "[f]rom its first day to the present day, the [U.S. Supreme] Court has routinely followed the majority-rule principle without even appearing to give the matter much thought."[w] He believes that it was just obvious to those who set up our judicial system that MD was the rule to use; it seemed natural, he says, and he cites John Locke, Benjamin Franklin, and Thomas Jefferson to that effect.[17] [x] The position seemed to be that MD was taken for granted and decision-procedures were stipulated in the Constitution's text only when there was to be a departure from MD.[y]

Jed Shugerman's article is mainly an account of the inadequacy of bare-MD and an argument advocating a 6-3 supermajority rule. But Shugerman does consider some arguments for MD in course of trying to show that a 6-3 rule would do better at promoting the values that MD is supposed to promote. He suggests that MD is based on a combination of practical efficiency and "a consensus theory of truth" among experts. I will examine what he says about this "consensus theory" in section 4(a) of the paper.

Rick Hills's contribution comes in the course of a symposium essay on Chris Eisgruber's book *Constitutional Self-Government*.[18] Eisgruber's book is a defense of the role of principled judicial decision-making on constitutional matters and the appropriateness of its being able to override the majoritarian decision-making of legislators. Hills says that Eisgruber's work is underpinned by an anti-majoritarian

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[15] There must be others: any help steering me to other discussions would be greatly appreciated.

[16] Roderick Hills, *Are Judges Really More Principled than Voters?* 37 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 37, 58-9 (2002).

[17] There is a brief discussion of the "naturalness" view, *infra* in note 20.

[18] Hills, *supra* note 16, discussing CHRISTOPHER EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (2001). In his response, Eisgruber acknowledges the point about judges using MD, but he does nothing with it: Christopher Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 UNIVERSITY OF SAN FRANCISCO LAW REVIEW 115, 126 (2002).

assumption "that there cannot be a connection between quality of argument and numbers of persons who are persuaded by an argument."[z] But, says Hills,

> This contrast between the weight of numbers and the quality of reasons … is confused: the assumption of any regime of political equality is that the arguments that persuade the largest number of adherents are the best arguments. Where political equality reigns, the weight of numbers is regarded as the best available proxy for the quality of argument. Thus, on that ultimate forum of principle, the United States Supreme Court, five votes decides a case and sets precedent. Why? Because the Justices are political equals: we assess the quality of argument by counting noses. Likewise, in every philosophy department, hiring decisions which rest largely on the "quality of reasons" in the published work of a candidate are determined by a majority or super-majority vote of the faculty (or their elected representatives on an executive committee). Why? Again, because the community is a community of equals, "counting heads" is regarded as the only acceptable way to determine quality of argument.[aa]

This passage definitely points us towards an affirmative argument in favor of MD. Indeed, maybe there are two arguments here. In section 4, I will tease out the difference between (a) an argument that "the weight of numbers is … the best available proxy for the quality of argument" and (b) the argument that, because judges are regarded as one another's equals, MD is required as a matter of fairness. Hills runs these two lines together in an interesting way, suggesting that fairness might require us to treat the weight of numbers *as if* it were the best proxy for the quality of argument (even if it is not). We will examine this possibility as well, in section 4(c) below.

4. Justifications for the Use of Majority-Decision in Court

So let us now ask our question directly. What is the justification for the use of MD in multi-member judicial panels? I am afraid that, before we can answer, we are going to have to pussyfoot around with a few more preliminaries.

My question talks of "*the* justification for the use of MD." That suggests a sort of single official justification. But there may not be anything of the sort since, as we have seen, the question is mostly unaddressed in official and scholarly circles. Perhaps it is better to ask: can the use of MD in court be justified (whether any official has ever signed up for such a justification or not)? And we may find that there is more than one line of possible justificatory argument.

Our question assumes that the use of MD requires an argument. Occasionally one finds suggestions in the literature that it does not—that it is simply something obvious and beyond justification.[19] Hannah Arendt, in *On Revolution* stated that "the principle of majority is inherent in the very process of decision-making" and is "likely to be adopted almost automatically in all types of deliberative councils and assemblies."[bb] The paucity of scholarly discussions may suggest that this is the prevailing view in the legal academy: MD needs no justification. But really that won't do, not for me at any rate. It is the job of philosophers to question the obvious, and to try to come up with arguments for things that practical people take for granted whether they "need" a justification or not.[20]

Anyway, in political theory, when democracy is being discussed, MD is treated as an open question. As we have seen, sometimes things are said about it that need to be

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[19] Maybe anthropologists can tell us whether something like MD is a cultural universal; maybe social psychologists can tell us whether it is the natural tendency of the human mind.

[20] Some theorists say that MD is "natural." I take it that a naturalness claim does not imply that MD is beyond justification. It rather points us towards a justification of a certain kind.

AMAR, *supra* note 10, believes the American founders must have held a view of this kind. He cites John Locke (whom he said the American founders must have studied on this point) and also Thomas Jefferson and Benjamin Franklin. But Franklin simply said that MD was common practice. Jefferson echoed John Locke, who was a little more forthcoming:

> [I]n assemblies empowered to act by positive laws where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course determines as having, by the law of Nature and reason, the power of the whole. –JOHN LOCKE, TWO TREATISES OF GOVERNMENT 332 (II, §96) (Laslett ed., 1988), cited by AMAR, *supra* note 10, at 358.

But Locke's naturalistic argument for this is unsatisfactory, depending as it does on a claim that each body moves by a sort of physical necessity "that way whither the greatest force carries it, which is the consent of the majority"—LOCKE, TWO TREATISES, 331-2 (II, §96). I used to have a more sympathetic view of Locke's account: see JEREMY WALDRON, THE DIGNITY OF LEGISLATION 130-50 (1999), but I accept the critique of Thomas Nagel, *Waldron on Law and Politics*, CONCEALMENT AND EXPOSURE 144-5 (2002).

rebutted.[21] (And if they need to be rebutted in the theory of electoral or legislative politics, they may also need to be rebutted in the context of the judiciary.) Or—harsh things or no—there is now simply an active and considerable literature on MD in political theory, and it is surely worth considering how that literature bears on its use in this particular domain.

Having said that, however, we must be careful about any assumption that arguments that purport to make sense of MD in the electoral or legislative context can be mechanically transferred to the judicial context. Some of them may; some of them may not. Here are a couple of examples that do not survive the transfer.

