# FOR JUDICIAL MAJORITARIANISM

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## ABSTRACT

*Why are some of the most important legal questions in our society—like the legal status of gay marriage, the right to unionize, the limits of campaign finance, the extent to which firearms can be regulated, abortion, and the outcome of a presidential election—decided by a bare majority 5–4 vote on the Supreme Court? The debate on judicial review has unearthed myriad compelling reasons for the judiciary to be empowered to consider and deliberate on these issues and arrive at consensus on the best way forward. But the questions persist of whether and why we should allow the judiciary to resolve those issues in a simple majority vote—where such a vote may neither demonstrate deliberation nor consensus.*

*This Article provides a comprehensive justification for judicial majoritarianism—i.e., the use of majority voting on an appellate court. To do this, the Article first constructs a framework for analyzing various types of court decision procedures, by identifying all of the different desiderata, or "virtues," of a decision procedure. The Article then identifies the plausible alternatives to judicial majoritarianism and scores each of them on the identified set of virtues. By comparing the performance of the different decision procedures on these virtues, the Article sets forth a defense of judicial majoritarianism.*

*The Article then applies the framework to four scholarly proposals to reform the U.S. Supreme Court (and its instantiation of judicial majoritarianism): (1) employing a supermajority rule on the Court for invalidating federal statutes; (2) balancing the Court with political appointees; (3) modestly expanding the Court and using panels of Justices instead of a single group of Justices sitting en banc; and (4) dramatically expanding the Court and using panels of Justices drawn from the Courts of Appeals. The Article provides a comparison of judicial majoritarianism versus these alternatives, concluding that there are compelling benefits to the Court's judicial majoritarianism and that any of its deficits compared to the alternatives are marginal. Though these proposals seek to reduce the effect of partisanship on the Court by shifting from judicial majoritarianism, the Article contends that the virtues of judicial majoritarianism sound in core values of the law that protect against the effects of partisanship.*

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## INTRODUCTION

Among the principal objectives of democracy are to allow for discourse and disagreement on our most important societal issues and to resolve those disagreements in a way that allows a society to flourish.[1] Proponents of judicial review contend that there are certain decisions that must be taken out of normal majoritarian processes and entrusted to neutral arbiters in a judiciary. The reasons supporting judicial review are myriad, but the most prominent justifications are: Judicial review is necessary to protect individual

1 *See, e.g.*, Joshua Cohen, *Procedure and Substance in Deliberative Democracy*, *in* PHILOSOPHY AND DEMOCRACY 17, 17–18 (Thomas Christiano ed., 2003) (stating that collective decision making is the foundation of democratic legitimacy).

rights[2]; it is necessary to protect the representative nature of government[3]; and it produces better decisions because judges have cognitive, situational, and motivational advantages over other actors that can allow the judiciary to better achieve settlement, coordination, and stability.[4] For purposes of efficiency, error correction, and establishing uniformity in the law, the judiciary usually has multiple levels, with a multiple-member apex court of last resort. Naturally, when there are multiple judges there will inevitably be disagreement. Nothing—whether it be common objective, erudition and expertise, or deliberation—can insulate the judiciary from the reality that judges will disagree. Thus, when a court is comprised of multiple judges it must also have a procedure for rendering a decision when judges disagree, and most courts use majority vote.[5]

However, the use of majority voting might seem curious, especially considering that these courts decide some of our polity's most important questions. The judiciary rules on matters relating to individual rights, ensuring that the democratic processes function, and settling and stabilizing the polity in moments of turmoil. Indeed, in the United States we have seen decisions on the legalization of gay marriage,[6] the right to unionize,[7] the limits of campaign finance,[8] the extent to which firearms can be regulated,[9] the right to abortion,[10] and the outcome of a presidential election[11] decided by a bare 5–4 majority. So why do we guide our society through these

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2 THE FEDERALIST NO. 78 (Alexander Hamilton) [hereinafter THE FEDERALIST NO. 78] ("The independence of the judges is . . . requisite to guard the constitution and the rights of individuals . . . ."); Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 LAW & PHIL. 247, 247–50 (2003) (discussing concerns about the maintenance of individual rights from a pro-majoritarian and anti-majoritarian perspective); CHARLES BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 125–27 (1997); LAWRENCE SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 199 (2004).

3 *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

4 *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1369–73 (1997) (noting that judges, as interpreters of the Constitution, play an exceedingly important role in establishing legal order for a population); Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455, 457 (2000) (arguing that when judges reach a settlement for what ought to be done in a certain situation, that settlement has value irrespective of its accuracy).

5 Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 YALE L.J. 1692, 1695 (2014) ("[Majority decision] is pretty much universal among multi-member judicial panels . . . .").

6 Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

7 Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448 (2018).

8 Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

9 District of Columbia v. Heller, 554 U.S. 570, 576 (2008).

10 Webster v. Reproductive Health Services, 492 U.S. 490, 499 (1989).

11 Bush v. Gore, 531 U.S. 98, 100 (2000).

inflection points with a bare majority decision of a select few people? As we have seen recently and not so recently, the appointment of these judges to the court can be politically fraught and may seem arbitrary.[12] So, if there is no clear consensus among our selected experts—i.e., our judges—then it is unclear why should we decide the question through the use of the judiciary as opposed to the more democratic modalities. These deep questions regarding about the use of majority voting on courts often reduce toward well-known arguments regarding the propriety of judicial review in the first place.[13]

Even if we conclusively resolve the justification of judicial review, however, the question persists why we use the particular decision procedure of majority voting on an *en banc* court—judicial majoritarianism or majority decision (MD)—as opposed to another decision procedure. Until recently there has been a surprising lack of theoretical attention to justifying the use of majority voting on courts.[14] Jeremy Waldron directly raised this question in his Essay *Five to Four: Why Do Bare Majorities Rule on Courts?*.[15] Waldron

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12 *See* Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2240–41 (2019) (reviewing RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT (2018)) (setting forth common questions of legitimacy the U.S. Supreme Court faces from scholars and politicians); New York Times Editorial Board, *The Stolen Supreme Court Seat*, N.Y. TIMES (Dec. 24, 2016), https://www.nytimes.com/2016/12/24/opinion/sunday/the-stolen-supreme-court-seat.html (describing the failure of Judge Merrick Garland's appointment to the U.S. Supreme Court as a stolen nomination); Erwin Chemerinsky, *With Kavanaugh Confirmation Battle, the Supreme Court's Legitimacy Is in Question*, SACRAMENTO BEE (Oct. 1, 2018), https://www.sacbee.com/opinion/california-forum/article219317565.html (describing the delegitimatizing of the U.S. Supreme Court arising from Justice Brett M. Kavanaugh's appointment).

13 *See, e.g.*, Guha Krishnamurthi, Jon Reidy, Michael J. Stephan & Shane Pennington, Note, *An Elementary Defense of Judicial Majoritarianism,* 88 TEXAS L. REV. SEE ALSO 33 (2009) (responding to challenges to judicial majoritarianism that, if correct, would question the justification for judicial review).

14 Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1392 (2006). Waldron further observed that insofar as the justification of majority voting is grounded in a claim of better outcomes, like by appeal to the Condorcet jury theorem, it may fare poorer than outcome-related cases for legislatures. Waldron also contemplated that majority voting may be defended as nothing more than a technical device of decision with no further theoretical ramifications. In either event, Waldron concluded that "[t]here is no additional fairness argument for the use of [majority voting] by courts, as there is for its use by legislatures." *Id.* at 1393.

My coauthored piece, *An Elementary Defense of Judicial Majoritarianism*, *supra* note 13, responded to *The Core of the Case*, *supra*, and argued that Waldron's questions about majority voting did not generate any new arguments against judicial review.

15 *See* Waldron, *supra* note 5, at 1692 ("What justifies judges' [and our] reliance on [majority decision]?").

surveyed potential reasons for majority voting[16]—including arguments for efficiency, epistemic benefits, and fairness—and concluded that none of these considerations favor the use of majority voting, leaving the question open for consideration.[17]

Alongside Waldron's challenge, the question of how to justify the use of majority voting on appellate courts has been percolating in other areas of scholarship about the courts. Specifically, within the recent scholarship on the politicization of the U.S. Supreme Court, several scholars have proposed alternative decision procedures for the Court. Jed Shugerman has argued that, instead of a majority, the Supreme Court should be required to obtain a supermajority to invalidate a federal statute.[18] Two pairs of scholars, Tracey George and Chris Guthrie and Daniel Epps and Ganesh Sitaraman, have proposed that the Supreme Court be expanded in numerical strength and move from hearing cases *en banc* to hearing cases in panels.[19] Epps and Sitaraman have also floated another proposal to balance the Court's bench politically by increasing the strength of the Court to 15 Justices, with 10 Justices selected in equal numbers by the two political parties, and the other

16 Waldron considers specifically the use of majority voting on an *en banc* court, wherein all the judges participate in the case. *En banc*, BLACK'S LAW DICTIONARY (10th ed. 2014). He calls this "MD" and I follow suit. Waldron, *supra* note 5, at 1694.

17 *Id.* at 1701–25.

18 *See* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 893–94 (2003) (considering a requirement that a two-thirds majority be had on the Supreme Court before an act of Congress could be declared unconstitutional). Jacob E. Gersen and Adrian Vermeule propose a similar supermajority rule, but with respect to *Chevron* deference. Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007).

19 Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1442–43 (2009) (arguing that this change could expand the Court's decisionmaking capacity "dramatically," which would offer "several benefits, including greater clarity and consistency in the law") [hereinafter George & Guthrie, *Remaking*]; Tracey E. George & Chris Guthrie, *"The Threes": Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825, 1825–27 (2008) [hereinafter George & Guthrie, *"The Threes"*] (seeking to modestly expand the Court to 15 Justices and use panels ranging anywhere from 3 to 9 Justices with the possibility of hearing some cases *en banc*); Adam H. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 175, 181 (2019) [hereinafter Epps & Sitaraman, *How to Save the Supreme Court*, Law Review Article](offering a proposal which envisions converting all of the U.S. Court of Appeals judges into Associate Justices of the U.S. Supreme Court (resulting in over 180 Justices) and selecting 9-Justice panels to hear cases); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, VOX (Oct. 10, 2018, 11:25 AM), https://www.vox.com/the-big-idea/2018/9/6/17827786/kavanaugh-vote-supreme-court-packing (arguing that a rotating panel system, which would consist of nine randomly selected federal court of appeals judges – who would also act as Supreme Court associate justices – would "effectively eliminate the high stakes of Supreme Court appointments, thereby taking the Court out of the electoral and political realm"); *see also* Morse & Julian E. Yap, *A Panel-Based Supreme Court*, 37 OHIO N.U. L. REV. 23, 23 (2011) (proposing a 15-member Court from which 9-member panels are selected).

5 Justices selected by the 10 partisan Justices.[20] These inventive proposals present a significant challenge to the *status quo*, and thereby require us to give careful thought to why it is we do things the way we do and whether we should change them. Because the U.S. Supreme Court employs majority voting on an *en banc* court, the challenge that these alternative proposals raise coincides with Waldron's open question.

This Article answers the open question of what justifies judicial majoritarianism by providing the first comprehensive assessment of the benefits and deficits of different adjudicatory decision procedures. In Part I, I set forth some preliminary definitions and assumptions, including explaining the contours of judicial majoritarianism. In Part II, I catalog and detail the different dimensions, or *virtues*, on which we can gauge the benefits and deficits of an adjudicatory decision procedure. I identify the following 7 virtues below: completeness, epistemic worth, stability, efficiency, representation, management of judicial authority, and legitimacy. In Part III, I identify three alternative adjudicatory decision procedures, namely Supermajority Voting on an *En Banc* court, One-directional Supermajority Voting on an *En Banc* Court, and Majority Voting on a Panel Court. In Part IV, I score all of the adjudicatory decision procedures on the set of virtues and compare judicial majoritarianism against the three alternatives. In Part V, I build a justification for judicial majoritarianism, highlighting its benefits by way of comparison against these plausible alternatives.

Most importantly, judicial majoritarianism is complete; has epistemic worth in its flexibility, relative correctness, and relative non-arbitrariness; is relatively stable; efficient in its simplicity and relative resource efficiency; representationally fair in its collegial neutrality, party neutrality, and relative diversity; and empowers the institutional court and the individual judges. In comparison to the viable alternatives, it has possible deficits in epistemic worth, stability, efficiency, and representational fairness, but these are marginal or uncertain and are counterbalanced by important benefits of judicial majoritarianism. Moreover, assuming an evaluative theory that preferences completeness, epistemic worth, stability, and efficiency in that order, judicial majoritarianism is the favored decision procedure.

Finally, in Part VI, I apply this framework to analyze four proposals to change the U.S. Supreme Court's judicial majoritarian decision procedure, all principally aimed at reducing the effects of partisanship on the Court. In particular, I use the virtue rubric to score the four proposals discussed above: (1) Shugerman's proposal to impose a supermajority requirement to

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20 Epps & Sitaraman, *How to Save the Supreme Court*, Law Review Article, *supra* note 19, at 193.

invalidate federal legislation; (2) Epps and Sitaraman's balanced bench proposal; (3) George and Guthrie's panel court proposal; and (4) Epps and Sitaraman's panel court proposal. I show that, as an instantiation of MD, the Court's judicial majoritarianism has many compelling benefits over each of these proposals and that the promised benefits for each of these proposals either do not manifest or are marginal. Consequently, I conclude that judicial majoritarianism possesses virtues reflecting important values of the law that protect against the effects of partisanship.

## I. PRELIMINARIES AND THE DEFINITION OF JUDICIAL MAJORITARIANISM (MD)

The first step is to define the key terms and the parameters of the analysis. An important background assumption of this Article is a commitment to judicial review.[21] Another important assumption is that the courts analyzed under this framework are situated in a common law legal system, where like cases are treated similarly and precedent holds some weight in decision making.[22] I will also assume that the courts under discussion in this Article are situated at the apex appellate level, with some court decision below that is being appealed.[23]

By adjudicatory decision procedure ("ADP"), I mean a procedure used by a court to determine the result of the cases before it. The fact that something is labeled an ADP does not mean that it produces good results or any results at all. I am deliberately capacious with respect to the definition of an ADP. I principally consider the voting requirements and the makeup of the voting judges as part of the ADP, but an ADP can also be based in part on the content of the cases. That said, the definition of an ADP is not

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21 In prior coauthored work, I have argued that questions about the use of judicial majoritarianism do not generate any new arguments against judicial review. *See* Guha Krishnamurthi et al., *supra* note 133, at 33. Waldron, in response, agreed that this was correct. *See also* Waldron, *supra* note 5, at 1701-02 (conceding that an inability to "justify majoritarian decision-making would not undermine judicial review"). But Waldron maintained that, even assuming adequate support for judicial review, judicial majoritarianism requires justification. I agree, and in that because of that posture, I agree and thus assume judicial review is proper. That said, insofar as some queries about judicial majoritarianism lead us to question the propriety of judicial review, those concerns, as I have argued, will reduce to well-known arguments.

22 GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 86 (1982) ("[T]he fundamental role of common law courts is to keep like cases being treated alike . . . ."); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 446 (2003) ("Stare decisis is a defining feature of all common law systems . . . .").

23 Waldron, *supra* note 5, at 1694 (asking the question about the use of majority voting "in most appellate courts"). I only consider ADPs with multiple members, because I assume that we do not want ultimate decisions to be made only be one individual.

intended to take into account the whole legal system, including the substantive law that would decide the merits of the case. I understand an ADP to be the governing structures and procedures of the court. Nevertheless, I observe with caution that the line is not always clear, and the merits may not be easily hermetically sealed from the governing structures and procedures.

I assume also that the choice in each case is binary, with no abstention. This tracks the choice between appellant and appellee before the appellate court. Of course, there may be different grounds of reasoning that can support a vote for one party. This may result in voting paradoxes, which in turn adds another level of complexity to the question. I will largely ignore the questions relating to the reasoning supporting a verdict, but there is a large body of scholarship devoted to these questions.[24] And regarding the docket before the courts employing the ADPs, I assume that the cases are those of the type before an apex court—including important procedural and structural questions and questions about substantive rights and governmental limitations.[25]

With respect to the judges, I will assume that they have fidelity to the legal systems and thus attempt to follow the rules of their legal systems. At the same time, I will assume that judges may act strategically and seek to interpret and apply the rules in service of their legal views, and to that end

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24 For discussions on various voting paradoxes arising from different bases for a particular vote, *see* Pamela C. Corley et al., *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, 31 JUSTICE SYS. J. 180 (2010) (providing a "theoretical account" and "empirical analysis of the causes of pluralities"); Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 811–31 (1982) (arguing that, in some circumstances, the claim that the split nature of many Supreme Court decisions undermines the Court's prestige is "worthless"); Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1, 1 (1993) (exploring the "doctrinal paradox" that arises "in appellate cases in which two or more issues present themselves" and which is rooted in the ability of the court to "reach a decision as to outcome in one of two ways…[which] can lead to different results"); David Post & Steven C. Salop, *Rowing Against the Tidewater: A Theory of Voting by Multijudge Panels*, 80 GEO. L.J. 743 (1992) (analyzing how the "views of individual judges on multimembers courts [should] be combined to reach a decision in any particular case"). For literature on the topic from other disciplines, see Gabriella Pigozzi, *Belief Merging and Judgment Acquisition*, STANFORD. ENCYCLOPEDIA OF PHILOSOPHY (July 8, 2015), https://plato.stanford.edu/entries/belief-merging/ (discussing the connection between judgment aggregation, which is "the aggregation of individual opinions on logically interrelated propositions," and belief merging, which is "the fusion of independent and equally reliable sources of information").

25 The question about what ADP to choose may depend in part on the docket before the court. The framework proffered in this Article will illuminate how an ADP fares on the various virtues, but how we weigh the scores of these virtues is a separate, downstream question that may depend on what kinds of cases the court hears. For example, a court that hears very fact-specific questions may be less dependent on precedent and therefore less concerned with the virtue of stability in the law. I thank Justice Goodwin H. Liu for calling my attention to this point.

that they may push the boundaries of those rules, including the doctrine of *stare decisis*. For simplicity, I assume that each individual judge will vote similarly on similar cases. I also assume that the judges render their verdicts independently, but as discussed below that does not necessarily mean that they are excluded from deliberating with each other and attempting to persuade each other.[26]

Dovetailing on this point, my analysis is focused on the *true* ADP. I recognize that if a court were to formally employ unanimous decision, there may be an informal rule that when there is only one holdout, that holdout judge will vote with the others, for the sake of reaching a decision. Or that, even with majority voting, there may be informal rules to never divulge bare majority votes, so that the court's decisions seem less controversial.[27] My analysis will not focus on these superficial rules, but instead the actual decision procedure that generates the decision.

I assume that, insofar as there are correct answers to legal questions,[28] judges are more than likely to get the answers right to legal questions. I refer to their likelihood of getting an answer to a legal question—either a specific legal question or legal questions generally—as *judicial competence*.[29] With respect to the parties, I will assume that they may seek to test the system in every way possible in service of their ends, whether those be political, personal, or simply for disruption.

