2023

Fractured Majorities and Their Reasons

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Articles:

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ABSTRACT

The wisdom of crowds correctly exalts majority decision-making on appellate courts as well as on many other settings, including hospitals and committees with multiple doctors or board members. But the same confidence in majorities should be applied to the *reasons* that are attached to a vote, or opinion, and then to a majority's rejection of a member's reasoning. This Article introduces the problems confronted when examining the reasons for opinions, and then the reasons beneath those reasons. It shows that majority decision-making is not as reliable as it first seems and, indeed, that a single decision-maker may at times be more reliable than a 2-1 or even a supermajority vote. One lesson or escape from this paradox is that judges and other decision-makers should reveal their disagreements, if any exist, with other voters' reasoning, to reveal whether there is such serious disagreement about their reasoning as to question the presence of a true majority.

* University of Chicago Law School. I am grateful for the ideas contributed by Elena Di Rosa and participants at workshops at the Center for Law & Economics, at ETH Zurich and, of course, at the University of Chicago Law School.

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I. OUTCOMES AND REASONING IN APPELLATE COURTS

Decision-makers sometimes agree, by a majority vote, on a conclusion, yet not on the reason for it. This Article explores the role of reasoning in reaching a conclusion where a group is seeking to find a right answer—where there is one—and hoping for the wisdom of the crowd. The argument here casts doubt on the formal version of this wisdom, the Condorcet Jury Theorem, which posits that as we increase the number of "voters" who are more likely to be correct than incorrect, and who reach one conclusion over another, the chance that the majority is correct also dramatically increases.[1] Three independent voters, each 60% likely to be correct, are more than 94% likely to be correct when they agree as a group, and they will therefore more often reach the correct conclusion than a single expert unless the latter is near perfect. The search for correct answers by majority vote, and ideally by a supermajority, is omnipresent. A jury is asked to decide whether a defendant was negligent; a panel of judges must decide what a statute or constitutional provision means; and a group of friends in a car must decide whether to turn right or left at an intersection. Although the aim of this Article is to cast doubt on our confidence in many majority decisions, even unanimous ones, a more optimistic conclusion is that decision-makers, including appellate judges, should be transparent about intra-group disagreements as to their reasoning. A key component of this Article's thesis is that when evaluating any group decision, the question must be whether there is a majority that finds a colleague's reasoning correct, and certainly not flawed. When a majority thinks that a reason motivating a colleague is incorrect, the decision or vote of that colleague should be eliminated.

Imagine that on an appellate panel facing two questions, Judge *A* thinks a petitioner has standing in the case but also that this petitioner should lose on the merits because of the way a statute or precedent is understood. Judge *B*, by contrast, thinks there is no standing but argues that if there were, the petitioner should prevail on the merits. Judge *C*

1. *See* Christian List & Robert E. Goodin, *Epistemic Democracy: Generalizing the Condorcet Jury Theorem*, 9 J. POL. PHIL. 277, 283 (2001).

thinks there is standing and that the petitioner should prevail on the merits. "Outcome voting" asks each appellate judge to affirm or reverse the lower court's opinion on these matters. Here, *A* and *B*, if asked as individuals, think petitioner should lose—Judge *A* because of a judgment regarding the merits and Judge *B* because of the standing problem. Judge *C* can write a dissent, but if there is some precedential value to derive from the case, it will come from the *AB* majority.

Under "issue voting," the panel is polled issue by issue. As applied to this example, the first issue polled would be standing and the second issue would be the merits. Different majorities could decide each of these two questions. Arguably, issue voting more fully embraces the Condorcet Jury Theorem because the Theorem looks for the wisdom of the crowd with respect to each matter. Law presumes that there are right answers to these matters, and it is a combination of these two right answers that will dictate the outcome of, and presumably the right answer in, the case. With issue voting, there is a positive vote for standing (*AC* combined) and then a positive vote on the merits (*BC* combined); thus, the petitioner would win because of these distinct 2-1 votes. But under outcome voting—the standard practice in American jurisdictions—*A* and *B* combine to produce a loss for the petitioner.[2] Critically, the well-established *Marks* Rule finds the holding, or precedential value, of a fractured court to be derived from the position representing the narrowest grounds offered by the concurring judges for the outcome of the case.[3] The Rule leaves *C* out of the group when it comes to writing the majority decision. After all, though they decide on different grounds, the decision is against the petitioner because of *A* and *B*'s judgments, while *C* dissented from the outcome supported by the majority.