It is sometimes said that MD is sort of proxy for combat in the political arena. In an essay entitled "Minimalist Conception of Democracy," Adam Przeworski said this: "Voting constitutes 'flexing muscles': a reading of chances in the eventual war. If all men are equally strong (or armed) then the distribution of vote is a proxy for the outcome of war." The party that wins an election, says Przeworski, is in a position to "inform the losers—'Here is the distribution of force: if you disobey the instructions conveyed by the result of the election, I will be more likely to beat you than you will be able to beat me in a violent confrontation."[cc] This is a pretty threadbare argument even for electoral politics.[22] But it makes no sense at all in the judicial context. Judges use MD to decide issues not just for themselves but (in our system) for more than 300 million people. It is imaginable, I guess, that if some of these issues are not decided in an orderly manner, they will have to be decided by fighting. (This happened with some important issues about race in the United States 150 years ago.) But if fighting does break out, on an issue like abortion for example, it will not be confined to the nine justices of the US Supreme Court. And so the existence of a majority (one way or the other) *among the justices* is no indication at all of who is likely to win a civil war about abortion in the country at large.

Here's another example of an argument for MD that won't survive the transition from electoral to judicial politics. Suppose that voters are self-interested: they vote their

[21] *Supra*, text accompanying note 3.

[22] Przeworski more or less acknowledges this in a reference to advanced weaponry and professional armies.

pocketbook; they vote for policies that they think will bring them, personally, a greater balance of happiness over suffering. And suppose, too, that they are well enough informed to make this calculation. (Strong assumptions, I know, but common in positive political theory.) Then the use of MD to make political decisions in an electorate of this kind may be justified on utilitarian grounds. The majority view corresponds (roughly) to the greatest balance of happiness over suffering in society as a whole. It is a rough correspondence at best.[23] But, rough or not, it will not survive the transition to judicial politics. For not even the staunchest rational choice theorist thinks that judges vote primarily for what will promote their personal benefit.[24] And even if they did, there is no conceivable ethical theory that could make the greatest happiness of the greatest number of judges into an ideal for the whole society.[25]

The failure of the utilitarian argument to survive the trip from electoral to judicial politics reminds us of a couple of important features of the judicial terrain. First, if the use of MD is to be justified on this terrain, it is to be justified on the basis that a majority of votes represents a majority of opinions rather than interests. Judges end up with different views, not just different preferences, on the matters of principle and interpretation they are called upon to address. So we can't use anything like a calculus of interests to address the problem posed by dissensus. It is not that sort of problem.

Second point: judges are supposed to be experts in the areas on which they disagree. We are not talking about the use of MD to resolve disagreements among amateurs. Both the judges in the majority and the judges in the minority are supposed to know what they are talking about. In this regard, we should bear in mind other features

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[23] The alleged equivalence between MD and the principle of utility is even rougher than I have indicated. For even if voters know their self-interest and vote for it, it is not clear how a single vote, equal to all others, can convey intensity. A majority of mild preferences might defeat a minority of very intense ones in a way that the principle of utility would frown upon.

[24] Maybe they vote their political preferences: but the utilitarian argument for MD is not plausible if it is supposed to range over political, as opposed to personal, preferences.

[25] The utilitarian argument for MD may work for legislators. In a properly apportioned polity, the vote of each legislator reflects a prospect for happiness aggregated over an equal number of constituents. But even in jurisdictions where judges are elected, we have no theory of representation that allows judges' votes to reflect the utility-prospects of those who elected them.

of judicial decision-making. Judges don't just "come up with" a view on the matter before them and vote in its favor. They are trained in the law. As experts, they hear hours of oral arguments back and forth and they read volumes of written submissions and precedent cases. They deliberate thoughtfully both among themselves and each in the solitude of his or her own chambers. They (or their clerks) write elaborate essays to spell out their reasons for adopting one or other view. And yet, as often as not, they still disagree—quite sharply in our judiciary. So the question is why—after all this training and argument and thought and deliberation and looking things up and testing them out—the simple procedure of "counting heads" that MD involves is the appropriate way ultimately to resolve these disagreements in these circumstances.

Thirdly, philosophers who grapple with our question have to reckon with the possibility that, of the various views held by the judges, some are objectively better than others. The fact that one judge, or any number of judges, hold a given view does not preclude the possibility that it is objectively false. And the fact that all or most of the judges reject a given proposition does not preclude the possibility that that proposition is objectively true. Of course the judges disagree about objective truth and falsity; but in their disagreements they will make claims in the language of objectivity, and anything we say about the use of MD has to come to terms with that.[26] The idea of objectivity, truth, and right answers will underpin what we say about a possible epistemic argument for MD in section 4(a). But it cannot do much more than that. No amount of philosophic vehemence can make "Choose the objectively right answer" into a decision-procedure capable of challenging MD in a world where people disagree about what the objectively right answer is.

[26] I am not going to be too strident about objectivity. The union rules for philosophy require me to mention it, and it kind of underpins what I shall call the epistemic argument for MD (such as it is). But most law professors—perhaps quite rightly—have little time for this sort of talk when they are not being browbeaten by philosophers. And, in a page or two, their (our) unease about it will play a role in my criticisms of Condorcet's defense of MD. See, *infra*, text accompanying note 31.

(a) Epistemic Arguments

Let's begin with the idea that MD may be an epistemically reliable way of getting at or near the objective truth. Rick Hills invited us to consider the proposition "the arguments that persuade the largest number of adherents are the best arguments."[27] Certainly there is something intuitive about this, especially when the voting constituency consists of experts; and its intuitive appeal is reflected in ancient doctrine.[dd] Who is not persuaded by the slogan "Four out of five dentists choose Colgate for their families"?[28] But it is surprisingly hard to account for the intuition, once it is put under pressure.

Let's take it step by step. That any given expert is persuaded by a proposition in his or her area of expertise is surely evidence, though not conclusive evidence, that the proposition is true—that we can accept. That any given expert denies a proposition in his or her area of expertise is surely evidence that the proposition is false—that we have to accept also. So far so good; but we haven't begun to grapple yet with majorities and minorities. We can perhaps advance a step or two further. If a majority among experts is overwhelming (say 4-1 like the dentists or 5-2 like the Nebraska Supreme Court striking down a statute), then the contrary view of one or two experts can be dismissed as an aberration. No expert is infallible, and for any expert there is some small chance that he might have made a mistake. If there is something short of a dissensus, we may want to ask ourselves: "Which is more likely, that the one or two outliers have made a mistake or that all the members of the large and expert majority have made a mistake?" We may think it is much less likely that the majority view is mistaken. But it is not at all clear that an expertise theory can survive for cases in which there is a *bare* majority, say 5 to 4.[29] Five experts believe that a certain proposition is true and four believe it is false; I don't

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[27] Hills, *supra* note 16, at 59. Shugerman, *supra* note 6, 932, calls this "the consensus theory of truth," and seems to endorse it. Krishnamurthi et al., *supra* note 1, at 34 make a similar assertion: "to maximize the chances of getting the right answer … seems to be the dominant reason why the judiciary utilizes majority voting."