With all that in mind, judicial majoritarianism (MD or Majority Voting on an *En Banc* Court) is an ADP on a court with fixed, relatively permanent judges hearing cases *en banc* that uses majority voting among the judges to

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26 There is controversy about whether such deliberation is compatible with independence. David Estlund has argued that deliberation between judges negates their independence for purposes of the application of the relevant probability theorems (including chiefly the Condorcet Jury Theorem). DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 225–26 (2008). Waldron disagrees with this, arguing that the kind of independence required is blind to how each judge reached their individual competence. Jeremy Waldron et al., *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 AM. POL. SCI. REV. 1317, 1326–28 (1989). For more on this point, see *infra* note 85.

27 *See, e.g.*, Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267, 1343–45 (2001) (explaining that there was a "norm of consensus" and "norm of acquiescence" on the Taft Supreme Court).

28 As I state *infra* Part I.B., I assume that there are correct answers to legal questions and treat "correctness" as a *simpliciter* concept. This is a controversial assumption, but the assumption is cabined to an assessment of one component of epistemic worth, namely the correctness of an ADP.

29 Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 424 (2012) (using the term "judicial competence" to refer to the tendency of judges to produce correct, good results).

determine the result of the cases before the court.[30] As is general practice, I assume MD is implemented on a court with an odd number of judges.

## II. THE VIRTUES OF AN ADJUDICATORY DECISION PROCEDURE

In answering the question of what justifies the use of an adjudicatory decision procedure (ADP), we first ask what are its desired characteristics—what I will call *virtues* of ADPs.[31] A preliminary question is how we generate these virtues. I propose three sources: First, I look to justifications of judicial review. If there is a particular reason to employ judicial review, then we want our judicial system to exhibit as best as possible properties reflecting that reason. For example, if one justification for judicial review is that it is better epistemically, then one virtue of our system is that a court reaches correct results. Second, I look to complaints about judicial review. On the flip side, if there is some reason to disfavor judicial review, then we want our judicial system to avoid as best as possible properties reflecting that reason. For example, if one complaint about judicial review is that it is not representative of the population, then one virtue of our system is that a court reflects the diversity of the population. Third, I look to general features of well-functioning systems, such as efficiency in use of resources and simplicity in operation.

Importantly, some of these virtues will be in necessary conflict with others. For example, the characteristic that an ADP has stable judgments may be in tension with the characteristic that an ADP is flexible to change its judgments. Yet I maintain both characteristics are *pro tanto* good.[32] That

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30 Majority voting can also be used in a panel system, wherein panels are subsets taken from a larger set of potential judges. But to allow for a more granular analysis, I consider such systems separately. *See infra* Part III.C (describing the use of panel majority decisions).

31 This "scorekeeping" methodology of enumerating desiderata and considering features of the judiciary in light of those goals is commonly employed. *See, e.g.*, George & Guthrie, *Remaking*, *supra* note 19, at 1443 (enumerating goals of a judicial system to analyze the size of the Supreme Court); George & Guthrie, *"The Threes"*, *supra* note 19 (same); F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 648 (2009) (same); Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 92 (1986) (same); Shugerman, *supra* note 188 (same).

32 *See* SHELLY KAGAN, THE LIMITS OF MORALITY 17 (Derek Parfit ed., 1989). ("A *pro tanto* reason has genuine weight, but nonetheless may be outweighed by other considerations. Thus, calling a reason a pro tanto reason is to be distinguished from calling it a *prima facie* reason, [because] . . . a prima facie reason *appears* to be a reason, but may actually not be a reason at all . . . .").

we would desire both is not incongruous, but it is the cruel world that we cannot have it all.[33]

Another important methodological point is that, admittedly, many of these virtues will not make an explicit difference to the calculus on which voting mechanism, among these plausible alternatives, we should employ. Nevertheless, there are reasons to set them forth. First, specifically for this analysis, though some of the virtues may not differentiate between the plausible alternatives, they will provide benefits over other potential alternatives. Second, more generally, the virtues provide a framework to consider not only voting methods but any ADPs attendant to the structure and procedures of court systems. The framework is generic and should be robust enough to consider other potential changes where these additional virtues may make a difference.

### *A. Completeness*

Because an adjudication seeks to resolve a dispute between the parties, an ADP should aim to determine the result of every case before the court. However, a court, employing its ADP, may not be able to reach a result in every case. For example, suppose an ADP requires unanimity among the judges to render a judgment. A court employing this ADP may not be able to reach a unanimous result for either party if there is a judge favoring each party. In comparison, consider a court employing an ADP that allows near unanimity—say, all but one vote. That ADP also may not be able to reach a result in every case, because there might be a bloc of two voters for each party. But it would reach a result when there is only one holdout in a case, and thus it has a better chance in reaching a result than the unanimity ADP. Thus, the near-unanimity ADP would likely perform better, and certainly no worse, in fulfilling the aim of determining a result in every case before the court than the unanimity ADP.[34] I use *completeness* to mean the measure of the amount of cases resolved by an ADP.[35]

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33 DRAKE, *Can't Have Everything*, *on* MORE LIKE (Cash Money Records 2017); THE ROLLING STONES, *You Can't Always Get What You Want*, *on* HOT ROCKS (ABKCO Music, Inc. 1969); *see also* Hessick & Jordan, *supra* note 311, at 650 (making the same point that sometimes the desiderata "do not present a consistent or cohesive set of design principles when taken together," because "they are often at odds with one another").

34 As long as there is a non-zero probability that vote results will have one, and only one, minority vote, there is a higher likelihood that the near-unanimity ADP will be more complete than the unanimity ADP.

35 Some scholars refer to this condition as being "decisive." Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision*, 20 ECONOMETRICA 680, 681 (1952).

### *B. Epistemic Worth*

We also want courts to arrive at true results and be validated as such. This presupposes that there is generally a correct result in a case that arises before a court. That proposition is itself the source of great controversy.[36] And even if we assume that there is a correct answer to a legal question, correctness itself can be cashed out in multiple ways. The correct answer to a legal question could be the one that best fits with the relevant sources of law; the one that produces the greatest welfare or the best results; or the one that is morally best (under a particular moral theory). For purposes of this Article, I will treat the correctness of a judicial question as having exogenously defined answers[37] and as a *simpliciter* concept.[38]

It goes without saying that no ADP can ensure correct results all the time, but some will fare better than others. For example, if an ADP used a coin toss, then in the set of cases where there is a binary decision and a correct result, the ADP will have a probability of success of 50%. In comparison, an ADP that uses a singular judge who has a likelihood of success of even a modest 60% will be better in ascertaining the correct result of the cases before the court. I use *correctness* as the measure of the proportion of cases correctly resolved by an ADP over the total number of cases resolved by the ADP and the comparison of *correctness* as the comparison of the associated proportions. Note that this notion of correctness is blind to the relative importance of the cases.

Still another way of approaching the truth is through ensuring that our decisions are produced through an epistemically sound process. To this end, we want the court to render judgments that are not arbitrary, but instead grounded in reason and good judgment.[39] Thus, we prefer that a court not render judgments subject to elements of randomness when avoidable, and

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36 For further discussion of the question of whether there are right answers to legal questions, *compare* Ronald Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1, 1 (1978) (arguing that there is a correct answer for every legal question, even if epistemically difficult to ascertain), *with* H.L.A. HART, THE CONCEPT OF LAW 123–36 (2d ed. 1994) (arguing that the law is "open-textured" on certain questions, without a correct answer).

37 This is meant to preclude an understanding of correctness in which the fact that the courts and judges fix an answer by itself means that the answer is correct. There are surely such cases, prototypically where the court is solving a coordination problem. There, the virtue of correctness will have little to say, but I take those kinds of cases to be relatively rare. I thank Mark Tushnet for calling this point to my attention.

38 *See* Hessick & Jordan, *supra* note 31, at 692-93 (identifying the problem of defining correctness, and assuming that "legal questions admit of 'better' and 'worse' answers").

39 *See* Antonin Scalia, *The Rule of Law as the Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) (arguing that employing rules in law *inter alia* serves to eliminate judicial arbitrariness).

we prefer that a court's reasoning be grounded in legal propositions that share wider acceptance as opposed to those that share narrower acceptance.[40]

An important epistemic feature is the ability to correct decisions or reverse course, if there are good reasons to do so,[41] which I call *flexibility*.[42] The primary reasons for reversing course are mistake and changed circumstances. Of course, when there is a mistaken judicial decision, we want a court system to be able to correct it. But the utility of flexibility goes beyond incorrect decisions, for it is possible that an earlier decision was not incorrect but that a reversal of course is required due to new information. Nevertheless, the structure of an ADP may make such a reversal of course more or less difficult. For example, a unanimity requirement may ossify mistakes, because reaching a unanimous decision is such an imposing requirement that it makes all changes to the *status quo* difficult.

Additionally, we also would prefer that the court produce a judgment that is the product of deliberation[43] and express its judgment with a reasoned

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40 *See, e.g.*, F.A. HAYEK, THE CONSTITUTION OF LIBERTY 153, 156–57 (1960) (contending that decisions not based on accepted norms are violative of the rule of law); F.A. HAYEK, RULES AND ORDER (1973) (stating that laws work best when they are consonant with widely accepted norms). We also desire that our ADP not be subject to corruption and be transparent. I consider these as subsumed in the non-arbitrariness metric, because decisions that are produced as a matter of corruptness generally do not share wide acceptance. Moreover, my analysis of the ADPs here does not require a focus on the potentiality of corruption. However, one could consider "non-corruption" as a separate virtue to analyze other ADPs where the potentiality of corruption is of particular concern.

41 *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954); Lawrence v. Texas, 539 U.S. 558 (2003); Obergefell v. Hodges, 135 S.Ct. 2584 (2015); Waldron, *supra* note 5, at 1712 (stating that "[w]e want a degree of settlement in the law but not absolute settlement" and suggesting that the ability to reverse decisions in the future may be an advantage of MD).

42 Some commentators also refer to this as "fallibility." MELISSA SCHWARTZBERG, COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE 11 (2013).

43 Kornhauser & Sager, *supra* note 31, at 102 ("[T]he general assumption favoring deliberation as an aid to correct judgment seems reasonable in light of common experience."); CARLOS SANTIAGO NINO, THE CONSTITUTION OF DELIBERATIVE DEMOCRACY 129 (1996) (observing that aggregation reduces mistakes because the probability of error is reduced, but suggesting that judicial review is prone to error because of the small number of judges).

There may be reasons beyond epistemic ones to prefer deliberation: Deliberation is important in conferring legitimacy to the process of decision making. That the judges have deliberated confirms for the parties and the public that the judges have considered the case fully and been exposed to alternative understandings of the case. And at a more basic level, some of the questions under consideration—which involve political and moral judgment—may defy individualized decision. Some theorists suggest that questions of political and moral judgment can only be approached through a deliberative model, involving argumentation and resulting in consensus. THOMAS MCCARTHY, THE CRITICAL THEORY OF JÜRGEN HABERMAS 293, 303 (1978) (explaining Habermas's theory of deliberative democracy); JOHN RAWLS, POLITICAL LIBERALISM 5 (1993); *see*

opinion.[44] These are generally regarded as indispensable features to a judicial system. As a consequence, they played an important role in picking the particular plausible ADPs before us, but will not serve to further distinguish them.

Another important epistemic consideration is the avoidance of voting paradoxes. One variety of paradox arises when there are multiple choices. As a general matter, we think that moving up on voter's ballots should not hurt the option's chances of victory. This is generally called *monotonicity*. Monotonicity has two component requirements: (1) for any option *X*, if the vote count was such that *X* was a winner, and a voter changes their vote to rank *X* higher, *X* would remain a winner, and (2) for any option *X*, if the vote count was such that X was a loser, and a voter changes their vote to rank *X* lower, *X* would remain a loser. However, there are some systems, like the plurality-runoff system, which fail this constraint and generate curious voting

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*also* CHANTAL MOUFFE, THE DEMOCRATIC PARADOX 102 (2000) ("A well-functioning democracy calls for a vibrant clash of democratic political positions . . . Too much emphasis on consensus and the refusal of confrontation lead to apathy and disaffection with political participation.").

Some might suggest that it does not really matter what the court does in reaching the judgment. *See* Adam M. Samaha, *Randomization and Adjudication*, 51 WM. & MARY L. REV. 1, 32 (2009) (arguing for the use of randomization in adjudication and stating that "[a] commitment to personalized adjudication should not be taken too seriously"). They might argue that, insofar as the parties are not exposed to the deliberations, their awareness of the court's deliberations is of little moment. And they might argue that political and moral questions, insofar as they have objective answers, do not necessarily need collective or deliberative decision.

We need not resolve those weighty questions here. What should be uncontroversial is that there is reason to prefer that, *all things being equal*, the court engaged in deliberation in reaching its result. Even detractors to deliberation are likely willing to agree to that point, because as an empirical matter deliberation is better for the public's view of the court as legitimate, even if that is an unjustified preference. *See id.* at 27–28 (admitting that the public would be dissatisfied with a system wherein decisions were reached by randomization and without active deliberation by judges).

44 Requiring a court to express its judgment in a reasoned opinion has epistemic benefits in ensuring that the court's work is sound, just as a mathematical proof shows the truth of an asserted theorem. Here too some might suggest that it does not really matter what the court does in explaining its judgment. They might argue that even if the parties are aware of the reasons for the result, that does not matter in itself.

I think that the public display of the opinion can allow for a public examination that leads to error correction, but it also has benefits beyond epistemic reasons: It helps to confer the court and its decisions with transparency and legitimacy. It also provides the parties and public with a reasoned judgment and helps satisfy the notice function of the law. This in turn ties into our key notions of fairness—the public should be able to ascertain what the contours of the law are so that they can conform their behavior and avoid negative consequences—and it results in good consequences, since the public will be deterred from trespassing beyond the contours of the law. Therefore, I contend that that there is reason to prefer that, *all things being equal*, the court provide a reasoned opinion with its judgment.

results.[45] Notably, failures in monotonicity occur when there are more than two choices, but because all of our voting mechanisms assume binary choices, our ADPs are monotonic.

Another kind of paradox that can develop even when a court is faced with multiple binary choices, namely the Condorcet Paradox.[46] The Condorcet Paradox does not arise in any individual binary choice,[47] but it may arise in the aggregate. As a general matter, we would think that our choices should be transitive: If $A > B$ and $B > C$, then $A > C$. However, that may not obtain because of a phenomenon called "cycling."[48] This is a potential problem for most ADPs except for unanimous vote. Indeed, scholars have identified the Condorcet Paradox in cases before the Supreme Court presenting multiple issues that could independently determine the outcome.[49] That said, the chance of cycling is fairly low and does not serve to distinguish the ADPs.[50]

### *C. Stability*

We also want decisions of the court to be stable, so that they may be replicable and not subject to inexplicable or unprincipled change. This helps to ensure that the law is predictable for the citizenry, providing notice and predictability to the public.[51] This is also in accord with a foundational

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45 Eric Pacuit, *Voting Methods*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 24, 2019), https://plato.stanford.edu/entries/voting-methods/#3.2 (discussing failures in monotonicity and setting forth examples of paradoxical voting situations).

46 MARQUIS DE CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making* (1785), *in* CONDORCET: SELECTED WRITINGS 33 (Keith Michael Baker ed. & trans., 1976).

47 MARQUIS DE CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making* (1785), *in* CONDORCET: SELECTED WRITINGS 33 (Keith Michael Baker ed. & trans., 1976).

48 WILLIAM V. GEHRLEIN, CONDORCET'S PARADOX 2–4 (2006) (stating that the Condorcet Paradox does not arise when there are only two choices). For example, in ranked-choice voting, it is possible to have scenarios where 2-to-1 voters prefer Abraham to Michael, 2-to-1 voters prefer Michael to Sriram, but 2-to-1 voters prefer Sriram to Abraham, thus creating a cycle.

49 David S. Cohen, *The Precedent-Based Voting Paradox*, 90 B.U. L. REV. 183 (2010) (discussing multiple-issue cases in the U.S. Supreme Court presenting the Condorcet Paradox).

50 *See id.* at 219 (stating that, while important to understanding group voting, multiple-issue voting paradoxes are rare).

51 *See, e.g.*, LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969) 51, 63, 79 (emphasizing the importance of the notice function of the law). Indeed, my discussion of stability is in the stead of notice and predictability, which as a general matter are the core of this virtue. Some of the features under the virtue of epistemic worth also may help with predictability and conferring notice on the parties. For example, correctness and non-arbitrariness may take into account the public's notice and understanding of the law and reasoned judgment informs the public, including the parties, of the reasoning behind the decision and how this decision would impact future cases, thereby allowing the public to appropriately conform its conduct.

feature of the common law, namely that we want sufficiently similar cases to obtain similar results.[52]

Suppose that an ADP requires that certain cases' results are determined by a randomized procedure like a coin toss, and that there are two very similar cases that will be determined by independent coin tosses. Because the results are defined by independent coin tosses, the cases could have differing results, even though their similarity would necessitate similar results. This would be an unwelcome result, as it would fail to treat like cases alike. I call *stability* the extent to which an ADP will confer similar results on similar cases.

### *D. Efficiency*

We also want our decision procedure to be as efficient as possible.[53] One key aspect of this is that we want our ADP to use as few resources as possible. Primarily, I consider efficiency in terms of *judicial* resources used.[54] One important data point on judicial resources is the number of judges required for a case to be resolved. An ADP that requires more judges to resolve a case is less resource efficient than one that requires fewer judges to resolve a case.[55] Another important data point is the percentage of the court's resources used for a case to be resolved. An ADP that requires 100% of the court's judges

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52 *See, e.g.*, CALABRESI, *supra* note 22, at 86 (making the assumption that "the fundamental role of common law courts" is to ensure that like cases are treated alike). Other scholars have referred to this as "reliability." *See* Kornhauser & Sager, *supra* note 31, at 91 ("By reliability, we mean the absence of bad surprises . . . .").

53 Assessing the efficiency of an ADP assumes that the ADP actually works in practice. This basic operability of an ADP is closely tied with whether it is complete—*i.e.*, whether it arrives at a decision.

54 There are various kinds of resources implicated by a judicial system, and so those generate other ways to measure the efficiency of an ADP. *See* Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 655 (2006) (discussing various cost considerations that may be used in estimating efficiency).

Another sense of efficiency is in terms of time to decision. Here, the ADPs under consideration all involve voting mechanisms that are roughly the same in terms of time efficiency: The judges may deliberate and a vote is called. If the judges cannot reach the threshold required, then there is some default procedure to resolve the case, and thus the case does not remain in abeyance. There may be some delays associated with prolonged deliberation or delay due to slower workers, but these are hard to quantify or intelligently compare and thus I do not further analyze this type of efficiency. *See* Hessick & Jordan, *supra* note 31, at 686–87 (making the point that a "task may be performed only as fast as the slowest [judge]" involved and that the likelihood of a slower-than-average judge increases as the panel increases).

55 I assume that there is a practical limitation on the number of judges that can hear any one case (~fifteen judges). Indeed, we do not see *en banc* courts larger than 15 judges across the globe. *See infra* note 78. An ADP that required more than that would be inefficient, but it may not even be efficacious and thereby will lack completeness.

to resolve a case has less capacity in its use of resources than an ADP that only requires 10% of the court's judges to resolve a case.