2. *See* David G. Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multi-Judge Panels*, 80 GEO. L. J. 743, 745 (1992) (noting that the Supreme Court typically engages in outcome voting though there are some exceptions); *see also generally* Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CALIF. L. REV. 1 (1993) (attributing the American norm of outcome voting to the longstanding British rule and then proposing that judges conduct a vote on whether to follow issue or outcome voting).

3. *See* Marks v. United States, 430 U.S. 188, 193 (1977) (explaining that a fragmented decision's holding is the "'position taken by those [m]embers who concurred in the judgments on the narrowest grounds'" (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))); *see also* Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943, 1971 (2019) (noting that plurality views are sometimes set aside when it comes to precedential value unless the *Marks* Rule is called upon). *See, e.g.*, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 81 (1987) (treating a plurality's view as nonbinding because it "did not represent the views of a majority of the Court"). Still, the *Marks* Rule often has bite, and it is not limited to the interpretation of Supreme Court cases. *See* Re, *supra* note 3, at 1955–56. Professor Re collects cases that apply the Marks Rule, and these include circuit court and state court decisions. *See id.*

The *Marks* Rule emerged with respect to the precedential value of a Supreme Court decision, but it is illuminating to explore the Rule in the context of three rather than nine decision-makers. A majority might agree 3-0 on the outcome, but for very different reasons, and again the *Marks* Rule tells later courts, and especially lower courts, how to interpret the decision. Sometimes a judge has great confidence in her thinking about one issue and the reasoning behind it. If, for example, *C*'s primary goal is to influence later courts about standing doctrine, *C* will be tempted to switch her position on the merits of the case in order to be in the majority as to the outcome. The panel will then be 3-0 against the petitioner, and *C* can be included in the decision-making and precedent-setting process. By strategically switching, *C* can help form the evolving law of standing; *C* might feel perfectly good about this switch because *C* is bowing to the majority as to the outcome of the case. The wisdom of the crowd informs *C* that she was more likely than not to be wrong on the first matter, and then *C*'s switch allows her to influence the precedent set for standing doctrine.[4]

The *Marks* Rule is an American rule. The situation is both less and more complicated in other countries. Many countries, especially in Europe, do not publicize concurring and dissenting opinions. This can hide contradictory reasons for a majority opinion, but at times, it also causes the majority simply not to state various reasons for its decision. Even without separate norms about precedent, this practice surely alters, and probably reduces, what Americans regard as the precedential value of cases.

It is important to stress that this example, and most of what follows, concerns situations in which the decision-makers are in fact looking for a correct answer, and not looking to satisfy preferences or advance political aims. This is not a trivial condition. The judges imagined here are looking for a correct answer to the case in their hands, but they are eager at times to set a precedent and to get the precedent right. Theirs is a search for two correct answers—the decision and the precedent—but once the possibility of vote-switching is entertained, there is also the question of how important the precedent is to a given judge. There might be a right answer to this, or it might be a matter of the confidence a judge has in the importance and correctness of their answer regarding the precedential question. But it is easy to imagine judges having different preferences about the importance of precedent or of their ability to influence future courts. This is especially the case if judges do, or should,

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

begin with their sense as to the right outcome of a case and then work backward to announce reasons or precedents that they may think correct on their own. When a judge in the majority opines as to the reason for her decision in a case, she must know that her reasoning will likely influence future decisions made by other courts.