[28] On the other hand, who is not curious about what the fifth dentist knows that the other four are not saying?

[29] Cf. Shugerman, *supra* note 6, 934: "A bare majority of experts is not at all convincing. If four out of five experts agree that Brand X is the best toothpaste, this consensus establishes a degree of reliability. But if five out of nine experts agree that law X is unconstitutional, one cannot conclude that the experts have spoken one way or the other. With five-four decisions, there is some sense of randomness that the decision came out one way and not the other."

think the dynamics of expertise and fallibility help us at all in this situation.[30] Which is more likely—that the five fallible experts are mistaken or that the four fallible experts are mistaken? Who knows? Would we be better off, epistemically, tossing a coin if there is no budging the 5 to 4 vote?[31] Maybe.

Notice the trajectory here. Accepting the view of the majority seems sensible (perhaps) in cases where it is an overwhelming majority. And maybe the earliest cases of dissensus on judicial panels were like that: they were cases of an overwhelming majority versus one or two dissenters. What has happened however is that, without thinking very much about it, we have generalized that decision-procedure in the form of MD, figuring that if it works for large majorities, the same logic must work (with perhaps just a bit of weakening around the edges) for bare majorities, indeed all majorities. But it doesn't; the intuitive case for MD more or less collapses when the vote is close.

Can the position be retrieved? In recent years, political theorists have become interested in something called "the Jury Theorem" associated with an eighteenth century theorist, the Marquis de Condorcet. As a matter of arithmetic, Condorcet proved that if a group like a jury faces a binary choice (say, guilty or not guilty), and if each of the individual jurors is more likely than not to arrive at the right answer when he votes (that is, if the probability of his getting the right answer is greater than .5)—I shall call this individual competence—then the likelihood that a *majority* of the jurors will reach the right answer is greater than the likelihood of any one of them getting the right answer. Moreover, the likelihood that a majority will get the right answer increases as group size increases. So, for example, if there are three jurors, each with an individual competence

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[30] A pure expertise argument would also have to take account of the fact that experts in the courts below have also had their say. Barry Friedman in his article *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1411 (2001) cites this comment from Melvin Urofsky: "Of the twenty-two judges who participated in the four [*Lochner*] decisions, twelve thought it constitutional, but because five of the ten who disagreed sat on the United States Supreme Court, the law went down."

[31] See Adam Samaha, *Randomization in Adjudication* 51 WM. & MARY L. REV. 1 (2009) for discussion of areas where we are comfortable with randomization in judicial processes (like the assignment of judges or selection of jurors) and cases where we are not comfortable (like judicial decision-making itself).

of .6, the chance that a majority of them will be right is .648. (And that latter chance increases quite sharply as group size increases.)[ee]

Can we apply Condorcet's Jury Theorem to the judiciary? Maybe. The judges are experts, so let's say that each of them surely has a greater than .5 chance of coming up with the right answer in a given case. And if that is true, then the Condorcet arithmetic ensures that the chance that a majority of judges—even a bare majority of judges—is right will be quite high. Indeed it will be higher, the higher up the judicial hierarchy you go: as we move from one federal district court judge, to a three-judge panel on a Court of Appeals, and then to a nine judge panel on the Supreme Court. Even if the expertise did not increase on the way up—and we hope and expect that it does—the Jury Theorem would seem to justify the use of MD on the multi-judge panels.[ff] QED?

I have to say that I am uncomfortable with this result.[gg] There is something weird about it, something gimmicky. And here the doubts I registered earlier about "objectivity" come home to roost.[32]

Most people do not approach decisions by the Supreme Court using dispassionate language of objectivity and expertise in the way that a philosopher might. They certainly do not attribute undifferentiated levels of expertise to the justices. The liberals I know think that at least four of the justices are likely (unerringly and maybe deliberately) to come up with the wrong answer on most important issues. And the conservatives I know think that about at least four other justices. Now let's suppose that the Court has made a decision by a bare majority (5 to 4) about some controversial issue like abortion. How should people think about this exercise in judicial majoritarianism? Specifically, how should people who oppose the decision that the Court has made think about this method of making a decision? Bear in mind that we try to justify a decision-procedure in circumstances of controversy not as an academic exercise, but in order to confer some legitimacy on the decision in the eyes of people who would otherwise oppose it. So let's suppose that five liberal justices have voted to uphold some pro-choice position. Can the

[32] See footnote 26 *supra*.

fact that this was determined by MD possibly make the decision legitimate in the eyes of conservative pro-life advocates? Specifically, can Condorcet's Jury Theorem contribute anything to the decision's legitimacy? I think not. The pro-life citizens will be convinced that the liberal justices are incompetent on this issue (willfully or for some other reason): they will think that the chances that liberal justices will come up with the right answer on abortion is well below .5 (probably they think it is something approaching zero). And since, *ex hypothesi*, there are five liberal justices out of nine involved in this decision, it is likely that our pro-life citizens will attribute to the panel as a whole an individual competence lower than .5. In which case, they will not be persuaded by any Condorcetian arithmetic to accept the legitimacy of bare-MD as a way of making this decision. (When average individual competence falls below .5, the Condorcet effect goes into reverse.) At best, they will end up where we were a page or two ago (pp. 16-17): when five alleged experts line up against four alleged experts on a matter like this, who knows where the truth lies. At worst, they will be where Justice Scalia was in *Planned Parenthood v. Casey*: all talk of judicial expertise and objectivity in this area of basic values is nonsense.[hh] And if this is the likely reaction of the pro-life citizenry to pro-choice decisions on the Court, it is also likely to be the reaction of pro-choice citizenry to pro-life decisions. On any controversial decision by the Court taken on the basis of bare-majority-decision, it is likely to be the reaction of the very group that most needs to be persuaded that this method of decision-making is legitimate.