A related aspect is that we want our ADP to be simple and straightforward to apply.[56] Simplicity allows for transparency for the officials of the system, other parties, and the broader public and reduces administrative and transactional costs and barriers, making it easier for the judicial system to operate.[57] Consider two examples of how choices in the ADP may render it more complex. First, suppose an ADP is *not* content neutral, but instead turns on the content of the case. Consider an ADP that states that the apex court will employ super majority voting on cases concerning property rights encoded in the constitution but employ majority voting on all other cases. In order to apply this ADP, the court will have to determine whether the case is one that concerns property rights encoded in the constitution. This adds another layer of complexity that, *all things being equal*, we would prefer to avoid. Second, in a similar vein, suppose an ADP formally allows the court to render conflicting decisions in similar cases. Because we want the court to provide lasting resolution on legal questions, as discussed above in the context of stability, the ADP must build in a secondary review procedure to resolve such conflicts. However, that procedure adds another level of review (and complexity), which, *all things being equal*, we would rather avoid.

### *E. Representational Fairness*

Next, courts should be fair in representation. There are different senses to this fairness in representation. As an initial proposition, courts should be "neutral" in deciding cases. This is generally uncontroversial, but there are also multiple dimensions of neutrality.

One way to understand neutrality is between the parties to (and interested in) the case. Call this *party neutrality*.[58] The basic idea is that the court should not, as a structural matter, privilege one party over another. It should obviously not privilege, all things being equal, one particular party over another. Moreover, all things being equal, it should also not privilege one set of parties over another, like appellants over appellees. There are at least

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56 Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, at 1, 6–7 (1992) (stating "[s]implicity is a compelling virtue" and arguing that the increasing complexity of the legal system is problematic for a system of justice).

57 *See Id.* at 7 (footnote omitted) ("Numerous commentators . . . point to the administrative and transaction costs that complexity generates.").

58 Another sense of neutrality concerns the subject matter of the case. I consider content neutrality under efficiency, specifically simplicity. *Supra* Part II.D.

two rationales for this: First, in order to genuinely safeguard a party's right to a hearing,[59] each should be treated the same as the other side. Second, an ADP's lack of party neutrality may have detrimental consequences. For example, an ADP that requires more votes to overturn a lower court decision puts a thumb on the scale in favor of the lower court decision. That in turn undercuts fulsome appellate review of the lower court decision and also may reduce the pressures on the lower court, both of which result in better decisions.

Two further points: First, this is not to say that the substantive law cannot privilege one party or set of parties over another. The law can, for example, privilege property owners over trespassers, impose special burdens on drafters of a contract, and presume the validity of patents. The focus here is about the structures and procedures of the court.[60] Second, of course, it will not always be possible to maintain perfect party neutrality. Sometimes there are situations of equipoise between the parties that require tiebreakers.[61] For example, at the trial level, if a plaintiff and defendant in a civil case have equal evidence for their respective positions, then the burden of proof imposed on the plaintiff will result in a verdict for the defendant.[62] Similarly, a doctrine that privileges the fact finding of the trial court will likely aid the appellee over the appellant. That is an asymmetry, but there are reasons for it because the trial court is better situated to assess these facts. Thus, not all discrepancies in party neutrality are unjust. Rather, the point is that party neutrality is a *pro tanto* good and, *all things being equal*, we prefer to have a party neutral system.

Another sense of neutrality is that between colleagues, here judges on the court. The animating thought is that no single judge should have any more power than any other judge. Their votes should count equally and any procedural mechanism that might change the result of a case should be equally available to each of them. Call this *collegial neutrality*.[63]

Waldron is skeptical of the importance of this virtue in the judicial context. He recognizes the importance of collegial neutrality in the context

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59 Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991, 1017 (2006) (arguing for the standing right to air a grievance as supporting the right to judicial review).

60 *See supra* Part I (circumscribing the definition of an ADP).

61 Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 51–52 (1961) (discussing the use of the burden of persuasion to resolve cases of equipoise).

62 *See* Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 758 (2012) (framing burdens of proof in terms of "evidence threshold[s]" that parties to a case must meet to establish liability on the part of the opposing party).

63 Waldron refers to this condition as "equality." Waldron, *supra* note 5, at 1718. Other scholars refer to this as "egalitarian[ism]." May, *supra* note 35, at 682.

of democratic majority voting, so that all citizens are treated equally.[64] But he wonders why we should care whether judges are treated unequally, given that they may have relevant differences in seniority and expertise.[65] He acknowledges that citizens must defer to judges, and to each individual judge, but does not understand why this translates to a support for judicial majoritarianism.

One line of response is that the only way to give due respect to each individual judge on a court is to treat them as equals. And the only way to give equal respect is to ensure collegial neutrality. There may be reasons to trade in collegial neutrality for gains in other virtues—like taking into account a judge's seniority and expertise to arrive at better results and increase the ADP's *correctness*.[66] At the same time, such approaches may raise other problems: It may be difficult to obtain agreement on whether such purported seniority or expertise is beneficial or detrimental in adjudication. One might be skeptical that mere seniority on a court is beneficial or even correlative with benefits. For one, those with seniority or expertise may be resistant to beneficial changes and alternative approaches to problems. Even assuming that such a characteristic is beneficial, it may be difficult to obtain agreement on which of the judges possesses it more and it may lead to other problems of administrability, like resentment and groupthink.[67] Given these potential problems, a collegially neutral rule may be the best default. Nevertheless, even if there are considerations that outweigh the benefits from collegial neutrality, at the least, it is a *pro tanto* good and, *all things being equal*, it would be better to treat the judges equally than not.

Another desideratum is that a court system include different types of judges—of different backgrounds, with different viewpoints, with different areas of expertise, and different concerns.[68] Justifications for diversity are

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64 Waldron, *supra* note 5, at 1718–19.

65 *Id.* at 1721.

66 *See id.*

67 *See, e.g.*, Neal Devins & Will Federspiel, *The Supreme Court, Social Psychology, and Group Formation*, *in* THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 85, 88 (David E. Klein & Gregory Mitchell eds., 2010) ("When a majority coalition forms, group dynamics play a crucial role in the Court's decision making. This is because when people align themselves as part of a group, powerful psychological pressures begin to bear on the members of the group.").

68 *See, e.g.*, Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410 (2000) (discussing the need for racial diversity in the judiciary and the Supreme Court in particular); Adrian Vermeule, *Should We Have Lay Justices?*, 59 STAN. L. REV. 1569, 1570 (2007) (contending that the Supreme Court should have non-lawyer Justices); Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 956 (2003) (arguing for greater career diversity on the Supreme Court); Hessick & Jordan, *supra* note 31, at 656 (making the case for greater demographic diversity on the Supreme Court).

varied—some maintain that diversity is a good in itself,[69] some maintain that it helps obtain legitimacy,[70] some maintain that it is critical to equal justice,[71] and others that it results in better decision making.[72] Call this *diversity*.

### *F. Management of Judicial Authority*

We also want our ADP to properly manage judicial authority. Here, there are at least two relevant considerations: First, we want to properly allocate authority to each individual judge. We want to make sure that each judge's vote is meaningfully powerful, but at the same time that individual judges do not wield too much power. Second, with respect to the institution of the court more broadly, we want to appropriately calibrate the authority of the court vis-à-vis other institutions, such as the executive and the legislature.

### *G. Legitimacy*

Finally, we consider the legitimacy of the courts. Legitimacy can be understood in terms of the viewpoint of the officials of the system itself, the parties, and the public at large. Of course, the courts' legitimacy is key to its ability to function.[73] However, what in fact gives the courts legitimacy depends on the perceiver and what considerations the perceiver takes into account.[74] For this reason, I do not consider legitimacy separately from the other virtues of an ADP, and instead account for legitimacy by directly analyzing the other virtues.

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69 *See* K.O. Myers, *Merit Selection and Diversity on the Bench*, 46 IND. L. REV. 43, 45 (2013) (stating that diversity on the bench "seems like an obvious and unquestionable good").

70 MALIA REDDICK, MICHAEL J. NELSON & RACHEL PAINE CAUFIELD, AM. JUDICATURE SOC'Y, EXAMINING DIVERSITY ON STATE COURTS, 1 (2008); Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 49 (2008); *see also* Hessick & Jordan, *supra* note 31, at 656 ("The appointment of a Justice from an unrepresented demographic group may convey a sense of representation.").

71 CIARA TORRES-SPELLISCY, ET AL., BRENNAN CTR. FOR JUSTICE, IMPROVING JUDICIAL DIVERSITY 4 (2d ed. 2010), http://brennan.3cdn.net/31e6c0fa3c2e920910_ppm6ibehe.pdf.

72 *See* CASS R. SUNSTEIN, DAVID SCHKADE, LISA M. ELLMAN & ANDRES SAWICKI, ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 140 (2006) ([D]iverse views, on any particular panel, are likely to be helpful."); Ifill, *supra* note 68, at 410 (footnote omitted) ("The interplay of diverse views and perspectives can enrich judicial decision-making."); *see also* Hessick & Jordan, *supra* note 31, at 695 (arguing that a lack of diversity may cause correlated bias and therefore impede accuracy).

73 THE FEDERALIST NO. 78, *supra* note 2 (stating that the judiciary is the weakest branch of government and relies on the other branches for enforcement of its judgments).

74 Other scholars have referred to this as "appearance" and have also noted that it is an essentially dependent virtue. *See* Kornhauser & Sager, *supra* note 31, at 92 ("Appearance is not a freestanding quality . . . .").

## III. ALTERNATIVE ADPS FOR CONSIDERATION

Even if we identify some problems with MD and some deficits in certain virtues, that alone does not constitute a dispositive—or even a persuasive—argument against MD. Given our preliminary assumption that we are committed to employing judicial review, we must have an alternative ADP that would replace MD.[75] The definition of ADP is broad, but because the focus of this Article is on voting mechanisms, I consider three plausible alternative ADPs that relate to voting on courts.

### *A. Supermajority Decision on En Banc Court ("SD")*

SD requires a supermajority—that is, more than a simple majority—of the *en banc* court to agree upon a result to render a decision for the court. For example, on a 9-member court, while MD would allow a 5–4 decision to dictate, SD requires a higher vote tally—6–3, 7–2, 8–1, or 9–0. Importantly, it is possible that no supermajority is reached for either result, which would mean that the court is unable to render a decision.[76]

### *B. One-directional Supermajority Decision on En Banc Court ("OSD")*

OSD requires a supermajority of the *en banc* court to agree on one particular disjunct of the binary choice and not the other. The prototypical example is the requirement of a supermajority to invalidate a legislative act; on a 9-member court, we might require a 6–3 supermajority to declare a statute unconstitutional.[77]

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75 Of course, one alternative is to replace MD with "nothing"—that is, dispense with judicial review altogether. Because I assume that we are committed to employing judicial review, I do not consider that alternative.

76 A special case of Supermajority Decision is the requirement of unanimity on an *en banc* court ("UD") for a particular result to obtain.

77 Notice that in order to *uphold* the statute, less than a majority is needed, because a 4–5 vote would block the supermajority needed to invalidate the statute.

This kind of rule is employed on the Nebraska Supreme Court and the North Dakota Supreme Court. NEB. CONST. art. V, § 2 (stating that "[n]o legislative act shall be held unconstitutional except by the concurrence of five [of the seven judges making up the Court]"); N.D. CONST. art. VI, § 4 ("A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, provided that the supreme court shall not declare a legislative enactment unconstitutional unless at least four of the [five] members of the court so decide."). Jed Shugerman has also argued for the implementation of a similar rule on the U.S. Supreme Court. *See generally* Shugerman, *supra* note 18, at 894.

Consider a rule in which the Court would affirm the lower court unless appellants attained at least a 6–3 supermajority. This is also a variety of OSD, but it is nearly duplicative of the SD rule with

### *C. Panel Majority Decision ("PMD")*

Another possibility is using a panel system instead of an *en banc* system. The setup is that there is a larger set of judges from which smaller, subset panels (consisting of an odd number of judges) are chosen. The subset panels then decide cases using majority voting among the judges on the panel.[78] Most commonly, on the United States Courts of Appeals, the panel size is

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a default to affirm the lower court for a limited purpose—except that the OSD rule is *not* for a limited purpose. As a result, I do not consider this variety of OSD separately.

78 This kind of rule is employed on the United States Courts of Appeal, the District of Columbia Court of Appeals, and in various countries including the United Kingdom (consisting of 12 Justices that generally opt to sit on 5-member panels); Canada (9 Justices, generally sitting on 7- or 9-member panels); India (31 Justices, generally sitting on 2-, 3-, 5-, or 7-member panels); Pakistan (17 Justices, likely sitting on 3- or 5-member panels); Israel (15 Justices, generally sitting on 3- or 5-member panels); and Ireland (12 Justices, generally sitting on 3- or 5-member panels). Constitutional Reform Act 2005 §§ 23, 42 (United Kingdom), *available at* https://www.legislation.gov.uk/ukpga/2005/4/part/3#commentary-key-131013edac747c01628ad336bcc7272c; GEORGETOWN LAW LIBRARY, *Judicial Authority,* UNITED KINGDOM LEGAL RESEARCH GUIDE, https://guides.ll.georgetown.edu/c.php?g=365741&p=4199181 (last updated Apr. 7, 2020); *Panel Numbers Criteria*, THE SUPREME COURT, https://www.supremecourt.uk/procedures/panel-numbers-criteria.html (last visited May 14, 2020) (discussing criteria for when a panel should consist of more than five Justices of the United Kingdom Supreme Court); Supreme Court Act 1985, R.S.C. 1985, c. S-26, §§ 4(1), 25 (Can.), https://laws.justice.gc.ca/eng/acts/S-26/page-2.html#docCont (delineating that only five of the nine total judges can count as a quorum); Lori Hausegger & Stacia Haynie, *Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and the South African Appellate Division*, 37 LAW & SOCIETY REV. 635, 642 (2003); *History*, SUPREME COURT OF INDIA, https://www.sci.gov.in/history (last visited May 14, 2020); Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. OF COMP. L. 173, 175 (2013); An Act to Determine the Number of the Judges of the Supreme Court of Pakistan, Act No. XXXIII of 1997, http://www.na.gov.pk/uploads/documents/1324616306_561.pdf; SUPREME COURT OF PAKISTAN, *Supreme Court Rules 1980*, Order XI, http://www.supremecourt.gov.pk/web/user_files/File/SUPREME_COURT_RULES_1980_AMMENDED.pdf (last visited May 14, 2020); FAQIR HUSSAIN, THE JUDICIAL SYSTEM OF PAKISTAN 9 (2015); *About the Supreme Court*, SUPREME COURT, https://supreme.court.gov.il/sites/en/Pages/Overview.aspx (last visited May 14, 2020) (Isr.); *Basic Law: The Judiciary (5748 – 1984) (Unofficial Translation by Dr. Susan Hattis Rolef)*,(Isr.), https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheJudiciary.pdf (last visited May 14, 2020); Constitution of Ireland 1937 art. 26(2), http://www.irishstatutebook.ie/eli/cons/en/html; Courts and Civil Law (Miscellaneous Provisions) Act 2013, § 22 (Ir.), http://www.irishstatutebook.ie/eli/2013/act/32/section/22/enacted/en/html#sec22.

Another potential alteration is to employ supermajority decision on the panels. If there are three-judge panels, you might require unanimity among the judges to render a decision, or if there are five-judge panels, you could require that 4 judges concur in the result. This is one part of the complex ADP of the Federal Constitutional Court of Germany.

fixed and its members randomly chosen for all cases.[79] This is the prototype of PMD that I consider.

## IV. SCORING THE VARIOUS ADPS

Now we evaluate the different ADPs based on the identified virtues. I first score MD on the virtues and thereafter score SD, OSD, and PMD, using MD as a baseline comparator.

### *A. Majority Decision on an En Banc Court (Judicial Majoritarianism or MD)*

#### *1. Completeness*

MD is fully complete. This is because MD has an odd number of voters and a binary choice. As a basic arithmetic fact, any distribution of an odd number of votes into two choices will result in one side receiving more votes.[80]

#### *2. Epistemic Worth*

In assessing MD's epistemic worth, and specifically whether it arrives at correct results, the first guidepost is Condorcet's Jury Theorem.[81] That theorem states that, assuming there is a correct outcome of a case, if the voters will decide their verdict by simple majority vote, the voters will each vote independently, and if each of the voters has a probability $p > 50\%$ chance of choosing the outcome correctly, then adding more voters increases

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79 In other countries' apex courts, such as in Canada, India, and the United Kingdom, the panel size may be varied for special cases. The determination of whether to expand the panel size is left to the Chief Justice, who may consider the content of the case. Benjamin Alarie, Andrew Green & Edward M Iacobucci, *Panel Selection on High Courts*, 65 U. TORONTO L.J. 335 (2015) (arguing, based on empirical data from the Supreme Court of Canada, that the ability to change the panel size is more efficient).

80 *See also* Partha Dasgupta & Eric Maskin, *On the Robustness of Majority Rule*, 6 J. OF EUR. ECON. ASS'N 949 (2008) (showing that majority rule more often satisfies the Pareto property, party neutrality, collegial neutrality, completeness, and independence of irrelevant alternatives in situations with decisions involving three or more choices than any other decision procedure).

81 CONDORCET, *supra* note 46. As astutely identified by Paul H. Edelman in *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327, 331–35 (2002), there are various ways to understand the competency requirement of the Condorcet Jury Theorem. I employ the aggregation model, wherein the judges are fixed and have a certain probability of arriving at correct decisions that arise before them with likelihood $p$.

the likelihood of choosing the correct outcome.[82] As a corollary, the likelihood of the court choosing the correct outcome is over $p$.[83]

As a consequence, under the basic assumptions, if we can ensure that each of our judges has $p > 50\%$ chance of choosing the outcome correctly, then employing MD will give us a better than $p$ chance of the court choosing the right outcome. Thus, MD likely betters our chances of getting to the correct answer, compared to a vote of the general public (which is unlikely to satisfy the competence assumption). To see this in action, on a 9-member court of independent judges, if each judge has a 60% chance of reaching the right result, then the court employing MD has approximately a 73% chance of reaching the right result.[84] If each judge has a 70% chance, then the court employing MD has approximately a 90% chance of reaching the correct result.

All told, MD is a way to improve the collective competence of the court when we are limited in our ability to discern the individual competence of each judge. For example, suppose we have a court with two vacancies, and all the sitting judges having competence at least $p > 55\%$. We might surmise that there are some judges who have better competence than 55%, but we are not sure, nor are we sure by how much. In such a scenario, we only might be able to estimate that they all have some threshold competence and so we might increase the likelihood of a correct decision by appointing two judges with competence over $p$.

### *a. Objections to Using the Condorcet Jury Theorem*

As discussed above, a preliminary set of objections is whether the Condorcet Jury Theorem is applicable at all to most judicial decision making. Specifically, the Condorcet Jury Theorem requires that the voters render their votes independently. Some scholars contend that the fact that judges generally deliberate amongst themselves, or have common backgrounds that inform their decisions, means that the antecedent requirement of the

82 *Id.*

83 *Id.*

84 This is calculated using the Binomial Probability Formula, assuming at least 5 of 9 independent judges must reach the correct result, with each judge having 60% competence. GEORGE P. WADSWORTH, INTRODUCTION TO PROBABILITY AND RANDOM VARIABLES 52 (1960).