Much of what follows analogizes the *reason* for a judicial decision to what we call a *preference* in other contexts, but the two are not the same. In the first place, a court's reasoning creates precedent, while our reasons for most decisions are unlikely to affect the future decisions of others. To illustrate, imagine that one friend decides to order vanilla ice cream rather than chocolate because of a preference for one flavor over the other, but this preference (leading to a consumption decision) rarely influences a friend's decision in the future. Still, there are many settings in which people must aggregate their preferences to reach a decision, just as judges' reasons are aggregated to reach precedent-setting decisions. To complicate things, in the judicial context it is convenient to think that there is a right answer about precedent-setting reasons. In other spheres, preferences are accepted as reasons for decisions but are seldom understood to have right answers. In both contexts, the assumption is that if decision-makers could be convinced that their reasons were wrong, they would change their votes or other decisions. In the ice cream example, one person is likely to have a preference between chocolate and vanilla ice cream, but if asked what percent of a large group of customers will prefer chocolate over vanilla, there is a correct answer. Those who are asked, perhaps three experienced salespeople in the ice cream shop, will have an answer, or a "prior" as statisticians call it, based on earlier experience. Condorcet would prefer that the "voters" be polled independently, but in real life, there is often value (improved predictions) in allowing the three to discuss the matter and then converge toward a posterior prediction. Presumably, this is one reason why appellate judges and juries are encouraged to deliberate.

Preferences can also change as information is absorbed. Consider first a case in which true preferences must be aggregated, perhaps because of economies of scale, and then another case in which friends are combining what they know to arrive at a conclusion that surely has a right answer. When a reason is demonstrated to be wrong, perhaps because of new information, the decision-maker is apt to shift to a different decision. If one prefers restaurant *A* over restaurant *B*, but then two friends say they suffered from food poisoning after eating at *A*, the decision-maker will be grateful for the information and will now prefer *B*. If three friends want to order a serving of ice cream to share, they will not necessarily abide by the majority's vote for one flavor; they might want to take second choices or strong preferences into account. But if

equally knowledgeable people are deciding whether to turn left or right to arrive at a destination, and three say to turn left while two say to turn right, following conventional thinking, turning left is the thing to do. It is the wisdom of the crowd.

The central point of this Article is that this conventional thinking may be wrong. The three in the majority who favor turning left, let us name them *T*, *U*, and *V*, may have three different, and even conflicting, reasons in mind. Meanwhile, the two in the minority, *W* and *X*, may share the reasons for their conclusion to turn right. If the first voter in the majority, *T*, thinks that turning left is the correct thing to do because it takes the car west and the destination is known to be west of the starting point, it may well be that four of the five people in the car think, or reason, that turning left is a mistake because the road has already taken them too far westward. In this case, the wisdom of the crowd is to head east and a reasonable *T* will now bow to the majority, even though *U* and *V* have different reasons for thinking that turning left is the correct thing to do. *U* may think that the road to the left eventually curves eastward, and *V* may think that turning left will get them to a gas station where they can get directions. A 4-1 majority disagrees with *U*'s reason, and a different 4-1 majority disagrees with *V*'s.

In the above example, the choice the group makes as to directions has a correct answer. On the other hand, where preferences are concerned, reasoning rarely matters; it mattered when someone learned of food poisoning, but this is an unusual example. Where correct answers are sought, however, the reasons for a conclusion often matter a great deal. The same logic that supports majority rule tells us that a vote may be wrong because a majority disagrees with the reason for that vote or conclusion. In this way, the Condorcet Jury Theorem turns on itself, instilling a kind of false confidence. The majority inclines us to be confident about a group's decision as to an outcome, but it should make us less confident when there is no majority as to the reasoning behind it. And if the different reasons are contradictory, such that a majority thinks that *U*'s reason is wrong, then the majority's decision should logically switch.

When judges are asked to reach a decision that is assumed to have a correct answer, their reasoning is of critical importance. This is not only because there is reason to doubt the majority vote as to the outcome of a case, for the reason just explained, but also because it is the reasoning of the majority that usually creates the precedent that future courts will follow. The interpretation of precedent is not quite the same as the more familiar question of interpreting a statutory ambiguity, which is answered by discerning the legislative intent of those, in the majority, who enacted a given statute. "Congress is a 'They' not an 'It'" because different

legislators are likely to have different reasons for supporting a statute.[5] But statutory interpretation can be restricted by the words of the text, or it can be based on a court's judgment about how to advance social welfare or how to return a matter to the legislature. Many judicial decisions seem easier to assign to straightforward majority decision-making because an appellate court is asked to affirm or reverse. But this binary decision is also based on the reasons for the judges' votes, and, in any event, the decision's precedential value depends on its reasons. A search for the "narrowest grounds" of a majority of judges has much in common with the search for a single legislative intent.