That's the best account that I can give of why I feel uncomfortable with the use of the Condorcet theorem/gimmick to shore up any epistemic argument for MD in court. For, remember, it *is* a gimmick. There is nothing mysterious or epistemological in Condorcet's Jury Theorem, which could justify MD as truth-enhancing. *It is just arithmetic*.[33] If there is a better than .5 chance that a given opinion will be φ then the chance that a majority of three opinions will be φ is greater than that, and the chance that a majority of opinions will be φ increases as the number of opinions given increases. The

[33] It works best for an urn containing 60 black balls and 40 white balls: the chance that a majority of three balls drawn at random from the urn will be black is .648.

value of φ may be "true" or "high-quality"; or the value of φ may be "long-winded," "melodious," "printed in pink," or "beginning with the definite article." The result still holds. Condorcet's theorem has nothing to do objective truth or right answers; those terms just happen to be within the domain of its arithmetic applicability.

(b) Fairness Arguments

In democratic theory, the most powerful case that can be made for MD is that it is required as a matter of *fairness* to all those who participate in the social choice. It's a way of being fair to them as equals, respecting them as equals. If a society faces a binary option, and each of its members votes one way or the other, then the advantage of MD is that it is decisive (except in the rare case of a tie), it is neutral between the options (and thus fair to the various supporters of the various options); it gives as much weight as possible to each individual's vote, in the direction in which that vote points (so it is fair to each voter); and it gives no greater weight to any one individual's vote than to the vote of any other individual (so that it is fair in the sense of equality.) That MD alone satisfies these four conditions—decisiveness, neutrality, highest positive weight, and equality—in the circumstances of a binary choice is a well-established theorem in the theory of social choice.[34] [ii]

In the democratic context, these conditions seem plausible. In the midst of political disagreement in society, we want a decision-procedure that will be decisive but not biased towards any particular political point of view. Respect for individual citizens in the context of a democracy, demands that weight be given to nothing but individuals' opinions, but democratic equality—one man, one vote—insists that the opinions of all should be treated equally. These requirements of fairness seem to argue for the use of MD to make social choices, not because of any epistemic hypothesis, but simply because this is a procedure that respects people as equals, as they are entitled to be treated on

[34] See Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decisions*, 20 ECONOMETRICA 680. (1952). See also see AMARTYA SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 71-74 (1970), CHARLES BEITZ, POLITICAL EQUALITY 58-67 (1989), and ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 139-41 (1989).

democratic assumptions. How do these conditions fare when we move to judicial decision-making?

That we want a decisive decision-procedure in court is clear enough: an appeal must be decided one way or the other. But the applicability of the other conditions is not so clear.

The Nebraska rule mentioned in section 1 invites us to abandon neutrality, at least in cases of judicial review of legislation: instead of being neutral between the claim that a given statute is constitutionally invalid and the claim that it does not violate the constitution, Nebraska operates instead with a presumption of constitutionality.[jj] That is the default position unless a supermajority ($\leq$ 5 to 2) can be assembled. It is by no means a silly position. A presumption of constitutionality used to be part of American constitutional doctrine;[35] and for a while people toyed with the proposition that the unconstitutionality of a piece of legislation could not be thought of as established beyond reasonable doubt if four justices believed it was constitutional. [36] However, quite early on, jurists realized that the two issues of reasonable doubt and substantive dissent could be drawn apart: the issue on which the bench divided 5 to 4 might be exactly the issue of whether there was reasonable doubt about a given law's constitutionality.[37] Anyway, I

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[35] The classic statements are in *Ogden v. Saunders* 25 U.S. 213, 270 (1827): "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt" and in the *Sinking-Fund Cases*, 99 U.S. 700, 718 (1878): "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."

[36] "Can it be said that an act is a clear violation of the Constitution when five justices declare it to be so, and four declare with equal emphasis that it is clearly not so? All doubt must be resolved in favor of the constitutionality of the law, and it must be clear in the mind of the court that the law is unconstitutional. But can this condition exist when four of the justices are equally earnest, equally emphatic, equally persistent and equally contentious in their position that a law is clearly constitutional?"—WATSON ON THE CONSTITUTION, quoted by Robert Eugene Cushman, *Constitutional Decisions by a Bare Majority of the Court*, 19 MICHIGAN LAW REVIEW 771 (1921), at 772. For a modern version of this view, see Shugerman, *supra* note 6, 895: "Just as the criminal jury's unanimity voting rule supplements the individualized 'reasonable doubt' determination, a six-three voting rule would appropriately supplement the Justices' individualized determination of deference to Congress."

[37] Justice Washington, writing for the Court in *Ogden v. Saunders* 25 U.S. 213 (1827) to uphold the constitutionality of a bankruptcy statute acknowledged generously that the presumption of constitutionality doctrine was held also by those dissenting justices who found the statute unconstitutional: "I am perfectly satisfied that it is entertained by those of them from whom it is the misfortune of the majority of the Court to differ on the present occasion, and that they feel no reasonable doubt of the correctness of the conclusion to which their best judgment has conducted them" (ibid., 270). See also Shugerman, *supra* note 6, 905.

am not urging the adoption of the Nebraska rule;[kk] I am just showing that there is room for doubt about the condition of neutrality which MD presupposes.

The other condition whose application might be thought problematic in the judicial context is the condition of equality. Each judge's opinion counts positively in the direction in which it points—that sounds sensible. But on what basis do we insist, as Hills puts it, that "the Justices are political equals."[ll] We saw Dworkin imagining a system in which more votes were given to senior judges because they had more experience, or one in which more votes were given to junior judges because they were likely better to represent popular opinion.[mm] As I have said elsewhere, the members of the Supreme Court are ranked by seniority, and the public commonly ranks them by their virtue, learning and effectiveness, not to mention their politics. They have an order of precedence in their dealings with one another and so on.[38] But in the authority accorded to their opinions, the rule seems to be that they are equal.[nn] When they disagree, the fact that the Chief Justice or a senior justice takes one side or the other makes no difference to the weight accorded to his vote.[oo] Why is this? In the electoral context, the assumption of political equality is fundamental, and the fierceness of our democratic insistence upon it gives a sharp and powerful edge to the fairness argument in favor of MD. "One person, one vote" matters enormously and most of us reject out of hand the plural voting system—more votes for university graduates—that John Stuart Mill envisaged.[pp] But we might not be so offended by a similar proposal for judges.