Condorcet Jury Theorem is unsatisfied,[85] while other maintain that all that is needed is causal independence and that is consistent with deliberation.[86]

One scholar, Franz Dietrich, agrees that deliberation does not necessarily contravene independence, but that when independence is secured the Condorcet Jury Theorem is uninformative.[87] He first observes that, for purposes of the Condorcet Jury Theorem, the type of independence needed is statistical independence. If we consider a case at random, the fact that the judges are competent—that they are more likely than not to get to the right answer—may lead to statistical dependence. That is, the fact that Judge *A* votes for a result means that result is more than likely right, which in turn means Judge *B* is also likely to vote for that result. This results in statistical dependence. Dietrich observes however that we may "conditionalize" to obviate the statistical independence. To "conditionalize," in this context, is to identify any common causes or factors that would affect more than one judge's vote and then build those common causes and factors into the problem.[88] Once we do that Dietrich claims, we can secure statistical independence.[89] As Dietrich explains, if we make the probabilities that a judge votes for a result "conditional on the same exact body of evidence, process of group deliberation, and so on, nothing is left that could create a probabilistic dependence between the voters (who do not look on each other's ballot sheets)."[90] For shorthand, call this "fixing the problem" before the judges.

But this generates a problem that renders the Condorcet Jury Theorem inapplicable. According to Dietrich, when we assess the *competence* of the judges, we do not "fix the problem" before the judges. Rather we determine that judges are competent by considering all the variety of cases that could come before the judges—that is, we "vary the problems" before the judges. Thus, Dietrich argues that there is an inconsistency: we "fix the problem" for one purpose and "vary the problem" for another. This, he claims, shows

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85 *See, e.g.*, DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 225–26 (2008) (discussing ways in which the statistical independence of voters can be violated); Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 669-70 (1992) [hereinafter Ladha, *CJT, Free Speech, and Correlated Votes*] (discussing Condorcet's Jury Theorem and "correlated votes"); Krishna K. Ladha, *Condorcet's Jury Theorem in Light Of De Finetti's Theorem: Majority-Rule Voting with Correlated Votes*, 10 SOC. CHOICE WELFARE 69, 85 (1993) [hereinafter Ladha, *CJT in Light of De Finetti's Theorem*].

86 *See* Waldron, *supra* note 5, at 1715 n.76.

87 Franz Dietrich, *The Premises of Condorcet's Jury Theorem Are Not Simultaneously Justified*, 58 EPISTEME 56, 56–60 (2008).

88 *Id.*

89 *Id.*

90 *Id.* at 57.

that the premises of Condorcet's Jury Theorem that the voters be competent and independent are generally not simultaneously satisfied. As a consequence, the Theorem cannot be used.

I am skeptical of Dietrich's construction of the inconsistency. In principal, it is not clear to me why we are not "fixing the problem" for competence. It is true that we determine that a judge is competent based on a consideration of a variety of cases and factors, but our determination that the judge is competent is still an assessment of competency *in the particular case* before the judge. Thus, this is "fixing the problem." And there is nothing in principle that disallows using information beyond the instant "fixed" case to determine competency. Consider an example of two loaded dice. We can stipulate that the rolling of these dice on any singular occasion are independent events. Suppose that the loaded dice are manufactured to have a 70% chance of falling on odd numbers (akin to the competency requirement). If someone asked why we know that these dice are loaded with a 70% chance of falling on odd numbers, we might refer to information outside the instant roll—we could reference the manufacturing of the dice and results from a number of test rolls. Reliance on that information does not handcuff our ability to infer that, on the instant roll, the dice are likely to fall on the odd numbers 70% of the time and, at the same time, maintain that the instant rolls are independent of each other. Thus, I think the Theorem can be fruitfully applied to competent *and* statistically independent voting judges.[91]

Though Waldron agrees that independence is no issue for the application of the Condorcet Jury Theorem to judicial decision making with deliberation, he poses two other objections to the use of Condorcet's Theorem in this context. First, Waldron claims that this is too "gimmicky," because this is not related to epistemology and is instead "mindless[]" arithmetic.[92] Indeed, he states that there is nothing about Condorcet's Jury

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91 Even if the Theorem would be inapplicable because of deliberation or common background that would result in correlation, there are close analogues of Condorcet's Jury Theorem to situations where judges are dependent. *See, e.g.*, Ladha, *CJT in Light of De Finetti's Theorem*, *supra* note 85 (showing that an analogue of Condorcet Jury Theorem applies as long as voters are "exchangeable" and thus do not change the probability distribution upon permutation); Philip J. Boland, *Majority Systems and the Condorcet Jury Theorem*, 38 J. OF ROYAL STATISTICAL SOC. SERIES D 181, 181–89 (1989) (generalizing the Condorcet Jury Theorem for situations with dependent voters); Ladha, *CJT, Free Speech, and Correlated Votes*, *supra* note 85 at 625–30 (showing that sufficient negative correlation between judges can establish an analogue of Condorcet Jury Theorem, which could be accomplished by picking judges from different ideological factions). Moreover, for a sufficiently large bench (over 15 judges), such correlation in votes will likely still be better than a judge's individual competence. Boland, *supra*, at 185–86.

92 Waldron, *supra* note 5, at 1716.

Theorem that is focused on truth, as opposed to other predicates like "high-quality," "long-winded," and "melodious."[93] Second, Waldron observes that the Theorem is unlikely to provide us with the neat mathematical result promised, because we cannot assure ourselves that each of the judges will have greater than 50% of reaching the correct result.[94] Specifically, Waldron observes that neither conservatives nor liberals believe that judges of the other stripe are likely to get a certain set of important cases correct.[95]

On Waldron's first argument, the Theorem requires that each judge have a greater than 50% chance of arriving at the *correct* answer—*i.e.*, the *truth*. That requirement itself tightly connects Condorcet's Jury Theorem to epistemic considerations. Waldron's point seems to be that the Theorem could be used for any other predicates and is therefore not specially related to epistemic considerations. And, indeed, Waldron is correct about that: if every opinion is more likely than not "melodious" (or whatever predicate you choose), the larger the number of opinions, the more likely that a majority of opinions will be melodious. But that means the result is true of the predicate we do care about: correctness. And the fact that the Theorem is arithmetic and applies to other predicates should not raise concern of its utility regarding correctness or judicial decision making. Indeed, May's Theorem is arithmetic and can apply to other predicates.[96] That does not contravene the applicability of May's Theorem, by Waldron's own concession.[97]

Waldron's second argument poses a greater challenge. Preliminarily, we must first recognize that there may be cases that do not have a correct answer, but rather rest on a matter of subjectivity, such as taste, disgust, or aesthetics. For such cases, the Condorcet Jury Theorem is of no moment, because it only applies to cases where there is a correct answer.[98] But even limiting to the cases where there is a correct answer, there is more to say: What Waldron observes may be a flaw in implementation and not in theory. For example, if we appoint judges who do not have a basic education in the law, then it may be true that they are no better than a coin toss, or perhaps even less than likely, to get the correct result, and the Condorcet Jury Theorem will be inapplicable. That is not to say that MD has failed, that is

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93 *Id.*

94 *Id.* at 1717.

95 *Id.*

96 *See generally* May, *supra* note 35.

97 Waldron, *supra* note 5, at 1718–19 & n.81 (applying May's Theorem).

98 Saul Levmore, *Ruling Majorities and Reasoning Pluralities*, 3 THEORETICAL INQUIRIES L. 87, 92 (2002) ("Where voting is about preferences rather than a shared preference for the right answer, it is plain that the Jury Theorem promises nothing.").

only to say that we have not implemented it correctly. A screwdriver is not inherently useless just because you use the wrong end.

Waldron may respond that this failure in implementation of MD is practically inevitable. Judges are selected through a fallible process, so we may get judges that are not competent. Moreover, because the process is political, we may get judges who are polarizing, such that there is one faction that considers the judges competent, another that does not.

In response, though I have assumed judicial competence, that is not strictly necessary to obtain positive results in correctness from MD. If we can ensure that the likelihood of a judge coming to the right result is better than the average citizen, there are still advantages in using MD. On a 9-member court, assuming 40% competence for each judge, the chances of obtaining a correct result with MD is 27%. But that may still be significantly better than the performance of the public. If the citizens have an average of, say, just 35% competence, then even 200 citizens using majority vote will perform very poorly (with < 1% chance of obtaining the right result).[99]

With respect to the question of political polarization, there is no dispositive response and this is a genuinely difficult problem for judicial review. But it is not a surprising result. If we are unable to guard the judiciary from political polarization, then we cannot expect the judiciary to cure the problems of political polarization. What we can say, as seen just above, is that we might be able to obtain better results from the judiciary *even on politically polarized questions* if the judiciary is at least more competent than the public (even if not more than 50% competent).[100]

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99 We can obtain a faithful approximation of this quantity by considering the binomial distribution over the average competence (35%). *See* Bernard Grofman, *Judgmental Competence of Individuals and Groups in a Dichotomous Choice Situation: Is a Majority of Heads Better than One?*, 6 J. MATHEMATICAL SOC. 47, 51 (1978). One might question the assumption that citizens would ever fare so poorly in decision making. However, the point still remains true as long as citizens are under 50% competence and fare worse than the judges in question, whether the judges are competent or not. The Condorcet Jury Theorem tells us that with a plausibly sufficiently large number of voters, majority vote among the citizens will be very probably incorrect. Moreover, such low competence for citizens may be possible due to systemic bias, and those biases may be particularly salient in cases for which judicial review is most apt, such as rights-based cases involving minorities.

100 Waldron focuses on the "important" cases where conservatives and liberals will each disagree with the abilities of the nominees. And with respect to those "important" cases, the Condorcet Jury Theorem may be inapplicable. But there are a whole host of other cases that courts hear that are uncontroversial. George & Guthrie, *Remaking*, *supra* note 19, at 1463 (tabulating that between 1953 and 2006, the percentage of 9–0, 8–1, or 7–2 cases was over 56%). With respect to these cases, liberals and conservatives may agree that the nominees have a strong likelihood of getting those correct. If so, in that pool of cases, the Theorem is applicable and majority voting gives us an advantage in correctness.

MD is mixed with respect to non-arbitrariness. As an initial matter, there is the base-level arbitrariness in the selection of judges to the court. Apart from that, however, MD does not use any overtly random processes in arriving at the judgment of the court. In particular, because MD uses an *en banc* system, there is no arbitrariness in the choice of which judges hear the case—all of the judges hear the case. Moreover, because MD can be employed consistently with an ADP with deliberation and reasoned judgment, an ADP employing MD can further minimize arbitrariness.

The main source of arbitrariness comes from the vote tally. On a 9-member court, a judgment arising from a 5–4 decision may not be seen as grounded in legal principles garnering broad acceptance.[101] And this may resurrect the notion that the judgment is arbitrary, because had any one of the 5 judges in the majority been replaced by another, the decision would be different. And, based on the votes of the judges in any 5-4 decision, there is a 44% likelihood that a replacement judge would vote differently. That results in a 25% chance that a replacement judge would have changed the judgment. In comparison, when the vote disparity is higher, there is a significantly less risk of arbitrariness. With a 6–3 vote, 66% of the court agreed with the judgment, which results in arguably robust consensus.[102] What these numbers point to is the general fact that decisions supported only by a bare majority are not ones that garner broad acceptance.

MD also offers moderate flexibility. The opportunity for change arises primarily with the replacement of judges. Decisions that obtain more than a bare majority require at least 3 judges from the supermajority to be replaced and to reverse their opinions.[103] That can be a tall order. However, decisions that obtain a bare majority only require one judge to be replaced and to switch votes, which is relatively less difficult to obtain. This kind of flexibility

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101 *See* Shugerman, *supra* note 188, at 934 ("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."); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 29 (1999) (inferring that relying on the judgments of five people against four, all of whom are replaced at random intervals, is not inherently more stable than relying on the judgments of a majority in the House of Representatives, for example).

102 There is less than a 1% chance that 3 replacement judges would be selected from the majority and vote in favor of the minority instead.

103 For example, on a 5-member court, the lowest SD rule requires a 4–1 vote, which requires a 3-vote change to reverse. Similarly, on a 9-member court, the lowest SD rule requires a 6–3 vote, which also requires a 3-vote change to reverse.

may be preferable, because the bare majority votes are the ones most likely to be controversial and therefore the ones most likely to require correction.[104]

*3. Stability*

MD is relatively stable, at least as stable as the judges that make up the court. Assuming that judges have fidelity to their own views and will treat like cases alike, we can expect MD to produce similar results in similar cases. The main point of instability for MD arises from the replacement of judges. Judges are humans and have limited professional and biological lifespans. Recognizing that a court will have different members over time, who may hold differing views about a particular case or issue, the court may reverse course on prior decisions. This is especially true if a result is obtained with a bare majority: If a member of the majority is replaced, then there is a nontrivial chance that the result will be reversed.[105] And while the doctrines of precedent and *stare decisis* counsel against such reversals, they cannot prevent them entirely.[106]

*4. Efficiency*

MD is a simple rule to apply with a determinative vote procedure. When deliberation runs to its end, it can be stopped and terminated with the voting procedure in favor of a result.[107]

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104 Waldron, *supra* note 5, at 1712 (making the point that flexibility, or "non-finality," may be a reason to prefer MD).

105 *See, e.g.*, Shugerman, *supra* note 188, at 949 (observing that five-to-four decisions in the U.S. Supreme Court "enjoy lesser precedential value," with 21 of the 498 cases overturned between 1958 and 1980 being five-to-four decisions); TUSHNET, *supra* note 101, at 29 (arguing that five-to-four decisions are at least as random as decisions by majorities in Congress); James F. Spriggs, II & Thomas G. Hansford, *Explaining the Overruling of U.S. Supreme Court Precedent*, 63 J. POL. 1091, 1104–05 (2001) (providing empirical evidence that bare majority decisions on the Supreme Court are significantly more likely to be overruled). *But see* Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 810 (2015) (footnote omitted) (observing that the U.S. Supreme Court rarely overrules its cases, with only "1.2% of its decisions, and 1.7% of its 5-4 decisions" having been overruled).

106 *See* KARL LLEWELLYN, THE BRAMBLE BUSH 66–67 (7th ed. 1981) (discussing how multiple doctrines are available to interpret precedential cases); Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862–63 (2014) (noting a variety of options to circumvent applicable precedent by interpreting previous decisions more narrowly).

107 *See* Samaha, *supra* note 54, at 616–18 (stating that MD is less costly in terms of resources such as "time, money, and emotional distress from uncertainty, conflict, worry, and the like" than, say, an unanimous decision).

In terms of resources, the fact that every judge sits on every case means that every case requires the attention of every judge of the court. MD does not fix the size of the court, but the more judges, the less efficient.

*5. Representational Fairness*

Regarding neutrality, MD is both collegially and party neutral. MD treats all voters equally because it is blind to who the voter is. That is, for any voters *X* and *Y*, if we switch their votes, the same result will nevertheless obtain.[108] As such, MD treats all judges equally, with no judge's vote having any more power than another. MD is also party neutral in that it does not privilege one choice before the court over another, and thus it does not privilege one party or set of parties over the other. This is shown by the fact that if the vote tallies are switched between the options, then the result is also switched.[109] Thus, MD treats the options before it—and thus the parties before it—equally, only considering the vote tallies for the options.

MD does not require that the group of judges have any sort of diversity, that the judges deliberate, or that they provide a reasoned judgment, but it is compatible with each of these virtues. Additionally, the fact that MD requires a multi-member court with every judge hearing every case allows for the possibility of a greater diversity in every case. The more seats available on the MD court, the greater the possibility of diversity.

*6. Management of Judicial Authority*

MD's management of judicial authority empowers individual judges and favors the power of the court as an institution. With respect to the individual judges, by hearing cases *en banc* every judge hears and votes on every case. This itself gives each individual judge significant authority. Further, because of collegial neutrality, each judge is given as much power as possible within the ADP. MD does not require a particular size of the *en banc* court; the smaller the court, the more authority each individual judge will have.

With respect to the institution, MD's use of majority vote is the minimum number of votes that an ADP could require to effectuate an action while still maintaining a semblance of collegial neutrality, non-arbitrariness, stability, and simplicity: If a minority of judges was to dictate the action of a court, that would result in more arbitrary decisions, that would not enjoy a consensus of the court, would likely create conflicting decisions, and would

108 May, *supra* note 35, at 680–84.

109 *Id.*

require higher complexity to resolve such conflicts. The fact that MD only imposes the minimal requirement to decide cases while validating these important virtues empowers the institution of the court and its ability to act.

*7. MD's Scorecard*

Taking stock, MD is fully complete and makes a strong showing on representational fairness, as it is party neutral, collegially neutral, and allows for diversity. On epistemic worth, under basic assumptions, MD improves on correctness compared to the voting of the general public and decisions by an individual judge, especially given our limited abilities in assessing the competence of individual judges. MD is relatively non-arbitrary, as it does not employ overtly random processes; however, bare majority decisions may appear arbitrary as they are grounded in reasons that may not garner broad acceptance. And MD is somewhat flexible, though on decisions garnering a supermajority change is unlikely, on bare majority decisions, MD allows for a significant chance of reversing decisions. On the other side, MD is generally stable, but risks unprincipled changes when judges are replaced. MD is simple, but may be resource intensive because every judge hears every case. Finally, MD manages judicial authority in a way that provides significant authority to individual judges and empowers the court as an institution.

*B. Supermajority Decision on an En Banc Court (SD)*

*1. Completeness*

Without default rules, SD is incomplete. As we saw, there are some voting scenarios in which no judgment will be reached. On a 9-member court with the SD requirement of 6 votes, a 5–4 vote will fail the 6-vote threshold and so the court cannot reach a judgment. Indeed, further examination shows how stark this can be. Most cases that reach the appellate stage have some level of controversy.[110] Let us say conservatively that in a case *A v. B*, there is at least a 20% chance that each judge will vote for *A* and an 80% chance each judge will vote for *B*. In such a case, there is approximately a 92% chance that a result will obtain.[111] That still leaves 8%

110 *See* Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1230-31 (2009) (noting that most disputes are settled at the bottom of the "pyramid" where "ordinary language and ordinary meaning hold sway").

111 This is calculated using the Binomial Probability Formula, assuming at least 6 of 9 independent judges must reach the same result, where one option has 80% probability and the other has 20% probability.

of cases undecided. But in reality, we know that cases can be much closer at apex courts—with each judge having at least a 40% chance of picking each option. In such a case, there is only approximately a 57% chance that a result will obtain. And it is worse when you increase the vote threshold required for a result.

Thus, SD alone has a sufficiently high deficit in completeness that would be intolerable for an ADP. This means SD will require a default rule to resolve cases.[112] There are two practical options: (1) as we are in the context of an appellate court, the court could let the judgment below stand, for a limited purpose, such as adjudicating the case for the parties without further precedential weight or with some other form of limited precedential weight;[113] or (2) the court itself could use a different procedure that is complete, like majority vote, to decide the case for a limited purpose, such as adjudicating the case for the parties without further precedential weight or with some other form of limited precedential weight.[114] But notice that the virtuousness of SD in the default cases reduces to an assessment of the procedure used in the default cases.

*2. Epistemic Worth*

We have seen that, by imposing a more stringent requirement on the vote total needed for a judgment, SD does not always a render a decision by itself. However, in requiring more votes, SD is able to better ensure correctness *when a judgment is reached*.