II. CONTRARY REASONING IN LARGE GROUPS

There is much to be said about the battle between issue and outcome voting. In many cases, the message ought to be that given the possibility of cycling—that is, that there might be no stable majority when more than two voters choose among more than two options—there is no reason to think that either of these methods leads to more unattractive strategic vote-switching by judges.[6] But the focus here is on the more general question of how to think about the *reasons* for each voter's conclusion when aggregating votes.

This question is important not only for appellate courts, but also with respect to juries, large-scale elections (when regarded as searching for right answers rather than simply as a means of aggregating preferences), elected representatives, corporate boards, and even medical and personal decisions. For example, if a supermajority of jurors is required for a finding of liability, what if four jurors give a single reason for their votes, and the other five jurors in the supermajority come to the same conclusion, but each for different reasons? This is the problem the friends faced when trying to decide whether to turn left or right. The problem is exacerbated here because it is difficult to know whether a juror in the apparent majority actually disagrees with the reasoning of a fellow juror or simply prefers one line of reasoning over another. Perhaps a good explanation for encouraging juries to talk things out in the jury room is to allow members to see that some reasons are likely to be wrong

5. Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992). Note that Shepsle's point is not that a single intent cannot exist, but rather that it may not exist. *See id.* at 244–45.

6. Cycling is normally associated with aggregating preferences, and here the analysis aggregates what are said to be correct answers rather than preferences. This distinction, whether valid or not, is left for future work. This is hardly the first association of nearly inevitable cycling with judicial decisions, which are ostensibly about finding right answers. The difficulty or impossibility of solving cycling problems is normally associated with *Arrow's Theorem*; its application to Court decisions is the subject of Frank Easterbrook's *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

because a majority thinks so. Once that is appreciated, jurors can switch their votes accordingly. In other cases, every juror who votes for a conviction in a criminal case might listen to the reasoning of the others and shrug a shoulder, inasmuch as a majority did not think one reason was wrong, but rather that it was orthogonal and perhaps just 50% likely to be wrong. When jurors do not think that their fellow jurors' reasons are actually wrong, they will correctly be disinclined to change their votes. Jurors do not need to agree on their reasons, but they should decide whether some reasons are seen by the group as mistaken and not just different. The wisdom of the crowd suggests that a reason rejected by a majority should be dismissed. In turn, our best estimate of the correct outcome will be altered unless another reason for the first outcome, supported by what looked like a majority, can gain majority support.

With respect to most group decisions, and certainly those by our hypothetical jurors and judges, additional complexity is posed by situations in which a disagreement does not rise to the level of thinking that a peer is *wrong,* but rather that some reasons for a given conclusion are stronger than others. One judge might prefer her own reasoning over another's without quite thinking that the other judge's reasoning is truly incorrect. This matters for the setting of precedents, but for this Article's main argument, the problem comes to light only if a majority thinks that a critical reason is wrong, not just that a better reason exists. It is sufficient to limit the concern to cases in which a majority reaches a decision, but then another majority (usually overlapping with the first or completely contained within it) thinks that some of the reasoning used by members of the majority is incorrect. If that disapproved reasoning was necessary for some voters to sign onto the majority that reached an outcome, then everything has unraveled. One majority should displace the other.