Perhaps there is a mistake here. Perhaps we should not be comparing the proposition of equality for judges (on which judicial MD is predicated) with the very fundamental proposition of political equality for citizens; perhaps we should be comparing equality for judges with equality for legislators. How does that comparison come out? Well, legislators have greater or less seniority, greater or less influence in their caucuses and on the floor of the house or the Senate. But when it comes to a vote on legislation, each legislator's vote is equal. Why? Because in a properly apportioned

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[38] And rank and seniority do matter in some contexts; the Chief Justice assigns the writing of the opinion of the Court, unless he is in the minority, in which case the senior Justice in the majority does.

polity, granting equal weight to the votes of each legislator is a rough and indirect way of respecting the equality of their constituents.[qq] Political equality for legislators thus conveys something of our fierce and fundamental adherence to political equality for citizens.

Maybe something similar can be said for judges, though it is a lot more indirect than the legislative case. Each justice represents an appointment by President, and the President of course is elected (indirectly) by the people.[39] So if we were to give greater weight to one judge than to another, we would be disrespecting the President who appointed the latter judge, and the voters who elected that President. Conservatives might like the idea of assigning less weight to the votes of Justice Ginsburg, than to the votes of Justice Scalia; but doing that would be a way of according less respect to those who voted for Bill Clinton in 1992 than to those who voted for Ronald Reagan in 1986. This is a pretty indirect argument, but it is the best I can come up with. (And maybe something similar can be rigged up for elected judges.)

I don't doubt that we could simply *announce* that we propose to treat each judge on a given panel as the equal of every other judge on that panel, and just leave it at that. And that could be the equality condition that underpins the use of MD. But remember how much work MD has to do. I go back to the point about legitimacy that I made on pp. 18-19 and the points about judicial politics that I discussed on p. 5. An awful lot hangs on the use of MD in court, especially on matters of fundamental principle. And for the time being, we require passionate advocates for one side or the other to put up with a constitutional position that they regard as an abomination simply because one more justice voted for it than for the contrary view.[40] That's a lot of weight to put on a decision-procedure and it is, especially, a lot of weight to put on a procedure one of whose leading assumptions is just a stipulation. In the case of electoral or legislative

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[39] Shugerman, *supra* note 6, puts it this way: "Each Justice represents a snapshot of political consensus by the President and the Senate at the time of his or her confirmation."

[40] It is quite remarkable that people put up with this—for example, that supporters of Vice-President Gore were willing to accept the bare majority decision in *Bush v. Gore*. (Would the supporters of Governor Bush have accepted a contrary result? No one knows. Remember the "Brooks Brothers Riot"?)

politics, we can invoke a powerful ethical premise to convince electoral or legislative losers to put up with adverse outcomes:

> It is an ethical premise of democracy, derived from belief in human equality (i.e., the equality of men as human beings to seek self-development, happiness, God, and fellowship), that each citizen, whether he be learned or barely literate, rich or poor, has the right to have his vote for elected officials counted equally with others.[41]

We plead with them in the name of fairness to their fellow citizens. But what do we offer the losers in 5-4 judicial decisions? I worry that the equivalent equality plea in the case of judicial MD is based on much weaker or perhaps even non-existent grounds.

(c) Hill's Hybrid

I don't want to end this discussion of possible grounds for MD without considering the hybrid view intimated by Rick Hills. Though Hills talks a lot about MD as a way of "assessing the quality of argument," I think his theory is really more like a fairness argument than an epistemic one. His position is that "[b]ecause the Justices are political equals we assess the quality of argument by counting noses."[rr] A pure fairness argument would say "because the Justices are political equals, we count noses." But Hills's view is that because the Justices are political equals, we act as though nose-counting were a way of determining epistemic quality. I don't want to put too much weight on what might have been quite a loose formulation—and what follows is rather tentative—but perhaps what Hills means is this:

We treat the Justices formally as one another's equals, not in the way that we treat citizens as one another's equals, but in the deferential way in which experts might be treated as one another's equals. Citizens are to be respected as equals in the way that (say) stakeholders are to be respected as equals; to treat one citizen as less than an equal is to act as though it didn't matter that he too has a stake in what is going on around here.

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[41] Neal Riemer, *The Case for Bare Majority Rule*, 62 ETHICS 16, 17 (1951)

The principle for citizens is *quod omnes tangit ab omnibus decidentur*: what affects all should be decided by all. But that is not the theory of judicial equality. We treat the judges on a panel as one another's equals because of what they represent—viz., the law. We—that is, those who are to be ruled by them—defer to them equally as experts in the law. Though in reality they may differ in their expertise, in court we are supposed to respect them as we would respect the law itself that they represent. It is a sort of artifice: each judge stands for the law and stands for it equally.

This is an interesting way of thinking about the equality that is supposed to underpin the fairness argument. We saw earlier (pp. 22-3) that there is really nothing in judicial decision-making equivalent to the political equality that serves as a normative foundation for electoral and legislative majoritarianism. Whatever insistence on equality that there is, to sustain the fairness argument for MD in court, is something like a mandated equal deference to the judges, to the judicial office embodied, in a purely formal sense, by each of them. We might even go so far as to say it is equal deference to the law as such, of which (in theory) each of the judges is supposed to be a mouth piece.[ss] Whether the principle of this deference can survive the sort of skepticism about expertise that we saw wrecking the application of the Condorcet argument is another question.[42]

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I have not been able to come up with any decisive and powerful argument for the use of MD in court. The epistemic argument falters when MD seems to support decision by a bare majority. The best argument in favor of MD—the fairness argument—is somewhat weaker than the equivalent argument in an electoral or legislative context. The hybrid argument is interesting, but its rationale for a normative principle of judicial equality rests

[42] Pasquino, *supra* note 7, suggests that it would be much easier to sustain the formal (Montesquieu-ian) view of the judge as just a "mouthpiece of the law" (respected on the same basis and to the same extent as every other judicial mouthpiece on the same panel) when individual judges are not celebrities and where there is no tradition of public dissent or of each judge's sustaining a consistent political line from individual opinion to opinion. (For Montesquieu's *bon mot*: see THE SPIRIT OF THE LAWS, supra note 7, 157 (Book XI, ch. 6): "[T]he judges of the nation are … only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigour.")

on an admitted fiction and may be vulnerable in exactly the circumstances, fraught with controversy, in which the Court's decision-procedure has to do its work.