For example, on a 9-member court employing SD with a 6-vote threshold, a judgment is reached in 8 vote tallies—*i.e.*, 6–3, 7–2, 8–1, and 9–0 for either of the choices before the court. If each judge has a 60% chance

112 *See* Kornhauser & Sager, *supra* note 31, at 99 ("In practice, sub- and super-majority rules are made workable by the addition of favored or default states. Where sub-majority rules are at play, typically one outcome is favored, in the sense that it will be adopted if it receives $k$ votes, whether or not some other outcome also receives $k$.").

113 This kind of rule is employed by the U.S. Supreme Court when there is a recusal and a tied result among the remaining Justices' votes. The tied Court affirms the lower court's decision and the decision is binding in the jurisdiction of the lower court, but no further. Justin Pidot, *Tie Votes in the Supreme Court*, 101 MINN. L. REV. 245, 245 (2016); *see, e.g.*, Friedrichs v. California Teachers Ass'n, 136 S. Ct. 1083 (2016) (resolving the case with a per curium decision). I assume, to avoid a regress, that the decision below was decided by a complete procedure.

114 One could question whether such a default rule is practicable, in that it may be infeasible for the court to truly decide a case for a limited purpose. That is, the mere fact that a majority of the court has decided a case in a particular way, even with no opinion, will allow the public to infer what the majority's view of the law is, which will in turn inform the public's understanding of the law going forward. Indeed, this reinforces the ultimate point that SD, combined with the default rules, mimics MD. I thank Mark Tushnet for bringing this to my attention.

of choosing the correct result, then the chances that there will be a 6–3, 7–2, 8–1, or 9–0 vote for that result is approximately 48%.[115] The chances that there will be a 6–3, 7–2, 8–1, or 9–0 vote for the incorrect result is approximately 9.8%.[116] (As we saw above there is approximately a 43% chance that no result will be reached.)[117] So, in the situations where the court reaches a result, the court has an approximately 83% chance of obtaining the correct result.[118] If each member of the court has a 70% chance of reaching the correct result, then the result is that the court has a 97% chance of obtaining the correct result, when it reaches a result. And the results are even better as we increase to the threshold vote required for a result.

In relation to MD, SD is itself comparatively non-arbitrary. Just as with MD, SD has the background concern about the choices of judges, but it employs no overtly random process in arriving at a judgment. And as discussed below, SD is fully compatible with deliberation and reasoned judgment, which in turn reduces the risk of arbitrariness. Importantly, because SD is meant to capture the idea of consensus, there is no clear demarcation of how strict the supermajority should be. On a 9-member court, should SD require 6 votes, 7 votes, or 8 votes? This requires a choice to fix the rule and that choice itself can be seen as arbitrary.[119]

However, the main difference in arbitrariness is that MD allows for bare majority decision, which can be relatively arbitrary. When a supermajority is reached, there is significant consensus behind that result, evidencing that the result garners wider acceptance. In that way, SD theoretically avoids this source of arbitrariness. But again, that only considers SD without the default mechanisms used if the court does not reach a decision. When the court does not reach a judgment, SD must rely on some process, either performed by a lower court or by the court itself. The potential options for that process are myriad, but plausibly I think they are majority decision (MD), majority decision on a panel court (PMD), or one-directional supermajority decision on an *en banc* court (OSD). And as shown below, MD is the least arbitrary of these.[120] Thus, at best SD can cabin the arbitrariness arising in these holdover cases by deciding the case with MD for a limited purpose or using a lower

115 *See supra* note 84 and accompanying text for a discussion of the Binomial Probability Formula.

116 *Id.*

117 *See supra* pp. 1232–33 (discussing probabilities of completeness).

118 *Id.* This is calculated by dividing the chance a correct result is reached (48%) by the chance a result is reached at all (48% + 9.8% or 57.8%), which results in 83%.

119 SCHWARTZBERG, *supra* note 42, at 158 (observing the inherent vagueness in fixing a supermajority decision mechanism and noting that it gives rise to arbitrariness).

120 *See* discussion *infra* Parts IV.C.2 and IV.D.2.

court's ADP for a limited purpose. Either way, SD does not have substantial benefits in avoiding arbitrariness over MD.

SD lacks flexibility when it comes to a decision. As discussed above, the main potential for change occurs with the replacement of judges. When a result is reached, to change a supermajority requires at least three judges from the supermajority being replaced and switching their votes. That is highly unlikely. And when the default rules are considered, SD's flexibility is similar to MD's.

*3. Stability*

SD has a mixed showing on stability. When a court employing SD arrives at a decision, it has much greater stability than MD. Just as with MD, the risk to stability comes with the replacement of judges. But the imposition of a supermajority creates a large hurdle for change. On a 9-member court with a 6-vote threshold, because SD requires at least a 6–3 vote, in order to change that vote, there must be 3 replacements all defecting.

Probabilistically, on a bare majority vote, if there is a 20% chance of a replacement judge voting the other way, there is an 11% chance of MD reversing course. With SD employing a 6-vote threshold, the probability of changing a bare supermajority vote is < 1%. If there is a 50% chance, MD has a 27% chance of reversing course of a bare majority decision, while 6-vote SD has < 1% chance. Thus, when SD reaches a result, that result is very stable.[121]

When SD does not reach a result, we have to consider the stability of the default procedures. And under both default rules, the stability of SD will plainly just be the stability of the default rule.

*4. Efficiency*

SD alone is simple to apply. But because it is highly incomplete, the added default rules to repair its incompleteness render SD more complex. Indeed, depending on the rule, SD may be significantly more complex, involving deference to lower court decisions and secondary votes employing different methods. And just as with MD, because SD requires every judge to hear every case, every case requires the attention of every judge of the

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121 Another illustrative example is to imagine that the vote breakdown is the very same—both the SD court and MD court have a 6–3 vote in favor of a result. While SD requires a 3-vote swing, MD only requires a 2-vote swing (to get to 5–4). That extra required vote for SD reduces the chance of reversal by nearly 10-fold.

court and thus it is relatively resource inefficient. SD also does not fix the size of the court, but the more judges, the less resource efficient SD will be.

*5. Representational Fairness*

SD is collegially neutral as it treats every judge equally. Specifically, every judge hears every case and, in any vote, we can switch two judge's votes for the same result and the same result will obtain. This is evident, because we have not taken into account any particular judge's position in assessing completeness and epistemic worth.

By itself, SD is party neutral, but that is not the full story. Because, as shown above, in a large number of cases the court will be unable to reach a result, we consider the default procedures: (1) letting the decision below stand for some limited purpose; or (2) deciding the case by other procedure, but for some limited purpose.

The first option is not party neutral before the court. Under the structure of most appellate systems, because appellants are challenging the decision of the lower court on the issue before the court, the appellants must have lost that issue below. Thus, in requiring appellants to obtain a supermajority to overturn the decision below, SD systematically benefits appellees over appellants. This is not senseless if we have faith in the court systems below. But it does make genuine appellate review more difficult, as it adds a layer of deference to the lower court. That said, the lack of party neutrality and its effects can be cabined by the fact that the court's decision is for a limited purpose. In the U.S. federal system, when the Supreme Court is unable to come to a decision, the Supreme Court issues a non-precedential order that the opinion below—that is, the Court of Appeal's decision—is affirmed.[122] Such a rule still benefits appellees over appellants, but it does not provide appellees—who may have systemic interests beyond the scope of this one case—with as decisive a victory.

The second option allows for party neutrality. For example, the ADP could require a supermajority for any precedential decision, but allow the court to decide the case for the parties through a complete procedure, like majority vote, with no precedential effect. That is a way for the court to sideline a portion of the full case, and decide the case in a limited way. Neither party is systematically advantaged by the sidelining of that portion. Notably, however, this option is not significantly different from MD. Even though the ADP states that a precedential holding is only garnered by a

122 Pidot, *supra* note 113, at 245.

supermajority, parties with sufficiently similar cases should expect similar results in their instant case—if they do not get those results below, they can appeal up to the Supreme Court to obtain a similar result. Thus, it seems that a court employing an SD ADP only obtains party neutrality by sufficiently mimicking MD.

Just as with MD, SD does not require that the group of judges have any sort of diversity, that the judges deliberate, or that they provide a reasoned judgment, but it is compatible with each of these virtues. SD fares equally with MD on diversity, as their structure is essentially the same.

*6. Management of Judicial Authority*

SD's management of judicial authority empowers individual judges. As with MD, by hearing cases *en banc* every judge hears and votes on every case and that confers on each individual judge significant authority. Additionally, collegial neutrality ensures that each judge is given as much power as possible within the ADP. And just as with MD, SD does not require a particular size of the *en banc* court; the smaller the court, the more authority each individual judge will have.

However, with respect to the institution, SD's supermajority requirement makes it more difficult for the court to act. As such SD disfavors court action and thereby lessens the institutional power of the court. Moreover, because the heightened requirement for action reduces the power of the court as an institution, it also lessens the power of the individual judge.

*7. SD's Scorecard*[123]

The first key difference is that MD is fully complete, while SD is by itself not. As discussed, SD requires default procedures in order to resolve all of the cases. These default procedures allow an ADP utilizing SD to be complete, but at the cost of the main advantages that SD offers on the other virtues. Moreover, even with those alterations to SD, MD has the benefit of deciding each of these cases *in toto* and not for a limited purpose. Thus, as far as completeness, MD fares slightly better.

Next, on epistemic worth, SD has limited benefits over MD. In terms of correctness, when SD reaches a result, it reaches more correct results. On a

123 As unanimous decision (UD) is a form of SD, it has the same scorecard, but there are particularly pronounced showings on the following virtues: UD has a very high deficit in completeness, but a strong showing on epistemic worth, though it is inflexible. When UD reaches a result, it is highly stable. And finally, it significantly lessens the power of the institution by its heightened barrier for action, which in turn significantly lessens the power of each individual judge.

9-member court, with judges at a relatively low competence level of 60%, MD reaches the correct result 73% of the time, 6-vote-SD reaches the correct result 83% of the time and 7-vote-SD reaches the correct result 91% of the time. At 70% competence, MD reaches the correct result 90% of the time, 6-vote-SD reaches the correct result 97% of the time, and 7-vote-SD reaches the correct result 99% of the time. But the benefits in correctness for SD cannot be divorced from its deficit in completeness. SD gains its benefits in correctness by remaining agnostic on the close-call cases.[124] However, in those close-call cases, an ADP utilizing SD must use one of the default rules to reach that result. Thus, any benefit that SD might have in terms of correctness mitigated, and at most SD can cabin the likelihood of mistake by cabining results arrived at by the applicability of the default rule for some limited purpose. At the same time, MD and SD are relatively nonarbitrary in that they do not use overtly random processes to decide cases. And though there may be some arbitrariness in their selection of judges to comprise their panels, they fare equally in this regard. SD introduces some arbitrariness in its choice of the supermajority rule, whereas MD does not. In terms of decisions being based on broadly accepted principles, SD is better than MD as it requires more votes and thus that the principles underlying the vote garner more agreement. Here too however the differential occurs when MD achieves its result through a bare majority, and the default rules used by SD in the nadir are just as arbitrary as MD. Finally, MD is more flexible than SD, as SD requires at least 3 judges to switch votes, whereas bare majority votes in MD can change with just 1 vote. That is cabined to bare majority votes however, because decisions that are reached with any kind of supermajority, whether under MD or SD, are improbably changed and cases that are handled under SD's default rules will mimic MD with respect to flexibility.

Similarly, MD is less stable than SD, but that difference is cabined to bare majority votes. The risk of changing decisions occurs when judges are replaced. MD has a significant risk for change when the court arrives at bare majority votes, which SD does not have. Even here however, cases handled under SD's default rules will be as stable as the default's.

On efficiency, MD is simpler than SD; though both are simple voting procedures, SD's default procedures import more complexity than MD. MD

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124 Relatedly, if we assume that cases which are likely to come to a result in UD and SD—*i.e.*, cases in which one choice is more much likely to be picked than the other—are cases where there is also high judicial competence, then the benefits of correctness are marginal because in those cases MD fares well in terms of correctness. Specifically, where judicial competence is at 70%, MD is correct 90% of the time.

and SD are relatively resource inefficient as they require judges to hear all cases before the court.

Regarding representational fairness, MD and SD are collegially neutral and equally consistent with diversity. The principal difference is with respect to party neutrality and concerns SD's default rules: If SD defaults to a lower court decision, then it is not party neutral, as it will systematically favor appellees over appellants. If SD uses another complete procedure in the court, for a limited purpose, it will be party neutral but mimic MD.

Finally, MD and SD empower individual judges by hearing cases *en banc*. MD provides the institution of the court with more authority than SD, because SD's heightened bar for action makes it more difficult for the court to take action. In so doing, MD also provides more authority for the individual judges, as they are members of a stronger institution.

### *C. One-directional Supermajority Decision on an En Banc Court (OSD)*

#### *1. Completeness*

OSD is fully complete. Every vote tally is associated with a result, because the supermajority is only required in one direction. Consider OSD on a 9-member court with a 6-vote requirement to invalidate a statute. That would require a challenger of a statute's constitutionality to garner at least 6 votes, and short of that the defender wins. Thus, every vote results in a judgment of the court.

#### *2. Epistemic Worth*

OSD's showing on epistemic worth is complicated. Consider a 9-member court, with a 6-vote requirement to invalidate a statute, hearing a case about the constitutionality of the Act. There are two important data points on correctness:

If we assume that invalidating the Act is the correct result, and that each judge has a 60% chance of correctly invalidating the Act, the chance that 6 judges or more will invalidate the Act is 48%. As the court is required to obtain 6 or more votes to invalidate the Act—so that the supermajority requirement is imposed on the choice more likely to be correct—the court will only be correct 48% of the time. At a 70% individual competence, the court will be correct 72% of the time—which does not improve much on the competence of the individual judges. On the other hand, if we assume that upholding the Act is the correct result, and that each judge has 60% competence, the chances that 4 judges or more will vote to uphold the Act is

90%. As the court is required only to obtain 4 or more votes to uphold the Act—that is, the supermajority requirement is imposed on the choice less likely to be correct—the court will be correct 90% of the time. At a 70% individual competence, the court will be correct 97% of the time.

The take-aways are then that, OSD provides significant gains in correctness when the supermajority requirement is imposed on the choice *less likely* to be correct. And when the supermajority requirement is imposed on the choice *more likely* to be correct, OSD does not provide significant benefits in correctness and can be counterproductive.

But it is not clear that OSD has these benefits in its prototypical application of requiring a supermajority to invalidate a statute. In such cases before the apex court, it is not clear that the legislature is more likely than not to have passed constitutional statutes. The cases that arise to the apex court are those that concern borderline issues that may be novel and complex. Moreover, the legislature has a motive to aggrandize power and thus may be inclined to push the boundaries of its legal authority. The picture may be worse when we consider that imposing OSD may alter the balance of the probabilities. For example, if OSD is imposed on challengers of a statute, that may embolden the legislature into testing and crossing the limits of constitutionality without repercussion. That will in turn make it less likely that a legislature is competent in passing statutes that meet constitutional muster. Put another way, it may be that the threat of robust review helps to ensure that the legislature stays within its constitutional bounds.

There may be specific situations in which we can be confident that there is a probabilistically favored result that requires deference. For example, suppose the U.S. Supreme Court employed a rule requiring a supermajority to overturn an agency interpretation of a statute (in which *Chevron*[125] deference is afforded).[126] In such cases, one might think that agencies have specialized expertise that results in the agencies being more likely to get the case "correct."[127] On the other hand, one might think that courts are

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125 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

126 *See generally* Gersen & Vermeule, *supra* note 18 (suggesting that *Chevron* be cast as a judicial voting rule as an alternative to the current *Chevron* doctrinal framework). I thank Cass Sunstein for bringing this point to my attention.

127 As earlier, I deliberately underspecify the meaning of "correct," but as a first pass in the context of agency policy making, correctness can be understood in terms of welfare maximization. Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2086 (1990) (discussing the rationale behind *Chevron* that agencies may be better suited to policy making, especially because legislative intent may be difficult to ascertain in certain contexts).

equipped to understand and process the explanations of agencies to get to the "correct" result such that no deference is required. Indeed, one might worry that, like with the legislature, deference in the form of a supermajority rule creates adverse incentives for the agency and potential problems of regulatory capture that result in epistemic detriment.[128]

Furthermore, OSD is relatively nonarbitrary in that it does not employ an overtly random process to decide cases. At the same time, just as with SD, the supermajority threshold that we pick itself is an arbitrary decision. Moreover, in terms of OSD's judgments being grounded in principles that share broad agreement, OSD necessarily has a mixed showing. Where a majority supports a result, but still loses due to the imposition of the supermajority requirement, the winning position obviously does not enjoy broad support—it cannot even garner a majority of the court! That results in a poor showing on non-arbitrariness. In cases where a supermajority requirement is not imposed, a bare majority may win and that resulting decision will be as arbitrary as MD.

Indeed, there may be further questions of arbitrariness depending on the variety of OSD rule. If the OSD rule requires a supermajority to overturn a federal statute, one question is why such deference is limited to the federal legislature and why it does not extend to, say, the federal executive or state legislatures. This in turn raises questions about the arbitrariness of the rule. One response is to justify the rule, but that may be still render the rule more complex. Another is to extend the OSD rule, but that may create issues of

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Another potential context is qualified immunity. Because one main question in qualified immunity cases is whether the official violated the plaintiff's "clearly established" constitutional or statutory right, you could implement a one-directional supermajority rule in favor of finding qualified immunity. Qualified immunity shields executive branch officials from damages liability, even when they have violated the Constitution, if they have not violated "clearly established law." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))(explaining the proposition that qualified immunity shields executive branch officials from damages liability, even when they have violated the Constitution, if they have not violated "clearly established" law). One might argue that if 3 of 9 judges found that the right was not clearly established then that in itself may be good evidence that the right was not clearly established. I am skeptical of this formulation. Rather, I would suggest that if 3 of 9 judges found that there was no such right, that might be good evidence that the right was not clearly established. But that formulation requires the judges to consider a separate question, subjected to a one-directional supermajority rule.

128 *But see* Gersen & Vermeule, *supra* note 18, at 710 (observing that the *Chevron*-deference regime already favors the agency in a way that is in accord with deference from a voting rule). That said, Gersen and Vermeule recognize that the voting rule makes "undermining [agency] deference"—which may be necessary if agency incentives and determinations are systemically askew—more difficult. *Id.* at 720.

complexity in managing conflicts between the legislative and executive branches or the federal and state authorities.

In terms of flexibility, the court can more easily reverse course to declare statutes constitutional. If a statute is declared unconstitutional by a bare supermajority, then it only takes one vote to change that view, and if a statute is declared constitutional by a vote one short of the supermajority threshold, it only takes one vote to change the result. At the same time, by design, it is difficult for a court to declare a previously decided constitutional statute unconstitutional.

*3. Stability*

Like MD, OSD presents a mixed showing on stability. The exemplar rule requiring a supermajority to invalidate a statute may pose issues of stability similar to those seen with MD. Suppose a statute is declared unconstitutional with a bare requisite supermajority. That will be stable, as long as the court remains as constituted. But on a boundary vote,[129] with one replacement judgment from the supermajority changing views, a similarly passed statute could be rendered constitutional. Indeed, this approximates the chance of reversal of the prior decision under MD.