This idea is not limited to juries and judges. In the case of medical procedures, what should a patient do if five doctors were consulted on an important matter, and two said to avoid surgery, while three said to submit to the surgery—but for three different reasons, or only if the procedure can be undertaken at three different hospitals? Again, the reversal contemplated here depends on the idea that each doctor in the apparent majority affirmatively disagrees with the reasoning of the colleagues who also suggested surgery. A majority of the five favors surgery; however, if the doctors' reasoning is considered, a plurality favors no surgery. Following the Condorcet Jury Theorem, and a belief in the wisdom of the crowd, each reason for surgery is rejected, and there is a plurality against the decision that first seemed to be favored by a majority of the doctors. Here, issue voting, as it were, logically

dominates outcome voting. Condorcet's logic applies to plurality voting as well as to majority voting.[7] Here, there is a 2-1-1-1 vote, and following the two is sensible unless there is reason to believe that one of the dissenters is far more likely to be right than the doctors who form the plurality. Indeed, in that case, it was a waste of time and resources to have consulted them in the first place.

The disturbing thing about the novel point advanced here is that virtually every outcome can derive from many reasons, and these reasons can be further divided into sub-reasons, any or all of which can be regarded as mistaken by a majority. It is therefore rare for there to be unambiguous majorities or pluralities. Where there is a right answer to be found, a majority can go in one direction with respect to a given reason, while a different majority can agree or disagree on the outcome based on these or other reasons. Ten divided by five equals two no matter how one does the calculation. But when a defendant is found to be negligent by a majority of jurors, and by the preponderance of the evidence, it is likely that as we dig down, we find many individual and non-majoritarian reasons for the conclusion.

The problem identified here is ubiquitous. Imagine, for instance, that a large majority of the 50 applicants accepted to two prominent law schools, School *X* and School *Y*, decide to choose *X* over *Y*, but the applicants do so for many different reasons. Assume that they all think that going to a good school maximizes future career opportunities and that this is something they all value. It is plausible that when we look at the disparate reasons for matriculation, we find a plurality of 18 out of the 50 thought that the probability of obtaining a federal clerkship was the paramount reason to select one law school over the other, and that *Y* placed the highest percentage, and even the highest absolute number, of its eager graduates in such clerkships.[8] These 18 are among 20 who prefer *Y*. Meanwhile, 30 of the applicants prefer *X*, but they do so for 15 different reasons, and they have no opinion at all about the reasoning of

7. *See generally* List & Goodin, *supra* note 1, which extends Condorcet's Theorem to plurality voting. A plurality winner, *A*, need not be pitted against competitors *B, C,* and *D,* but need only defeat them in pairwise competition, which is easy for the plurality winner. The argument in the text suggests that this is not at all straightforward if *B* and *C* share some reasoning.

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

the 18.[9] If we first took a vote on the most important thing to consider in selecting a school, clerkship success would have won with a plurality. If we move on, as the outcome system does, and as Condorcet's Theorem seems to require, additional admitted students ought now to attend *Y* because the wisdom of the crowd has informed them that the clerkship factor is most important.[10] Indeed, students who previously leaned toward *X* might now rationally switch to *Y*. As in the example about doctors, the critical element is whether a divided majority as to reasoning contains voters who do not just have different reasons for their preferring one outcome over another, but incorporates voters who think one another's reasoning is incorrect. Ideally, we would like majorities as to reasons as well as outcomes.

III. REASONS BENEATH REASONS

A means of connecting the central point of this Article to its starting point is that one justification for the U.S. practice of favoring outcome voting over issue voting on judicial panels (but not with respect to some jury decisions[11]) could be that a majority vote on an issue can also be subdivided into many smaller issues. A majority in favor of standing may have conflicting reasons for that view. If so, the cleanest unambiguous majority is found when voting for one outcome over another, where there are only two choices: affirm or reverse. Further inspection might again flip things. In the case of law school applicants included above, those who first chose *Y* because of the clerkship factor might have done so for several different reasons. Some might have selected *Y* because a clerkship provides a path to later opportunities—the reason attached earlier to all the applicants, but now relaxed—some because the clerkship numbers reflect an attentive faculty, and some because

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

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

11. *See generally* Elizabeth A. Larsen, Comment, *Specificity and Juror Agreement in Civil Cases*, 69 U. CHI. L. REV. 379 (2002) (discussing case law on the requirement that jurors agree on the specific reason for a verdict, including *Stoner v. Williams*, which held that it is good enough for jurors to agree as to the verdict and elements in a given case, so that where jurors considered a set of seven possible fraudulent acts and did not agree on which one of the acts had been committed, they could find for the plaintiff as long as a supermajority (minimum nine) thought that at least one of the acts had been committed, *see Stoner v. Williams*, 54 Cal. Rptr. 2d 243, 996 (1990)).

clerkship success indicates that informed observers regard *Y*'s education as superior. There might be no majority at this level of investigation, and combined with the views of those who selected *X*, a different ambiguous majority could suggest a different decision or outcome.