5. SAYING MEAN THINGS ABOUT MAJORITARIANISM

I want to end with a provocation. Perhaps it is no surprise that American legal scholars have not come up with a convincing defense of the use of MD in court. Many of them have gotten so used to saying mean and disparaging things about majoritarianism (among the citizenry or in the legislature) in their arguments for judicial review, that they find themselves a bit tongue-tied when forced to say something about the use of *exactly the same decision-procedure* among judges on appellate courts. If we go around saying that a commitment to the use of majority-decision in politics involves a "crude statistical view of democracy,"[43] we will probably want to avoid drawing attention to the fact that ultimately nothing but numbers determines how the Supreme Court, supposedly a "forum of principle,"[tt] makes its decisions.[44] Statistics don't cease to be statistics just because the numbers are lower and the voters wear robes: that 5 votes beat 4 on a court is as crude and statistical as the proposition that 218 votes beat 217 in the House of Representatives.

Once we face up to this point, it might be a good idea to change the terms in which the question of judicial review is usually stated. Judicial review is said to pose a "counter-majoritarian difficulty"[uu] and of course we all know what that means. But it is, strictly speaking, inaccurate. Entrusting final decisions about important legislation to courts does not involve abandoning or rejecting majoritarianism: it reveals, instead, what Dennis Baker calls a preference for courtroom majoritarianism over legislative majoritarianism.[vv] What changes is the constituency of people whose votes will be

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[43] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 365 (New edition, 2005)

[44] The obvious retort is that judge's votes are complemented by the reasons they give, which means that it is never *just* a matter of counting noses on a Court as it is in the legislator. But legislators give reasons, too. I argued in *The Core of the Case against Judicial Review*, *infra* endnote *d*, at 1384-5, that a comparison between the reasons given for abortion law reform in a judicial context, say in *Roe v. Wade* 410 U.S. 113 (1973) and in a legislative context, e.g., in the UK House of Commons Second Reading Debate on the Medical Termination of Pregnancy Bill 1966 at http://hansard.millbanksystems.com/commons/1966/jul/22/medical-termination-of-pregnancy-bill#column_1067 certainly does not flatter the judicial reasoning.

counted on the matter: the votes of just nine unelected judges will be counted (to determine a simple majority) rather than the votes of a hundred elected senators or 435 elected representatives or millions of ordinary voters in a California-style plebiscite. It is a counter-democratic difficulty not a counter-majoritarian difficulty.[ww] Our practice of referring certain matters to the courts for final decision reflects a distrust of democratic decision-making. It is a distrust of persons: we don't trust ordinary voters or their representatives on certain matters; we prefer the judges. It is not a distrust of MD, for that is a principle we continue to deploy.

I say all this not to embarrass defenders of judicial review. But I do believe a more open and accurate characterization of the decision-procedure that judges use may help us get clear about a few things that are relevant to that debate.

First of all, there is nothing inherently incompatible between the use of MD and the addressing of issues of principle. When we contrast judicial decision-making with majoritarianism, the implication is that majoritarianism is appropriate for bread-and-butter issues, or grubby pork barrels, where crude and inarticulate interests are involved, but that issues of principle should be decided by a more elevated procedure. We must abandon that characterization. The fact that courts address matters of principle by voting tells us that there is nothing inherently inappropriate about these issues being decided in institutional contexts that are more notorious for their majoritarianism.

Secondly, frank recognition of the role that MD plays and of the circumstances of judicial decision-making that call for a decision-procedure of this kind may help us think more tolerantly about disagreement. Part of understanding that matters of principle have to be dealt with in this way involves owning up to the fact that reasonable disagreement is possible on these matters. Judges disagree about rights—there is no way round that—and although they are experts in constitutional law, there is no denying that their disagreements with each other are in many ways just like the disagreements, on these matters, that ordinary citizens have with one another. On abortion, on affirmative action, on campaign finance, or the juvenile death penalty—on all these issues, reasonable people disagree. That even the judges, at the end of the day, have no choice but to count

heads on these issues shows us that. Acknowledging this, we might be a little more tolerant of our disagreements with one another—not relaxing our opposition necessarily, but refraining from characterizing our opponents' views as positions that are in some sense vicious, corrupt or beyond the pale.

Thirdly, acknowledging the use of MD in court might make us more judicious in the way we use the phrase "the tyranny of the majority." It's a phrase that rolls easily off the tongue when we are discussing "the counter-majoritarian difficulty." But once we see that there is no getting away from majorities and minorities, we might be more careful how we use it. Of course we must acknowledge the possibility that a majority-decision may be tyrannical, whether it is a majority decision by a court or majority decision by a legislature: *Dred Scott* was tyrannical and so were the Fugitive Slave Acts. But, in either context, tyranny of the majority does not happen every time someone loses a majority vote. Judicial MD helps us see that: a judicial minority may fervently disagree with the majority on the court, but in almost every case *they*—I mean the dissenting justices—do not suffer from anything that can be called the tyranny of the majority. Justice Scalia does not suffer under the tyranny of the majority in *Dickerson* or in *Planned Parenthood v. Casey*. Once we realize this, we may want to say the same thing about being a member of a losing faction in democratic decision-making: it does not necessarily mean suffering under the tyranny of the majority. It *may*—in cases where members of the decisional minority are also members of a topical minority group who suffer disadvantage as a result of the majority decision.[45] But even in cases like that, the imposition of the disadvantage on the minority by a majority decision is not necessarily tyrannical. The disadvantage might be fair and appropriate; or its fairness and appropriateness might be a matter of dispute; it is not tyrannical just because it is a disadvantage, and it is not tyranny of the majority just because it was imposed through MD.

[45] For the distinction between *decisional* majority and minority and *topical* majority and minority, see JEREMY WALDRON, LAW AND DISAGREEMENT 13-14 (1999).

My fourth and final point takes us out of the judicial context, but suggests ways in which judicial MD might help us in democratic theory generally.[46] Facing up honestly to the use of MD in court might help us develop more realistic accounts of what is known in the trade as "deliberative democracy." Democratic theorists these days are quite keen on the idea of a democracy where citizens address the major issues facing the polity in a thoughtful and impartial spirit, not focusing exclusively on their own pocketbooks: they discuss the issues of the day, presenting their opinions to others, and holding themselves open to persuasion and correction when the opinions of others are presented to them.[xx] But it is evident that deliberation does not always yield consensus, though consensus (on the truth) might be thought of as its *telos*: sometimes deliberation aggravates dissensus.[yy] So there is a question about how deliberative democrats should think about decision-making in the face of disagreement. The problem is that, as things stand, deliberative democracy and majority voting seem like odd bed-fellows. There is something embarrassing about voting in a deliberative context —or at least that is the impression we are given; voting seems like an admission of deliberative failure, for it shows that a discussion based on the merits has failed to resolve the issue. When those who write about deliberation turn their attention to voting, the sense of distaste is almost palpable. I think what we need is a theory of democracy which makes voting the natural culmination of deliberation, rather than something indicating that deliberation has been in some sense inadequate. We need a theory of deliberation that dovetails with voting, not a theory of deliberation that is embarrassed by it, a theory that explains why it is reasonable to require people to submit to MD not just their self-interest, but their most impartial, their most earnest, their most high-minded, and their best-thought-through convictions about what justice, rights, or the common good require.