There is another source of potential stability for OSD that arrives as a consequence of one action being disfavored by the rule and thus less likely to obtain.[130] The idea is that because one action is disfavored, it is more predictable for the parties and the public that the favored result will obtain, which in turn makes the law more stable.

*4. Efficiency*

OSD is roughly as resource efficient as MD. It also requires an *en banc* court and is therefore relatively resource intensive. It is also seemingly simple and straightforward to apply, but it depends on the rule. For example, if we consider a rule that would extend OSD to overturning statutes and declaring acts of the executive unconstitutional, when there is a conflict between the legislature and executive, the court deferring to both may undercut its decision. Suppose the legislature passes a statute to limit executive power, and the court does not obtain a supermajority to declare this unconstitutional. Thereafter, suppose the executive takes action to flout this

129 By "boundary vote" I mean a vote that just meets the supermajority threshold required for OSD. If a 6–3 vote is required to overturn a statute, then both a 6–3 vote and a 5–4 vote are boundary votes, that can be overturned with one changed vote.

130 Gersen & Vermeule, *supra* note 18, at 720.

limitation imposed by the legislature. If the court allows this action, again by not obtaining a supermajority, then the court will be undercutting its initial decision that the legislature's statute was constitutionally valid. This is not beyond repair, but doing so may involve complex rules that will result in OSD faring poorly in simplicity.

*5. Representational Fairness*

OSD is collegially neutral as it treats every judge equally. Specifically, every judge hears every case and, in any vote, we can switch two judge's votes for the same result and the same result will obtain.

OSD, however, is not party neutral. OSD does not privilege any particular judge in its system, but it systematically benefits one set of parties by requiring the other set of parties obtain a supermajority to obtain a favorable judgment. There may be good reason for this. With respect to the heightened requirement for invalidating a statute, the supermajority requirement may be imposed on challengers of the constitutionality of a statute because statutes are presumed to be constitutional in deference to the legislature. But at the same time there are potential detriments. In addition to the impact on correctness seen above, the asymmetry may be seen as impeding a party's right to judicial review. Critical to the right to judicial review is that there be a genuine second look at the prior decision, with the robust ability to correct the errors.[131] Deference takes away from the genuineness and robustness of the second look. Imagine extreme deference: A court will uphold a statute if it can be verified to be a duly passed statute by the legislature. We could rightly question whether this is meaningful judicial review at all. That is because this form of review does not genuinely engage in whether there is a constitutional error in the statute. Sometimes deference is warranted as a practical matter, but the use of deference impedes the genuineness and strength of the judicial review.

*6. Managing Judicial Authority*

OSD's heightened requirement to take a particular action reduces the authority of the institutional court. The nature of the OSD rule has further implications as well. Insofar as the heightened requirement makes it more difficult for the court to take a particular action—like to strike a statute—the

131 Eylon & Harel, *supra* note 59, at 1002 (arguing that the right to judicial review requires a robust and neutral examination of the grievance).

court is weakened against another institution of the government—the legislature.

The impact on the individual judges' authority is nuanced. As a general matter, OSD provides significant power to individual judges. Because OSD is on an *en banc* court, the individual judges hear every case and therefore have significant authority. Yet, because the court is weakened in taking some action, like invalidating a statute, this impacts the individual judge as well. The individual judge's ability to cause the court to invalidate a statute is weakened, but to hinder the invalidation of a statute is strengthened. Thus, this strengthens the individual judge's authority, but only in one direction.

*7. OSD's Scorecard*

OSD and MD have different profiles on epistemic worth. OSD fares well in terms of correctness when the supermajority requirement is imposed on the result that is less likely to be correct, but it fares poorly when the supermajority requirement is imposed on the result that is more likely to be correct. As long as OSD requires a supermajority to pick the less likely result, it represents a significant gain in correctness over MD. The key question is whether OSD can ensure this. With regard to the prototypical rule requiring a supermajority to invalidate a statute, such a rule would register benefits in correctness *if* the legislature had significant competence in crafting statutes that pass constitutional muster. However, in cases that come before the court, which are likely to be novel and difficult, there is reason for skepticism that the legislature will have particularly significant competence in passing constitutional statutes. Moreover, making it difficult to challenge a statute may further embolden the legislature to take constitutional risks, further lowering its competence.

Both MD and OSD are relatively nonarbitrary because they have no overtly random process in their decision making. However, in terms of whether the decisions are supported by generally accepted reasoning, MD fares better than OSD, because there are instances where OSD will come to decisions not even supported by a majority of the court. That said, because OSD imposes a supermajority requirement on decisions of a certain type—such as the invalidation of a statute—those decisions will enjoy greater support and thus be less arbitrary than if decided by a bare majority in MD. Additionally, there may be some arbitrariness for OSD in the construction of the rule requiring a supermajority that does not exist with MD. Specifically, if the OSD rule is constructed to require a supermajority for invalidation of a federal statute, there may be questions about why the rule

is so limited. It could be that OSD could be expanded to include other actions, but that may have impacts on OSD's simplicity.

MD and OSD are similarly flexible; when a decision is achieved with a bare majority or a boundary vote, respectively, the results can be changed with one replacement judge.

In a similar vein, with respect to stability, OSD and MD are fairly similar. Both OSD and MD are stable when the court continues with the same members. It is when judges are replaced that decisions are most susceptible to change. When OSD and MD obtain a result with a boundary vote or a bare majority, respectively, the results can be changed with one replacement judge, rendering OSD and MD similar in stability. Of course, because it is more difficult to reach one set of results under OSD, that renders the favored result more stable.

MD and OSD are essentially the same in terms of efficiency as they both employ *en banc* courts. Additionally, on their face, MD and OSD are both simple to apply. OSD's simplicity is largely dependent on the instantiating rule. It is simple enough to state and apply a rule that requires a supermajority to invalidate a statute. However, as discussed, that rule may result in arbitrary decisions insofar as it does not extend the same deference to actions of the executive branch. And if OSD is expanded to defer to both the legislative and executive branch, conflicts can arise from situations in which the judiciary—and thus the court—is required to settle such disputes. Of course, rules can be devised to handle these conflicts but they will add to the complexity or arbitrariness of OSD. In contrast, MD raises no such specific problems and is thus likely simpler.

With respect to representational fairness, MD and OSD are collegially neutral and are equally able to accommodate diversity. The main difference here is that MD is party neutral and OSD is not. As we have seen, MD does not prefer either party itself; each party must obtain a simple majority of the votes of the court. In contrast, OSD does differ based on the role of the party: On the prototypical example, to invalidate a statute, one party must obtain a supermajority while the other only need block the supermajority.

Finally, MD and OSD both empower individual judges by hearing cases *en banc*. With regard to the institution, OSD makes one choice of action more difficult for the court and the other easier. Depending on the rule, that may make the court weaker in comparison to another political institution—that is, a rule that makes it more difficult to invalidate a statute weakens the court in comparison to the legislature. MD takes no such position and imposes

only the minimal requirements for institutional action while maintaining other key virtues.

### *D. Majority Decision on a Panel Court (PMD)*

Because PMD employs majority voting on a court with an odd number of members, it closely follows MD's performance on many of the virtues.

#### *1. Completeness*

Just like MD, PMD is fully complete. Every case is assigned a panel and then subject to a majority vote, so the court will reach a judgment on each case.

#### *2. Epistemic Worth*

Since PMD uses majority voting on the panels, its showing on correctness depends on the size of the panels used to decide each case. For example, with three-judge panels and 60% individual judicial competence, the court has a 65% chance of arriving at the correct answer; and at 70% individual judicial competence, the court has a 78% chance of arriving at the correct answer. With five-judge panels and 60% individual judicial competence, the court has a 68% chance of arriving at the correct answer, and at 70% individual judicial competence, the court has an 83% chance of arriving at the correct answer.[132] Based on the Condorcet Jury Theorem and its underlying assumptions, further expanding the size of the panels will increase the court's likelihood of arriving at the correct answer.[133]

Additionally, depending on its implementation, PMD may introduce a higher level of arbitrariness in its rendered decisions. In addition to the general arbitrariness arising from choosing judges to be part of the court and the arbitrariness arising from the use of bare majority voting, because PMD uses panels that are subsets of the entire court, there must be a way of

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132 *See supra* note 84 and accompanying text for a discussion of the Binomial Probability Formula.

133 Even beyond the Theorem, there may be other practical reasons why larger panels will arrive at more correct decisions than smaller ones. Because of the increase in resources, "[t]hey often have greater ability, expertise, energy, and diversity than smaller groups," which are qualities that tend to aid in more frequently arriving at the correct decision. At the same time, there are practical reasons to think that smaller panels are better at communication and coordination, also qualities which tend to aid in more frequently arriving at the correct decision (and are certainly relevant to more efficient decision making, as discussed below). These are difficult to quantify or compare, and perhaps with better data we can make more headway. George & Guthrie, *Remaking*, *supra* note 19, at 1473-4 (footnotes omitted) (discussing benefits and deficits of larger decision-making bodies versus smaller decision-making bodies).

choosing the judges on the panel. Courts often use some randomized process to choose the panels, and the introduction of such an overtly random process would increase the level of arbitrariness of the ADP. Alternatives to a random process may decrease the arbitrariness, but score poorly on other virtues. For example, if some subset of judges were to choose the appointment of panels, then that would further reduce the collegial neutrality of the ADP. And if all of the judges were to vote on the appointment of panels, that would render the process more complex and less efficient.[134]

Depending on the rules to decide conflicts, PMD may entail greater flexibility for the court. If a case is adjudged by an idiosyncratic panel in PMD that arrives at a decision with which a majority or consensus of the court disagrees, then the court may hear a similar case again.[135] And because the panels are selected randomly, it is unlikely that the very same panel will be chosen to hear the case again, which will enable the court to take a fresh look at the case. That said, this variety of flexibility is largely to repair a problem that arises because of the use of panels. Ultimately, compared to MD, this variety of flexibility cannot better rectify poor decisions with which a majority of the court agrees.

*3. Stability*

PMD introduces increased instability due to its use of panels. That is, because panels are selected for each case, it could be that two similar cases receive different panels, with judge who vote differently, and therefore receive different judgments. In order to avoid this instability when there is conflict between cases heard by different panels, PMD can implement a decision procedure on how to resolve the conflict. Three potential solutions are: (1) the earlier case defines the law; (2) the later case decides the law; or

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134 The size of the court can impact arbitrariness in terms of its susceptibility to capture (and corruption), but there are countervailing considerations. For example, a smaller court, using MD, can be effectively captured with a simple majority. But with a larger court using PMD, prior to panel selection, you may need to capture many more judges. If you want to win every panel decision and can only capture before panel selection, you will need as many as $(k-((n-1)/2)$ where $k$ is the full court size and $n$ is the panel size. If the court has an *en banc* procedure, then you will need a simple majority of the larger court. However, if you are able to capture after panel selection, then you need fewer judges, namely a simple majority of the smaller panel.

135 Of course, this depends on the way the court decides to hear cases. If the court is an apex court that is empowered to decide whether to hear a petition, then the court must have another decision procedure here. One candidate is to use majority voting for such a decision. Another is to require a supermajority to hear a case. And still another is to allow some threshold minority to decide to hear the case.

(3) the court uses a larger panel or an *en banc* court to rehear and decide the case.

The first rule is essentially an articulation of *stare decisis*. As discussed above,[136] such a rule may not in practice ensure sufficient stability, because judges may be able to distinguish earlier cases in order to escape the rule, even if such bases of distinguishing would not actually justify a different decision. Moreover, even if the rule was practicable, this would leave the ADP inflexible.

The second rule does not do much for stability because it allows later courts to overturn prior decisions. At the same time, it allows for greater flexibility in the court in that a case can be reheard by a new panel and come to a new decision.

The third rule may garner more stability. If the rule uses a larger panel (that is not *en banc*), it may lessen the problem of instability, because the more judges on the panel, the more likely the panel's judgment reflects the views of the court. However, in theory, the same problem of instability can persist, because there may be disagreements between two larger panels on similar cases. If the rule uses an *en banc* court with majority voting, then it simply reverts to MD.

*4. Efficiency*

PMD does not fix the number of judges used for each panel, but the larger the panel the less resource efficient PMD will be because it requires more judges.[137] Indeed, there are further practical reasons that suggest smaller panels may be more resource efficient. As the scholars Tracey George and Chris Guthrie argue:

> Smaller groups, on the other hand, tend to have "process" advantages. Because they tend to be less complicated than larger groups, smaller groups tend to possess communication and coordination advantages, to be more cooperative, to be more cohesive, to avoid such problems as "social loafing" and free-riding among some group members, and to reach outcomes more expeditiously. Smaller groups, in short, tend to be more "effective at using information to come to a decision."[138]

Thus, overall, PMD is comparatively resource efficient. PMD's voting mechanism on each of the panels is relatively simple, since it just uses

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136 *See supra* note 106 and accompanying text.

137 One potential tweak to PMD is to vary the size of the panels beyond the exclusive choice of a small panel or en banc. This can be done based on the nature and importance of the case. This variation in size of the panel is employed in various apex courts, including in India and the United Kingdom. I thank Justice Goodwin H. Liu for calling my attention to this point.

138 George & Guthrie, *Remaking*, *supra* note 19, at 1473–74.

majority voting. But PMD's use of panels may lead to conflicting decisions from the court, which in turn requires a process of resolving such conflicts among the panels. As discussed above, there are three viable rules to resolve such conflicts: (1) the earlier case defines the law; (2) the later case defines the law; or (3) the court uses a larger panel or an en banc court to rehear and decide the case. The first two do not give rise to significant complexity, because (1) is an articulation of *stare decisis* and (2) simply allows the court to disregard the weight of prior decisions. Option (3) will do better in resolving the conflicts in a stable manner, but it may give rise to increased complexity because to ensure stability, it must introduce additional layers of review within the court.

*5. Representational Fairness*

Because PMD employs majority voting on the panel, it is straightforwardly party neutral. However, because PMD selects panels, it treats judges differently. Those who are selected on the panel cast votes on the judgment and those who are not selected on the panel do not. Thus, the ADP does not treat each of the judges completely equally and therefore has a deficit in collegial neutrality. This level of differentiation may be minimized by the process through which panels are selected. If the panels are selected randomly with each judge having an equal chance of being selected for any particular case, then each judge is treated equally with respect to the chance that they will be picked to rule on a case. On the other hand, if the Chief Judge is empowered to pick the panels for cases, then that creates a power differential between the judges.

In terms of diversity, just like Judicial Majoritarianism, Supermajority Decision, and One-directional Supermajority Decision, nothing about PMD mandates diversity of the judges. That said, PMD, with its use of panels, can accommodate a larger bench, with more judges, than *an* en banc court.[139] And because the court size can be larger, it has more seats to reflect the various dimensions of diversity in the population.[140]

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139 As discussed in *supra* note 55, I assume that there is a practical limitation on the number of judges that can be employed on an *en banc* court (approximately fifteen judges) but a panel court can have many more.

140 Of course, it is a separate political question as to whether those spots will reflect the diversity in the population.

*6. Managing Judicial Authority*

Like MD, PMD's management of judicial authority favors the power of the court as an institution. With respect to the institution, PMD's use of majority vote is again the minimum number of votes that an ADP could require to effectuate an action while still maintaining a semblance of collegial neutrality, non-arbitrariness, and simplicity. Consequently, PMD imposes the minimum requirement to have an effective ADP and effectuate results, which in turn empower the institution of the court to take actions.

The authority of an individual judge under PMD depends on whether they are selected to hear the case. If panel selection is done at random, each judge will have a probabilistic chance of hearing the case, and this significant lessens their authority. But if selected, then PMD may afford a lot of authority to the individual judge. Though PMD does not fix the size of the panels, normally the PMD panel is smaller than the normal en banc panels used in the other ADPs. And because the smaller the panel the more impact the individual judge has, PMD potentially increases the authority of a judge selected to be on the panel. Finally, insofar as PMD has some procedure by which the entirety of the court can confirm or ratify panel decisions, an individual judge's impact on such a decision may be lessened because the full strength of the PMD court will often be much larger than the normal en banc panels used by other ADPs.

*7. PMD's Scorecard*

The principal difference between MD and PMD is between hearing cases en banc and using panels, as both ADPs use majority voting between the judges hearing the case. Because MD and PMD use majority voting, they are both complete.

On epistemic worth, PMD performs worse than MD. Though MD and PMD do not fix the number of judges used, the common implementation of using panels in PMD is to use panels of smaller size than an en banc court. If this is the case, then PMD will fare worse than MD on correctness. This is because, by the Condorcet Jury Theorem, the larger the set of deciding judges, the more likely the court will reach the correct result.[141]

PMD also has a significant additional source of arbitrariness. As discussed above, MD has a base level of arbitrariness that arises from the selection of judges. So too does PMD, but insofar as more judges are selected

[141] *See supra* Part IV.A.2. (discussing the Condorcet Jury Theorem).

for PMD than MD, then it is arguable that there is less arbitrariness in the makeup of the court. Similarly, if MD renders bare majority decisions, then those decisions may be considered somewhat arbitrary, since the decision does not obtain a strong consensus of the court. PMD shares this arbitrariness, but it may be more pronounced, if the panels rendering the decision are smaller. (For example, a decision only obtaining two out of three judges may seem more arbitrary than a decision obtaining five out of nine judges.) In addition to all of this, PMD has the potential arbitrariness that arises from the appointment of panels. If this appointment is done pursuant to some random process, then PMD overtly includes a random process thereby rendering the decision process more arbitrary. The principal way to mitigate this arbitrariness is by seeking confirmation of panel decisions by a larger subset of the court. However, that essentially mimics MD.

And finally, PMD is essentially the same as MD on flexibility. Depending on the rule for dealing with panel conflicts, PMD may have flexibility to overturn idiosyncratic panel decisions, but it is roughly as flexible as MD in overturning decisions that command a majority (or bare majority) of the court.

At the same time, PMD may fare worse than MD on stability. Because different panels may judge similar cases differently, it could be that cases decided by one panel of the court are effectively overruled by cases decided by other panels. To effectively mitigate this possibility, PMD must refer such cases to a larger set of judges, and perhaps the whole court. In so doing, if using majority voting, PMD essentially mimics MD.

On efficiency, PMD has a mixed showing. PMD has potential to be more resource efficient than MD. In terms of the total use of judicial resources, that depends on the size of the court and panels. Typically, the PMD court's panels are smaller than the MD court's en banc, so PMD will use less judicial resources to decide each case. Additionally, in terms of the percentage of judicial resources used, MD requires all of the judges hear every case, while PMD requires only a subset of the court's judges hear each case. Thus, in deciding each case, MD uses more of the court's available resources than PMD (and with the same judicial strength the PMD court can consider and resolve more cases than MD for the same amount of resources).

On simplicity, though both MD and PMD use majority voting, PMD's use of panels introduces the possibility of conflicting results from different panels and therefore requires some rule to resolve such conflicts. As discussed above, there are three main alternatives. Two of them, which resolve the conflict based on the order of decision of the conflicting cases, are fairly simple but may not resolve the conflicts or may introduce problems of

instability. The third alternative, which requires a larger set of the court's judges to resolve the conflict, mimics MD but as it introduces another layer of judicial review, it is consequently more complex than MD.