This problem goes to the heart of majoritarian decision-making. Oddly, a 2-1 decision may be less convincing, and certainly more confusing, than a 1-0 opinion.[12] The former might reflect a situation where there is a majority against every reason advanced by each voter, while a 1-0 case completely misses the opportunity to profit from the wisdom of the crowd but avoids the problem of aggregating decisions when voters have different reasons. The majority in a 2-1 case, or every other multiple-person majority judgment, may not really be much of a majority, but rather something that emerged from the way reasons and outcomes were framed. A 2-1 reversal of a lower court's judgment is quite likely not one made by an unambiguous majority with respect to anything that will be used as precedent. It will often be nothing more than a 1-1-1 set of approaches followed by some combinatorial gymnastics to obtain a majority outcome.[13] In this way, a 1-0 decision can be more convincing than a 2-1 decision, or even a 3-1 decision. This is especially the case if we continue to parse judges' thinking and reasoning. It might be sensible to latch onto a majority decision as to an outcome, but then avoid finding any precedential value when there is no shared reasoning among the majority of this group. Another approach—and perhaps one found, but unstated, in practice—is to incorporate the lower court's thinking into the calculus. A 2-1 decision on top of a single lower court judge's decision might give us a 2-1-1 plurality as to reasoning, and therefore make precedent more meaningful. Of course, the opposite might appear; what seemed to be a majority on the appellate court, as to reasoning as well as outcome, might now look like something less than that. One solution, even if it appears too convenient, is to count the lower court's reasoning, but then afford the reasoning less weight than that afforded to the appellate judges, who are presumably more trusted.

Once we go down this troubling rabbit hole of reasons for reasons (as introduced here in the example of admitted students), it is fair to question the precedential value of even a 3-0 (or 9-0) decision, even where the three (or nine) appear at first blush to agree about their reasoning. If we dig down into the reasoning, we might once again find no majority at all, and we are likely to find some majority against any

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

13. For a period, the practice was to regard plurality opinions as establishing no precedential value. *See* Re, *supra* note 3, at 1998.

given reason. And if this skeptical view is adopted, the very notion of precedential value is in question. Indeed, predictability is now threatened, and judges have reason to be strategic when announcing their reasons. One way to steer free of this skepticism about majority decision-making is to see that as the size of the majority increases, it becomes more likely that there is majority agreement about the reasoning that produced the majority's opinion. Presumably, there is a finite number of reasons that will motivate the decision-makers, and eventually, a large percentage will agree on at least one of those reasons. In addition, the greater the number of voters, the more likely it is that many within the large majority are correct and there is at least a smaller majority as to the reason for the outcome.[14]

If there is to be a coherent view of precedent, when in reality we are unlikely to find majority agreement as to the reasoning, or indeed a majority decision *against* any given reason, it might be wise for judges and other voters to delegate some decision-making. For example, the announcement and interpretation of the reason for an outcome might be delegated to a single person. The intermediary or single author can then evaluate the arguments offered by colleagues (or by judges on earlier courts), their relative expertise, and the importance of a clear precedent, all before announcing the court's reasoning—even if this is an unconventional approach to majority decision-making. Again, and in practice, courts and committees might do this unofficially, but it is difficult to know how often this is the case. We often find ourselves agreeing with a group and keeping silent about the reason for our agreement. There is every reason to think that judges do the same, even when the important precedential value of a case is at stake. Judges, like corporate board members, might sign on to an opinion, but it cannot be known whether their reasoning is shared. It could be that one or more of them prioritized the production of an unambiguous precedent (like a manicured set of minutes recording a board meeting) above the value of revealing his or her reasoning or disagreements among voters.