I suggest that we should take voting on the Supreme Court as our clue, for the development of a more general theory which reconciles voting and deliberation. For there

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[46] This paragraph and the next are adapted from Jeremy Waldron, *Deliberation, Disagreement and Voting*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 210, 211-16 (Koh and Slye eds., 1999), where I first considered this matter.

is surely no doubt that the Supreme Court is a deliberative body, and that it does not cease to be so when its members disagree with one another, even though their disagreement means that, at the end of their deliberation, the matter before them has to be determined by a vote. This, I say, we should regard as our clue—for it indicates that in principle there is nothing incompatible between deliberation, disagreement, and voting. If the combination makes sense in the courtroom, then maybe it also makes sense at the level of a more general theory of deliberative democracy.

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These changes in the way we think about judicial decision-making, judicial review, and deliberation in the face of disagreement are the intended normative pay-off of this paper. This has been an exercise in exploration rather than advocacy or denunciation. I do think it is a pity that there is not more discussion of MD in court, and it is interesting how difficult it is to transpose into the judicial context arguments for MD that seem to work reasonably well in electoral and legislative politics.

I have mentioned several times the possibility of instituting a supermajority decision-rule for striking down legislation. No doubt it is healthy to think about that and to come up with reasons why it might be a good or a bad idea. But it is not the aim of this paper to advocate such a rule: even Jed Shugerman said that his discussion of it was primarily by way of thought-experiment.[zz] Experiments in thought can help fill out gaps in our understanding and it primarily with that in mind that I have undertaken this discussion of the use of majoritarian methods by judges.

ENDNOTES

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[b] See Barry Friedman, *Dialogue and Judicial Review* 91 MICHIGAN L. REV. 577 (1993), at 600. See also Richard Pildes, *Is the Supreme Court a "Majoritarian" Institution?* THE SUPREME COURT REVIEW [2010], 103.

[c] I follow HANNAH ARENDT, ON REVOLUTION 164 (1973) in distinguishing "majority-decision" from "majority rule": "Only where the majority, after the decision has been taken, proceeds to liquidate politically, and in extreme cases physically, the opposing minority does the technical device of majority-decision degenerate into majority rule."

[d] See Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE LAW JOURNAL (2006), 1346.

[e] DAVID ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK (2007).

[f] THOMAS CHRISTIANO, THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS (2008).

[g] For a discussion of the supposedly low costs of MD, see Adam Samaha, *Undue Process,* 59 STANFORD L. REV. 601 (2006) at 618-20

[h] See Michael Kirby, *Judicial Dissent: Common Law and Civil Law Traditions*, 123 L.Q. REV. 379 (2007).

[i] Most discussions assume that there will be something like MD and focus instead on how to modify it: e.g. David Post, *Rowing against the Tidewater: A Theory of Voting by Multijudge Panels* 80 GEORGETOWN LAW JOURNAL 743 (1992).

[j] See, e.g., JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 177ff. (2006) for the claim that judges ought to be willing to log-roll and vote strategically.

[k] Adrian Vermeule alludes to this in his article, *Absolute Majority Rules*, 37 BRITISH JOURNAL OF POLITICAL SCIENCE 643, 645 (2007), where he says (ibid., 645): "Throughout, I confine the discussion to legislatures, although there are analogous issues in the design of voting rules for courts, direct democracy and other institutions."

[l] See, e.g., Richard Fallon, *Stare Decisis and the Constitution*, 76 N.Y.U. LAW REV. 570, 577-81 (2001).

[m] Quoted in SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787 (2011) at 262 (my emphasis).

[n] Pasquale Pasquino, unpublished and untitled paper, presented at Collège de France, June 2010.

[o] There is a fine account in Shugerman, *supra* note 6, 899-931, summed up in some tables at the end of his article, at 1013-19.

[p] Larry Alexander, *On Extrajudicial Constitutional Interpretation*, 110 HARVARD LR 1359 (1997) at 1372n. See also Shugerman, *supra* note 7, 949: "[F]ive-four decisions are too unstable to create reliable constitutional law. The Supreme Court itself has demonstrated that these opinions enjoy lesser precedential value. Of the forty-nine decisions overturned between 1958 and 1980, twenty-one of them were decided by a five-vote majority."

[q] Cf. AHARON BARAK, THE JUDGE IN A DEMOCRACY 211 (2006): "In a previous case I wrote a dissenting opinion. Now the issue arises again and I remain in the dissent. How should I behave? Should I accept the majority opinion and reiterate my dissent…? Each judge will act as he sees fit. Throughout the years my view has been that, as a rule, I accept the majority opinion and do not repeat my dissent." But he makes an exception for cases "that cut to the heart of the matter of realizing the judicial role."

[r] "§ 3501" refers to 18 USC § 3501, which was the statutory provision, purporting to override *Miranda v. Arizona*, which was struck down by a 7-2 majority in *Dickerson*.

[s] Waldron, *Core of the Case*, *supra* endnote *d*, at 1392-3.

[t] Jeremy Waldron, *A Majority in the Lifeboat*, 90 BOSTON UNIVERSITY LAW REVIEW 1043, at 1044 (2010).

[u] AMAR, *supra* note 10, 357-61.

[v] Shugerman, *supra* note 6.

[w] AMAR, *supra* note 10, 360.

[x] Ibid., 358.

[y] Ibid., 358-9.

[z] Hills, *supra* note 16, 58.

[aa] Ibid., 58-9.

[bb] ARENDT, supra endnote *c*, 164.

[cc] Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, excerpted in THE DEMOCRACY SOURCEBOOK, 12, (Dahl, Shapiro, and Cheibub eds., 2003), at 15.

[dd] See John Gilbert Heinberg, *Theories of Majority Rule*, 26 AMERICAN POLITICAL SCIENCE 452, citing Gierke. But Heinberg adds that in canon law, "there was introduced the doctrine of the *maior et senior pars* whereby the 'majority' was both counted and weighed. Thus it might be possible for a minority composed of *pars sanior* to prevail over a numerical majority. In time, however, the simple numerical count came to prevail, and a preponderance in number was taken as evidence of a preponderance in *sanitas*" (ibid., 456).