Representationally, PMD is party neutral, but because not all judges on the court are equally situated with respect to each case, and thus, unlike MD, PMD is not collegially neutral. That said, if the judges are chosen through some process by which every judge has an equal chance at hearing the case, the judges are treated equally at this higher level of generality. Thus, PMD deficiency in collegial neutrality relative to MD can be mitigated. Finally, because PMD uses panels, the strength of the full court can be greater than with MD and so the PMD court is better able to reflect diversity than MD.

Finally, both MD and PMD provide significant authority to the institutional court by utilizing a low threshold for the court to take action. MD empowers individual judges because, by hearing cases en banc, every judge hears every case. In contrast, PMD reduces the impact of each individual judge by requiring they be selected on a panel; but once a judge is selected, PMD likely provides more authority for the individual judge, because normally the panels are smaller than the en banc court and so the selected judge's vote is more impactful.

## V. THE AFFIRMATIVE CASE FOR MD

The case for MD is essentially in comparison to its alternatives—namely, Supermajority Decision on an En Banc Court (SD), One-directional Supermajority Decision on En Banc Court (OSD), and Majority Decision on a Panel Court (PMD). We can tabulate in short form how MD fared against the alternatives.

As we have seen MD is fully complete; as an epistemic matter, it is relatively flexible; in terms of representational fairness, it is party neutral and collegially neutral; and in terms of efficiency, it is simple to implement. As seen through the comparisons with MD, on these features, MD is either superior to or equal to the alternatives. MD's potential deficits occur in aspects of its epistemic worth, stability, efficiency, representational fairness, and managing judicial authority.

In the context of our alternatives, to obtain an ADP that performs better on features of epistemic worth than MD, the two options are SD and OSD. SD offers benefits over MD in correctness, by reaching the correct result more often when it reaches a result, and non-arbitrariness, as decisions that reach a result will obtain a larger consensus than MD's potential decisions. But we have seen that these benefits of SD obtain precisely when cases are

hard to decide—when MD reaches a bare majority vote to decide a case, but SD refrains from deciding the case. When SD is considered in conjunction with its default rules, the benefits in correctness and non-arbitrariness are marginal. And depending on the specifics of the default rule, we give up party neutrality (if the SD rule defaults to the lower court's decision) or simplicity and resource efficiency (by complicating the decision procedure and by requiring future adjudications for the same fact pattern). Moreover, SD lacks the flexibility of MD.

With OSD, the calculus is further complicated. To obtain the benefits in correctness, we have to be confident that our supermajority rule is oriented in a way that will enhance correct decisions. But as with the prototypical OSD rule—requiring a supermajority decision to invalidate a statute—it is not clear that such a rule would probabilistically result in more correct decisions. And even if it were true, this requires giving up MD's epistemic benefits non-arbitrariness, its representational fairness benefits in party neutrality, and its efficiency benefits in simplicity.

For stability, the only option that is potentially better than MD is SD. At first glance, SD is more stable than MD. Of course, any benefits in stability come at the expense of the epistemic feature of flexibility in MD. But more importantly, once SD is supplemented with the default rule to resolve the cases, any benefits in stability are severely mitigated. Moreover, as we have seen, the default rules come at the price of party neutrality or simplicity and resource efficiency.

With respect to efficiency, PMD logs some benefits over MD. Specifically, because PMD uses panels, it is potentially more resource efficient than MD. But the potential for panel conflict may require more complex rules to manage the conflicts and therefore create a deficit in simplicity. Furthermore, this comes at the expense of the epistemic benefit of non-arbitrariness (by introducing randomness in judge selection), the representational fairness benefit of collegial neutrality (because all judges do not stand in the same footing), and stability (because of the potential of panel conflict).[142]

With respect to representational fairness, the one alternative that may improve upon MD is PMD. Because PMD can use a court with a larger strength than MD, it has a potential for greater diversity. But because of the

142 Nor does PMD's deficit in stability result in any practical benefit in flexibility over MD. The fact that panels can overturn prior idiosyncratic decisions only repairs the problem introduced by PMD's use of panels, but it cannot rectify the problem of wrong decisions that are supported by a majority of the court any more than MD.

use of panels, the benefit of that diversity is mitigated, as each judge does not weigh in on every case. Moreover, as seen above, this comes at the expense of the epistemic benefit of non-arbitrariness, the representational fairness benefit of collegial neutrality, and stability.

In terms of managing judicial authority, there are reasons to prefer empowering the court and individual judges and reasons to prefer limiting the institutional court and limiting the power of individual judges. Thus, the choice of MD vis-à-vis any of the alternatives is justifiable on the basis that it is desirable to empower the institutional court and the individual judges to the greatest extent feasible.

Thus, the pluralist affirmative justification for MD is that it is complete; has epistemic worth in its flexibility, relative correctness, and relative non-arbitrariness; is relatively stable; efficient in its simplicity and relative resource efficiency; representationally fair in its collegial neutrality, party neutrality, and relative diversity; and empowers the institutional court and the individual judges. In comparison to particular viable alternatives, it has possible deficits in epistemic worth (versus SD and possibly OSD), stability (versus SD), efficiency (versus PMD), and representational fairness (versus PMD). But there is a strong case that these deficiencies are not sufficient reason to depart from MD, as the benefits are marginal or uncertain and require giving up important benefits of MD.[143]

Notwithstanding the pluralist case, consider the following plausible lexical ordering of virtues: Completeness, epistemic worth, stability, efficiency, followed by the two virtues of representational fairness and managing judicial authority in any ordering/weighting.[144]

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143 Of course, the question of which ADP is best will ultimately reduce to questions of whether the benefits in some virtues are worth the cost to other virtues. At bottom, this requires that we make value judgments about the relative worth of the various virtues. These judgments will inevitably be contentious, because *inter alia* many of the virtues are incommensurable. For example, comparing MD and PMD, it is difficult to dispositively show that MD's benefits in collegial neutrality, stability, non-arbitrariness, simplicity, correctness, and increasing the authority of individual judges outweighs the PMD's benefits in diversity and resource efficiency. If one prefers resource efficiency over other goals—and there may be practical reason to do that if the judicial system fields a large number of cases—PMD may be a better choice. Similarly, if one prefers epistemic worth or stability of decision over all else, that may favor SD. And if one values deference to the legislature above all else, that may favor OSD. The preceding argument contends that under a pluralistic view of the virtues, holding each of the virtues in regard, there is a strong argument in favor of MD.

144 By lexical ordering, I mean an ordering wherein the criteria must be adjudged in the order given. The name is derived from "lexicon" and the prototypical example is alphabetical ordering. In deciding how to order words alphabetically, we look at the first letter and attempt to sort, and then if they are the same, we look to the second letter and attempt to sort, and so on. Similarly, a lexical ordering on these virtues will first attempt to compare the ADPs on the first listed virtue, and then proceed to the second virtue, and so on.

As discussed above, MD, OSD, and PMD are complete and SD can be made *fully complete* when appended with the default rules.

### *A. On Epistemic Worth*

MD compares favorably to OSD, because it does not have the problems of arbitrariness that OSD has in deciding a case (prototypically, upholding a statute) with less than a majority of the court. Moreover, MD does not depend on an uncertain assumption about the competence of the decision being reviewed (prototypically, that the legislature was more likely to have passed a constitutional statute).

MD fares better than PMD on non-arbitrariness and correctness, but these differences can be mitigated.

To assess SD epistemically against MD, we have to consider the default rules utilized, as SD's benefits in correctness and non-arbitrariness arose from its refraining from decision on controversial cases. If SD uses default rules like MD or PMD, then it will be roughly comparable to MD epistemically. Thus, on epistemic worth, MD, SD, and PMD are arguably comparable, while MD is superior to OSD.

### *B. On Stability*

MD results in more stable decisions than PMD, because of the potential for panel conflicts. There are ways to repair this deficiency of PMD, but that entails mimicking MD.

Because both SD and MD are similarly stable when a supermajority vote obtains, SD's stability turns on the application of the default rules. Here, SD does best on stability if it employs MD, in which case it is obviously fares very similar to MD. Thus, on stability, SD employing an MD default rule and MD are comparable, while MD is superior to PMD.

### *C. On Efficiency*

MD and SD are comparably resource efficient as they utilize an en banc and can employ an identical number of judges. But because SD must employ default rules in order to be complete, MD is simpler. Therefore, on efficiency, MD is superior to SD.

Thus, on this ordering of the virtues, MD is the best ADP. MD is superior to OSD on epistemic worth; superior to PMD on stability; and superior to

SD on efficiency. And insofar as PMD and SD are comparable to MD on these virtues, it is because they mimic MD.[145]

## VI. LESSONS FOR THE U.S. SUPREME COURT

There has been a growing chorus lamenting a crisis of legitimacy for the Supreme Court. Commentators proffer varied reasons for this crisis: Some argue that the Court is simply another arena of majoritarian politics.[146] Others contend that it is not sufficiently representative of the people.[147] And still others complain that the Court is not doing its job in deliberating and creating consensus.[148] All of these lamentations have been further catalyzed by the stalled nomination of Judge Merrick Garland to replace Justice Antonin Scalia upon his death, the subsequent appointment of Justice Neil Gorsuch to that vacancy, and the controversial appointment of Justice Brett Kavanaugh to replace Justice Anthony Kennedy upon his retirement—all occurring against the backdrop of a steady stream of 5-4 cases touching on

145 In this Article, I do not consider the impact of changing from one system to another. Of course, it may be the case that changing from one system to another itself causes problems. Insofar as these kinds of problems arise, I contend that the framework can recognize those issues. For example, suppose a change is seen as partisan and there is retaliation in altering the system repeatedly. This may cause problems in stability, epistemic worth, efficiency, representational fairness, and management of judicial authority. I thank Catherine Baylin Duryea for calling my attention to this point.

146 *See, e.g.*, Lee Epstein & Eric Posner, *If the Supreme Court Is Nakedly Political, Can It Be Just?*, N.Y. TIMES (July 9, 2018), https://www.nytimes.com/2018/07/09/opinion/supreme-court-nominee-trump.html (discussing the growing phenomenon of justices tending to vote along the ideology of their appointing president).

147 *See, e.g.*, Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1516–17 (2010) (arguing that the Supreme Court Justices are impacted by elite institutions more than public opinion and seek approval from those elite institutions); Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 410 (2000) (discussing the need for racial diversity in the judiciary and the Supreme Court in particular); Angela Onwuachi-Willig, *Representative Government, Representative Court? The Supreme Court as a Representative Body*, 90 MINN. L. REV. 1252, 1258 (2006) (contending that "diversity matters on the Court and that the Court should be a demographically representative body of the citizens of the United States"); Katie Reilly, *Justice Sotomayor Calls for More Supreme Court Diversity*, TIME (Apr. 9, 2016), https://time.com/4287655/sonia-sotomayor-supreme-court-diversity/ ("Justice Sonioa Sotomayor said . . . that greater diversity on the high court is important . . . ."); Jeffrey Rosen, *Ruth Bader Ginsburg Opens Up About #MeToo, Voting Rights, and Millennials*, ATLANTIC (Feb. 15, 2018), https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millenials/553409/ (quoting Justice Ginsburg as stating that "[t]here is a life experience that women have that brings something to the table. I think a collegial body is much better off to have diverse people of different backgrounds and experience, that can make our discussions more informed").

148 *See, e.g.*, Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301–02 (2017) (arguing that the polarization of the Supreme Court has led to ideological fracturing such that the Justices do not genuinely deliberate).

the most important questions of our polity.[149] Recently, there have been a variety of proposals to change the Supreme Court, targeting aspects of judicial selection and the Court's processes. I consider the following proposals:

(1)The Federal Statute Supermajority Invalidation Proposal, which requires that the Supreme Court obtain a supermajority to invalidate a federal statute.[150]

(2)The Balanced Bench Proposal, which would increase the strength of the Supreme Court to fifteen Justices, with five Justices to be selected by each of the two political parties, and the other five to be selected by the ten partisan Justices (through a supermajority vote of some sort).[151]

Two proposals to change the Supreme Court to a panel system, selecting Justices to hear cases from a (much) larger set of Justices:

(3)The Court of Appeals Proposal,[152] which would convert the Supreme Court into a court in the image of the Courts of Appeal, with say fifteen Justices picked in panels of 3–9 Justices to hear particular cases. The Court could also use an en banc for some subset of cases to resolve conflicts.

(4)The Supreme Court Lottery Proposal, that would convert every federal court of appeals judge into an Associate Justice of the Supreme Court (resulting in a strength of over 180) and select panels of nine Justices to hear cases for some limited period of time.[153]

### *A. The Federal Statute Supermajority Invalidation Proposal*

This proposal, requiring a supermajority to invalidate an act of Congress, is the prototypical instantiation of One-directional Supermajority Decision (OSD).[154] As an initial matter, note that this proposal is no panacea for the Supreme Court's politicization problems as a number of the most

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149 *See supra* note 12 and accompanying text (observing the issue of the Court's legitimacy raised by the series of events leading to Justice Kavanaugh's appointment to the U.S. Supreme Court).

150 *See* Shugerman, *supra* note 18, at 894.

151 Epps & Sitaraman, *How to Save the Supreme Court*, Law Review Article, *supra* note 19, at 193. As I discuss at further length below, this proposal is not like the others in that it relates to judicial selection and not judicial voting procedures. Even still, I contend that the framework set forth can elucidate the benefits and detriments of this proposal.

152 George & Guthrie, *Remaking*, *supra* note 19, at 1442–43; George & Guthrie, *"The Threes," supra* note 19, at 1825–27.

153 Epps & Sitaraman, *How to Save the Supreme Court*, Law Review Article, *supra* note 19, at 193.

154 *See supra* note 77 and accompanying text (describing the mechanics of OSD).

controversial cases before the Supreme Court arise pursuant to state legislation, on which this proposal is silent.[155]

Recall that, on epistemic worth, in order for OSD to produce correct results, it must be more likely that the preferred result—*i.e.*, the result that requires a supermajority against—is correct. In this case, in order for OSD to produce correct results, it must be more likely than not that a federal statute under consideration passes constitutional muster. As discussed above, this is a controversial assumption. Of course, most federal statutes pose no constitutional concern, but we are concerned with the subset of those statutes that raise sufficient concern that the U.S. Supreme Court would grant the petition for writ of certiorari to hear the case about the constitutionality of the statute. With respect to those cases, at least four Justices must have voted to grant the petition for writ of certiorari, suggesting that at least four Justices think that there is a genuine question about the constitutionality of the statute under consideration.[156] At that juncture, I contend there is no compelling reason to think that the statute is more likely than not constitutional. Without obsessing about Congress's myriad weaknesses, we can observe that Congress has an incentive to test the constitutional boundaries of its authority in passing statutes, further undermining our trust of Congress's judgment on the constitutionality of the statute. Moreover, as observed above, the likelihood that a statute under consideration will be constitutional is not static with respect to systemic changes in the ADP. Indeed, this proposal has the effect of relaxing oversight of Congress, which may embolden Congress to further test the boundaries of its constitutional authority and further the likelihood that such statutes will pass constitutional muster.

Additionally, the proposal introduces additional arbitrariness. First, as Shugerman recognizes, the fixing of the supermajority rule itself may be arbitrary.[157] But the problems go beyond that. Shugerman complains about the real and perceived arbitrariness of 5-4 decisions, and that is seemingly a key motivation for his proposal. The supermajority threshold is supposed to produce decisions of greater consensus. The problem is the one-sided nature of the requirement because only the party seeking to invalidate the federal legislation must obtain a supermajority. This proposal, as a species of OSD,

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155 *See, e.g.*, Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448 (2018) (concerning the constitutionality of a state law authorizing agency fees); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (reviewing the constitutionality of state statutes restricting access to abortion services and counseling).

156 Rogers v. Miss. Pac. R.R. Co., 352 U.S. 521, 529 (1957) (Frankfurter, J., dissenting); United States. v. Generes, 405 U.S. 93, 115 n.2 (1972) (Douglas, J., dissenting).

157 *See* Shugerman, *supra* note 18, at 939 ("[A]ny benchmark other than fifty-percent-plus-one or one hundred percent is an arbitrary mathematical choice.").

offers a worse possible result: The Court may render a 4-5 decision, where the five-vote majority loses. Such a result, which cannot even command a majority of the Justices of the Court, does not command broad consensus and is more arbitrary than a majority 5-4 vote. Indeed, another aspect of arbitrariness arises from the question of why, say, Congress is alone given such deference, and not the President.[158] Thus, there are significant epistemic deficits and risks to the proposal.

Next, the proposal offers limited benefit in stability. Because this proposal is one-sided, the risk of instability is similar to Supreme Court's judicial majoritarian rule. Shugerman claims that "five-four decisions are too unstable to create reliable constitutional law."[159] But a boundary decision is similarly unstable. Suppose the supermajority threshold is 6-3 and a court invalidates a statute with six votes. If later, one of the Justices in the six-vote majority is replaced with a Justice who disagrees, then that decision may be overturned. Congress could then pass a similar statute and have it declared constitutional by a four-vote minority! Similarly, even a 5-4 vote that a statute is unconstitutional—a losing vote—is relatively unstable. One vote-changing replacement from the four votes holding the statute constitutional

158 An associated problem arises from the fact that states are not given the same deference. As a result, there could be discordant decisions on similar legislation passed by states and Congress, which would result in further arbitrariness. This could also render the system more complex, thereby affecting its efficiency. Shugerman addresses this in the context of state legislation that is directly linked to federal statutes permitting such legislation. *Id.* at 958–59 (discussing *Saenz v. Roe*, 526 U.S. 489 (1999), which invalidated a state welfare law that adjusted benefits based on time of residency even though expressly allowed by federal legislation). He states that under the proposed rule, the Court could invalidate all of the state legislation on a bare majority but would be required to leave the federal legislation as is unless a supermajority was obtained. *Id.* This, I contend, would increase the arbitrariness of the decisions and the complexity of the system.

Shugerman argues that the distinct treatment of state legislation makes sense. First, even if so, it still renders the system more arbitrary, in that you could have conflicts in decision on federal and state legislation, and more complex, because of the differential rule. But I am not convinced that the distinct treatment is warranted: He says Congress is "coequal" with the Supreme Court, it has made fewer mistakes than the states, it gets more media attention, and the structure of legislative requirements requiring two-branch approval or a supermajority of Congress in turn demand more deference to Congress. *Id.* at 964–66. The first is unpersuasive, because why should coequality of the branches require *supermajority* deference? The second two are contingent and contestable—and I suggest not the proper bases to create a lasting system. And the final structural point is seemingly true of states, too. Depending on each state's specifics, a state may also require two-branch approval or the supermajority of its legislature. The operative difference seems to be the national consensus represented by Congress and the Presidency, but I don't see why that requires judicial deference.

159 *Id.* at 949.

is enough to upset the result. The additional stability offered is from the fact that federal statutes are by design difficult to overturn.[160]

On representational fairness, the proposal would give up party neutrality, by making it more difficult for the challengers of statutes to win in the Court. That may hamper the genuineness of review by the judiciary.