It must be emphasized, and stated once more, that this novel argument refers to matters in which we think there is a correct decision to be found rather than an amalgamation of preferences. The argument assumes that there is a correct answer to much of what judges (and corporate boards) do. In comparison, if among ten friends looking to dine together on a special occasion, seven prefer restaurant *Q* and three prefer restaurant *R*, it is of little significance that the seven prefer *Q* for five different reasons, such as individually preferred entrees, while the three

14. If nine out of ten doctors agree that a patient should undergo a particular surgical procedure, it is more likely that as many as six (a majority) agree on the reason for this right answer than if only six recommend surgery.

prefer *R* for a single reason, be it *R*'s convenient location or its chocolate cake. The three constitute a plurality at the level of (first-order) reasoning, but here we are trying to maximize utility or find a Condorcet winner[15] (or preserve friendships). Intensity of preferences aside, going along with the seven is almost always the correct thing to do where preferences are concerned, especially if this is a one-off get-together.[16] If a majority prefers restaurant *Q*, and three do so because they like the chocolate cake offered at *Q*, it does not matter to these three that the other four persons who like *Q* find the chocolate cake there awful, but prefer *Q* because of its view of a lake. Put differently, even a plurality might be wrong about its reasoning where a right answer is concerned, and while this example puts the right answer in doubt, it is hard to be wrong about a preference—so long as we set aside the problem of preferences formed on the basis of factual misconceptions. If those who like the cake learn that the others who prefer *Q* dislike the chocolate cake because they know of two friends who became sick after eating that cake, the cake lovers might now change their preference and prefer not to dine at *Q*. But, in most cases, having different reasons for a shared preference does not matter, while having different and conflicting reasons for finding a defendant to be guilty matters a great deal.

IV. CONCLUSION

Knowledge about the real reasons for a group's majority decision is inconvenient, or at least troubling. Majority decision-making and precedential value look good only if we avoid thinking about the nature of the reasons used and given for a vote or other decision. But another conclusion is that we ought to recognize the importance of assessing the likelihood that a group of voters is or is not likely to share the reason(s) for a decision. At times, it may be of no consequence whether decision-makers share their reasoning, but, in the case of precedential value and many jury decisions, it surely matters a great deal. When we search for a correct answer, majorities are not as reliable as they seem. Strategic behavior aside, the wisdom-of-crowds justification for abiding by judicial precedents loses force unless there is evidence that a majority agreed not only on an outcome but also on the reason(s) for this outcome. Judges should be encouraged to state when and why they disagree with the reasoning of fellow judges.

This Article's argument can be applied to political elections, though that is a matter best left for future work. The case for simple majority

15. An option that would defeat every alternative in head-to-head competition.

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

rule in large-scale elections might be that preferences rather than right answers are at stake. Alternatively, it is arguable that a majority of voters, however much they diverge in their reasoning, should get their way simply because the alternative is absurd; the minority is not only intuitively unattractive but also less likely to reflect an amalgamation of conflicting reasons. The majority is more likely to contain a plurality without conflicting reasons as to its conclusion.

Finally, where juries are concerned, it seems unlikely that 12 jurors often agree on both reasons and outcomes. Perhaps this is why mere majorities are not trusted in criminal cases, and even in civil cases a true majority, once we take reasoning into account, is more likely with a supermajority than with a simple one. The extreme form of the argument about reasons beneath reasons is that a 12-0 vote is anything but that. Some jurors, but not a majority, think that the defendant is guilty because of the testimony of a police officer, others vote to convict because of a video, and others because of a confession. And even if a sub-majority was convinced by the police officer's testimony, this might have been for different and conflicting reasons. One juror trusted the officer because of his position on the police force, while the others think that a higher rank is associated with dishonesty rather than reliability, and so forth. A simple majority might have rejected each of the reasons (taken alone) that motivated the "unanimous" jury to convict. It follows that combining the voters in the manner advanced by Condorcet is not just incorrect, but backward: each of the three reasons should be thrown out as (more likely than not) incorrect. The same is true when the vote is for a finding of innocence. In the end, it may be that all majorities are fractured, and all juries are truly hung juries.