[ee] Suppose there are three voters—V, W, and X—voting independently, each with a .6 chance of being right. When V casts his vote, there is a .6 chance he's right and a .4 chance he's wrong. When W casts his vote: there is a .6 x .6 = .36 chance that a majority comprising at least W and V will be right; a .6 × .4 = .24 chance that V will be right and W wrong; and a .4 x .6 = .24 chance that V will be wrong and W right. Now X casts his vote. If V got it right and W wrong, there is a .24 x .6 = .144 chance that a majority comprising only V and X will be right. And if V got it wrong and W right, there is the same chance (.144) that a majority comprising only W and X will be right. The overall probability that a majority will be right then is [.36 (VWX or VW) + .144 (VX) + .144 (WX)] = .648, which is somewhat higher than the .6 individual competence we began with. For a sense of the difference that an increase in group size can make, consider that if we add to the group two additional voters of the same individual competence (.6), we get a competence of .68256 for the five members deciding by a majority. To get a group competence of higher than .9, we need only add an additional 36 members with individual competencies of .6. See Bernard Grofman and Scott Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82 AMERICAN POLITICAL SCIENCE REVIEW 571 (1988).

[ff] Someone might say that if the Condorcet theorem justifies the use of MD on judicial panels, then it surely justifies even more strongly the use of MD in legislatures where the numbers are one or two orders of magnitude higher. But Condorcet argued that there is no guarantee that electable representatives have a greater than .5 chance of coming up with the right result: "A very numerous assembly cannot be composed of very enlightened men. It is even probable that those comprising this assembly will on many matters combine great ignorance with many prejudices. Thus there will be a great number of questions on which the probability of the truth of each voter will be below ½." If average individual competence falls below .5, the Condorcet effect goes into reverse. "It follows," said Condorcet, "that the more numerous the assembly, the more it will be exposed to the risk of making false decisions." –CONDORCET, SELECTED WRITINGS 49 (Keith Michael Baker ed., 1976).

[gg] This is not because I worry that discussion among the judges might spoil the Condorcet result. The theorem does require that the individual votes be independent of one another, but on my reading of the Jury Theorem it is a mistake to think that this precludes prior deliberation. Provided the competence of the individual voters is measured after the deliberation takes place, then the Condorcet result will accrue irrespective of how each individual's competence came to be at the level it is at. We have to remember, after all, that the Jury Theorem is a purely arithmetical result; it has no epistemic substance that could be affected by facts about how the voters came to have a given level of epistemic competence. I mean it is *utterly arithmetical*; put 60 white balls and 40 black balls in an urn, shake them up and pull out three; the chance that a majority of three balls will be white is .648 irrespective of how it came to be that the chance of any given ball being black was .6. (See Jeremy Waldron, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AMERICAN POLITICAL SCIENCE REVIEW (1989), 1322-8.)

[hh] *Planned Parenthood v. Casey* 505 U. S. 833 (1992) at 1001 (Scalia J., dissenting):

> The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the 'liberties' protected by the Constitution are, as the Court says, undefined and unbounded, then the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours.* … Value judgments, after all, should be voted on, not dictated….

[ii] A lottery might also satisfy these conditions—cf. Ben Saunders, *Democracy, Political Equality, and Majority Rule* Ethics, 121 ETHICS 148, 151 (2010): "In lottery voting, each person casts a vote for their favored option but, rather than the option with most votes automatically winning, a single vote is randomly selected and that one determines the outcome. This procedure is democratic, since all members of the community have a chance to influence outcomes, but is not majority rule, since the vote of someone in the minority may be picked. It is, as I describe it, egalitarian, since all have an equal chance of being picked. It gives each voter an equal chance of being decisive…." See also the discussion in Adam Samaha, *Randomization in Adjudication* 51 WM. & MARY L. REV. 1 (2009). But MD assigns greater weight to each individual vote (in the direction in which it points) than lottery voting does.

[jj] *Supra*, text accompanying note 5. See also, in that same note, the quotation from *Mehrens v. Greenleaf*, 119 Neb. 82, 227 N.W. 325, Neb., (1929), elaborating the connection between the supermajority requirement and the presumption of constitutionality.

[kk] For some history of political arguments that the Justices should follow a supermajority rule, see Evan Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 INDIANA LAW JOURNAL 72 (2003).

[ll] Hills, *supra* note 16, at 59.

[mm] Dworkin, *supra* note 14.

[nn] See also Dennis Baker *Retort: A Parliamentary Power to Resolve Judicial Disagreement in Close Cases,* 21 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 347 (2002), 356.

[oo] Jeremy Waldron, *Deliberation, Disagreement and Voting*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS (Koh and Slye eds., 1999), 210, at 223-4.

[pp] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 179-80 (1991): "[T]hough every one ought to have a voice—that every one should have an equal voice is a totally different proposition. … If, with equal virtue, one is superior to [another] in knowledge and intelligence—or if, with equal intelligence, one excels the other in virtue—the opinion, the judgment, of the higher moral or intellectual being is worth more than that of the inferior: and if the institutions of the country virtually assert that they are of the same value, they assert a thing which is not."

[qq] For discussion, see JAMES BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY, Ch. 16 (1962).

[rr] Hills, *supra* note 16, at 59.

[ss] I am grateful to Arie Rosen for turning my thoughts in this direction.

[tt] Again, the phrase is Dworkin's: see RONALD DWORKIN, A MATTER OF PRINCIPLE 33 (1985).

[uu] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16 (1962).

[vv] Baker *, supra* endnote *mm*, at 356.

[ww] Cf. Thomas Nagel's acknowledgement in CONCEALMENT AND EXPOSURE, *supra* note 20, 141-2 concerning the US Supreme Court's decision-making on basic principles of right and justice: "Since that Court also operates by voting and often decides cases by a five-to-four majority, the issue is not whether majorities should be permitted to decide fundamental disputes of justice and rights but who it should be a majority of, how the members of the group should be selected, and what kind of debate should lead to the vote."

[xx] See e.g., DELIBERATIVE DEMOCRACY (Jon Elster ed., 1998), Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY (Hamlin and Pettit eds. 1989), and John Ferejohn, *Instituting Deliberative Democracy*, in NOMOS XLII: DESIGNING DEMOCRATIC INSTITUTIONS 79 (2000).

[yy] Jack Knight and James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 POLITICAL THEORY (1994).

[zz] Shugerman, *supra* note 6, 895.