The key difference is how the proposal would manage the judiciary's authority. The proposal seeks to render the Supreme Court more deferential to Congress than would the standing majority rule. This is because by heightening the standard for action in acting against Congress's labor—namely, invalidating federal statutes—the Court cannot as easily take action against Congress and is thus rendered weaker vis-à-vis Congress. This is at core a species of the debate about judicial review.[161]

Thus, the principal impact of this proposal is that it results in U.S. Supreme Court being more deferential to Congress. There are marginal benefits in stability, but the proposal imposes a significant cost to epistemic worth and a limited cost to representational fairness.

### *B. The Balanced Bench Proposal*

The Balanced Bench Proposal is an instantiation of judicial majoritarianism (MD), with some critical tweaks. The main change of the Balanced Bench Proposal is to alter the selection of the judges in the interest of at least three virtues: (1) properly managing the authority of the judiciary; (2) improving the epistemic worth; and (3) improving legitimacy. Though Epps and Sitaraman focus on legitimacy, I do not consider (3) separately for reasons discussed above.[162]

As an initial point, the Balanced Bench Proposal is different from the others in that it is not a proposal about the voting mechanism of the Court, as much as it is a proposal about the selection process for the makeup of the

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160 In comparison to a bare majority vote in MD, there may be a higher probability that a replacement judge will vote for the favored result in a boundary supermajority vote in OSD, because a supermajority of judges did so. That is, in a case where six of nine judges voted for a result, it would be reasonable to predict that a replacement judge would vote for that result 66% of the time. And in a case where five of nine judges voted for a result, we would similarly predict that a replacement judge would vote for that result 55% of the time. However, at the same time, there is also a higher likelihood that the replacement judge will come from the supermajority, than from a bare majority. And combining these facts, the stability of a boundary supermajority vote in OSD and a bare majority vote in MD are nearly the same. Using the rough heuristic, on a nine-member court with boundary votes, MD has a 24.2% chance of switch while OSD has a 21.8% chance of switch.

161 *See generally, e.g.*, Waldron, *supra* note 14 (examining the justification for majority voting on courts); *see also supra* notes 2–4 and accompanying text (highlighting reasons supporting judicial review).

162 *See supra* Part II.G. (describing why this Article does not examine legitimacy independently).

Court. Nevertheless, as discussed above, the framework is designed to be robust enough to consider ADPs that are not solely about the voting mechanism.

The first concern arises from the fact that the U.S. Supreme Court's Justices are selected through a political process: The President nominates the candidate Justice and the Senate must decide whether to confirm the Justice, thereby finalizing or rejecting the lifetime appointment. The resultant problem is that the political process that selects the Justices may be (and may be seen as) determinative of the legal questions before the Court. This raises the question if judicial review is merely a reflection of the realm of majoritarian politics, then what work is it doing in constraining majoritarian tendencies? The Balanced Bench Proposal aims to address that concern to some extent, by ensuring that the Court's Justices do not simply reflect majoritarian preference. Instead the selection procedure is intended to ensure that the Court consists of jurists who have views that are in some sense more broadly grounded than is reflected in majoritarian political discourse. Moreover, it allows the judiciary to have a degree of autonomy from the political branches.

The second concern arises similarly: If judicial review simply reflects the majoritarian politics, and the politics is evenly fractured, then the decisions of the court may not be grounded in reasoning that obtains broad support and thus will be relatively arbitrary, and thereby epistemically worse. Introducing this revised selection process seeks to disconnect the makeup of the judiciary from the political realm, with the aim of generating decisions that obtain broader support.

While Epps and Sitaraman consider a host of constitutional objections, they devote relatively little attention to the structural costs of the Balanced Bench Proposal.[163] This is where the virtue framework can provide a fuller picture. As the Balanced Bench Proposal is basically a form of MD, it has a very similar profile as the Supreme Court's judicial majoritarianism. As discussed, the motivation behind the Balanced Bench Proposal is to alter the Court's judicial authority and its epistemic worth. But in so doing it raises a significant concern on completeness, and some more limited concerns on representational fairness and efficiency.

The key difference between the Balanced Bench Proposal and the Supreme Court's ADP is that the Balanced Bench Proposal is not complete. The proposal requires that ten Justices, five from each party, come to a

163 *See* Epps & Sitaraman, *supra* note 19, at 28–33 (discussing only constitutional objections, legitimacy concerns, and representational concerns).

supermajority consensus on a slate of five other Justices. But there is no guarantee that the ten politically selected Justices will be able to come to even a majority decision on five other Justices, much less a supermajority consensus.[164] If they cannot come to such a decision, then there is seemingly no Court to decide cases.

One might hope that this result, and its odiousness, would provide enough reason for compromise, but that is far from clear. Deadlocks happen, even when the result of a deadlock is onerous to both sides. Moreover, the lack of effective judicial review at the Supreme Court does not obviously affect both political parties equally. It may be that the ruling party benefits from the lack of judicial review. Or one political party may benefit without a functioning apex court because of the partisan advantage in the lower courts. However this shapes, it is likely that one political party will benefit from the lack of judicial review and so that political party's Justices may decide to hold out until a slate of Justices is chosen that favors their party.

That is in some sense welcome, because at least the Court would function. But notice that this possibility may eliminate the very benefits that the Balanced Bench Proposal is intended to rectify. In such an event, it is far from clear that the proposal distances the judiciary from normal politics, or even the normal politics of judicial selection. Because there is no assurance that the slate of selected Justices will be selected through a genuinely nonpartisan process, there is no assurance that the resulting decisions of the Court will be significantly different from those generated by the Supreme Court's judicial majoritarianism.

Additionally, the proposal is less efficient in that it is considerably more complex with its tiered selection process.[165] The Balanced Bench Proposal is also not collegially neutral, in that some Justices have the power to select other Justices onto the bench, but this is seemingly insignificant and

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164 Epps and Sitaraman's proposal also requires that this decision be made on a yearly basis, compounding the possibility that the Court will deadlock on a slate of Justices. Epps & Sitaraman, *supra* note 19, at 25.

165 It also seems that the proposal assumes the perpetual existence of a two-party system, consisting of liberals and democrats. But the proposal should be robust enough to apply even if there are changes to the political landscape. (I consider this as a part of efficiency, but it could be categorized as another virtue, say, "robustness.") It is, of course, easy enough to envision how the balanced bench proposal would apply if there were two main parties, but they broke along different lines than conservatives and liberals. However, it is unclear how the system would operate if there were more than two main parties and whether that solution would still preserve the supposed benefits of the balanced bench proposal.

A related concern is, even if there are two parties, if one party dominates electorally for many years, it is unclear why the ten Justices should be split in even. That might raise further representational fairness concerns.

contained, because, according to Epps and Sitaraman's proposal, selected Justices cannot be renewed or selected again. Though it does provide the politically selected Justices with an opportunity to pick colleagues that are potentially similar in thinking (and thus perhaps "double" a politically selected Justice's vote), this advantage is dulled by the partisan Justices on the other side.

Taking stock then, the Balanced Bench Proposal has a significant deficit, compared to the Supreme Court's judicial majoritarianism, in that it is not complete.[166] A nonfunctioning Court is surely worse than what we have with our current Supreme Court and its ADP.

### *C. The Court of Appeals Proposal*

The Court of Appeals Proposal is the prototypical instantiation of Panel Majority Decision (PMD). Tracey E. George and Chris Guthrie set forth the following benefits for implementing the Court of Appeals Proposal on the Supreme Court: (1) epistemic benefits, in that there will be a depoliticized appointment process of Supreme Court Justices, because the enlarged court and the randomness of the lottery would reduce the stakes of any one appointment,[167] less likelihood of fractious decisions,[168] and the opportunity to improve the quality of decisions, because the Court will have the bandwidth to take on cases from different areas and better its understanding of the courts and its reviewing role[169]; (2) benefits in efficiency, because of the expanded ability to review more cases (which will in turn create a credible threat of review that will incentivize better behavior by other institutions)[170]; and (3) representational benefits because there will be the opportunity for a more diverse bench.[171] They also recognize that there are potential costs: (4) there is the epistemic concern that decision quality may suffer because the

166 There is a trivial sense in which it is complete—without apex review, something must happen to the case and that is a result. If what is a "result" and completeness is conceived of in this way, the significant deficit comes from the virtue of management of judicial authority, since there is no judicial review, and also in epistemic correctness, and stability.

167 George & Guthrie, *Remaking*, *supra* note 19, at 1469. This is essentially about the arbitrariness of the decisions of the Court, and in that sense is about the epistemic worth of the ADP.

168 *Id.* at 1470.

169 *Id.* at 1471.

170 *Id.* at 1469; George & Guthrie, *"The Threes," supra* note 19, at 1832.

171 George & Guthrie, *Remaking*, *supra* note 19, at 1470.

deciding panels are smaller and thus lack the resources accompanying larger panels.[172]

Regarding the supposed epistemic benefits, I am skeptical. The impact on the political branches is somewhat outside the scope of this Article's analytical framework,[173] but it is dubious as the fact that there are 6–15 more appointments does not obviously reduce the political tension of those appointments. The theorized depoliticization of the appointment process does have a more direct effect as adding more Justices does indeed reduce the arbitrariness of the ADP: That is, because there is some base level arbitrariness in the selection of a Justice, that there are many more Justices on the Supreme Court makes it so each selection is less impactful, thus mitigating the arbitrariness of the selection process and the Court's makeup. But this arbitrariness is counteracted by another source of arbitrariness in the Court of Appeals Proposal: The panel court proposal introduces arbitrariness by including the overtly random process of selecting Justices by lottery.

Furthermore, George and Guthrie's contention about less fractious decisions on the Court is tenuous and speculative. There is little reason to think that decisions by three- or five-member panels will be less fractious than decisions by a nine-member en banc Court.[174] Indeed, mathematically, it is more likely that a bare majority result will obtain on a smaller panel than a larger panel.[175]

George and Guthrie's contention that the proposal will result in more correct decisions also appears tenuous and speculative. It could also be that

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172 *Id.* at 1472–73. They also note as a cost that there may be more cert petitions because litigants will recognize the expanded bandwidth of the Court and seek to take advantage of that. *Id.* at 1474. I do not necessarily consider this a cost. In any event, it seems to sound in a concern for resource efficiency—that this proposal will incur more work for the Court and thus make it less efficient. That may be correct, but the proposal also frees more resources for the Court to consider these petitions. Whatever increase will likely be proportional to the increase in resources. In essence, this just points out that the Court will be able to consider more cases.

173 George and Guthrie's point about benefits to the politics of the selection process is dubious, or at least marginal. There are still only fifteen Justices, sitting on panels where they will have a much more impactful vote, and so these selections would still be rather important in shaping the law through the Supreme Court.

174 *See, e.g.*, Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 305 (2004) (showing empirically the presence of ideological voting in subject areas of controversy on three-judge panels of the U.S. Courts of Appeal).

175 Moreover, when there are split panels, in terms of party, controversial cases are likely to be dictated by the party of the Justices, and thus we are unlikely to see any decline in fractious decisions. *See id.* (finding an absence of ideological dampening in certain subject areas, such as the controversial areas of abortion and capital punishment).

the Court's attention diverted in many different areas lessens its ability to specialize, thereby resulting in worse decisions. It is generally true that larger panels increase correctness, thus the en banc cases, heard by all fifteen Justices, will fare better. But by design, most cases will be heard by panels smaller than the Supreme Court's standing 9-member court, which will result in a worse showing on correctness. As noted, George and Guthrie acknowledge this deficiency in their sixth point, but they also contend that there are benefits in correctness from smaller groups. Here too, I am skeptical of the applicability of some of the research they marshal, as I am uncertain that deliberating Justices work together in the way they envision, especially at the appellate level. Regardless, I think that even if smaller groups posed advantages in correctness due to benefits in cooperation, judges on larger panels could (and would) avail themselves of these benefits by joining in smaller groups to process and understand the information in the case and reconvening.

What is more, the Court of Appeals approach may fare poorly on stability, as there is the further concern that arises with PMD that differently constituted panels may come to different decisions. George and Guthrie claim that the probability of differing panel decisions is low because most decisions are reached by strong consensus even on a nine-member court.[176] But that is misleading. There are a number of cases that result in 5-4 and 6-3 votes on the Court. Those tend to be controversial cases and, by the fact that the Supreme Court has chosen to hear them, they require final resolution.[177] There is a nontrivial probability that two three-member panels from a set of fifteen Justices may rule differently on these cases. George and Guthrie have a way to solve this instability—by using an en banc court. But that solution essentially mimics MD (and the Supreme Court's judicial majoritarianism) for that set of cases.

Indeed, this has impacts on efficiency. Introducing a tiered review process within the Supreme Court increases the complexity of the ADP, because *inter alia* it must create a decision process for when cases are heard by en banc. As discussed above, that process may be determinative of the result and indeed it may itself mimic MD. But as George and Guthrie note, there are benefits in resource efficiency. And that this increased resource

176 George & Guthrie, *"The Threes," supra* note 19, at 1828.

177 Similar to my observation on MD, PMD will produce benefits in resource efficiency, with no failure in stability, in uncontroversial cases. *See supra* note 100 (positing that in uncontroversial cases, the Condorcet Jury Theorem holds and MD will produce correct results). Indeed, many of the cases before the Supreme Court arise due to a split in the circuits, which further bolsters the contention that Supreme Court decisions may be particularly prone to vacillation if decided by panel vote.

efficiency can have the consequent impact that the Court is better able to serve its review function. However, if there are a significant number of cases that would require resolution by the entire Court en banc, because they are contentious or because the Court is politically polarized, that will significantly reduce the benefits in resource efficiency.

As a representational matter, the Court of Appeals Proposal, as a species of PMD, offers the benefit of increasing the potential diversity of the bench.[178] The addition of six Justices provides a significant opportunity to bring other voices and ideas to the Court. But the selection of panels reduces to an extent the impact of this diversity, because those voices are not consistently heard. Because it is a form of PMD, this proposal is not collegial neutrality, because not all Justices will hear every case. However, this inequality between the Justices is cabined because each Justice has the same opportunity to be selected to hear a case.

Finally, in terms of managing judicial authority, the proposal has a mixed effect: It reduces the impact of the individual Justice because they do not vote on every case, but increases their impact on cases they are selected to hear, because the deciding panel is smaller.

In sum, the Court of Appeals Proposal has no certain epistemic benefits, with considerable epistemic risks; and it poses problems for stability, which can only be rectified in mimicking MD and thus nullifying the benefits in efficiency. It offers mixed benefits in efficiency—it has potential gains in resource efficiency, but introduces complexity. Finally, it offers some representational benefits by expanding the diversity of the court.

### *D. The Supreme Court Lottery Proposal*

The Supreme Court Lottery Proposal is also a variety of Panel Majority Decision (PMD), with a large panel. Epps and Sitaraman, similar to George and Guthrie, claim that their proposal would: (1) have epistemic benefits, because it would result in less arbitrariness by reducing the stakes of any one appointment and thereby depoliticizing the appointment process,[179] it would result in more correct decisions by decreasing any ideological partisanship and idiosyncrasy,[180] and it would further reduce arbitrariness and increase

178 *See supra* Part V.D.5 (discussing representational fairness in PMD).

179 Epps & Sitaraman, *supra* note 19, at 170.

180 *Id.* Even Epps and Sitaraman's point about benefits to the politics of the selection process is dubious. As they recognize, the appointments to the U.S. Court of Appeals would become higher stakes, because those judges are now Justices. Why would the selection of judges to the U.S. Court of Appeals—who would also become Associate Justices of the Supreme Court—not become highly politicized?

correctness because Justices will be inclined to craft narrow decisions and follow precedent; and (2) it will result in more stability, because the decisions will be more narrowly crafted and in line with precedent.

Again, I am skeptical. The claims that the Supreme Court Lottery Proposal will result in less politicization, less partisanship, or less idiosyncratic decisions fail for similar reasons seen with the Panel Court Proposal.[181] Epps and Sitaraman's last point—that the proposal will result in more narrow, precedent-based decisions—is speculative and perhaps wishful. Perhaps Justices, recognizing that there will not be an opportunity for an incremental strategy due to the limited nature of their appointments, will pursue a "big splash," shock-and-awe strategy, untethered to precedent.[182] Indeed, this would undercut any of the supposed epistemic benefits, for it would not reduce arbitrariness or necessarily increase correctness. Additionally, it raises concerns for stability, because differently constituted panels may come to different decisions. Epps and Sitaraman's proposal has little way of easily mitigating this risk of instability, because the full strength of the Court is so large that it is difficult, if not practically impossible, to ascertain the views of a set of Justices large enough to protect against a future differing decision.

Indeed, insofar as there is a way, Epps and Sitaraman's system will be less efficient, in increasing the complexity of the ADP and requiring many judicial resources. Furthermore, unlike most common instantiations of PMD, Epps and Sitaraman's proposal would also not be more resource efficient because the panels have nine Justices and thus are the same size as the Supreme Court's judicial majoritarianism.[183] Thus, each decision would require just as much judicial time and resources as the Court currently uses.

Regarding representation, the proposal, as a form of PMD, will fare better in diversity of the bench, because with the large number of Justices, there is a greater opportunity to achieve more diverse representation (if they are selected to a panel). It will fare marginally worse in collegial neutrality, because not all Justices will hear every case, but this inequality between the Justices is cabined because each Justice has the same opportunity to be selected to hear a case.

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181 *See supra* Part VII.C (addressing claimed benefits (2) and (3) of the Court of Appeals Proposal).

182 *See* Daniel Hemel, *What Happens if Ruth Bader Ginsburg Remains Too Sick to Work?*, POLITICO (Jan. 16, 2019), https://www.politico.com/magazine/story/2019/01/16/ruth-bader-ginsburg-supreme-court-health-224014 (suggesting that fixed terms may result in more political decisions); Eric Segall, *Why Professor Hemel is Wrong About Life Tenure for SCOTUS*, DORF ON LAW (Jan. 16, 2019, 3:00 PM), http://www.dorfonlaw.org/2019/01/why-professor-hemel-is-wrong-about-life.html (suggesting that judges who are inclined to be partisan are likely to be partisan regardless of term length).

183 *Supra* note 77.

Finally, on managing judicial authority, the proposal reduces the impact of the individual Justice. This is because they do not vote on every case, but because they are on nine-member panels, their vote on any case which they are selected to hear has the same impact as the Supreme Court's judicial majoritarianism.

The upshot is that the Supreme Court Lottery Proposal has no clear epistemic benefits and may in fact increase the arbitrariness of the decisions. The main benefit of the proposal is that it provides opportunities for a diversity of the bench, and, if one has the goal of reducing the impact of an individual Justice of the Court, it accomplishes that as well. However, this comes at a significant cost in stability and efficiency.

## CONCLUSION

Why do we allow a bare majority vote on our judiciary to answer some of our most important societal questions? This Article has provided a comprehensive answer to that question, showing that judicial majoritarianism best balances the various virtues of adjudicative systems to best further our institutional goals. On a pluralist, holistic understanding of the virtues, this Article has argued that judicial majoritarianism is the best of the plausible options, as it is complete; has epistemic worth in its flexibility, relative correctness, and relative non-arbitrariness; is relatively stable; efficient in its simplicity and relative resource efficiency; representationally fair in its collegial neutrality, party neutrality, and relative diversity; and empowers the institutional court and the individual judges. Though it has potential deficits in epistemic worth, stability, efficiency, and representational fairness, they are marginal or uncertain and are counterbalanced by substantial benefits. This Article has further shown that on a reasonable evaluative theory—that preferences completeness, epistemic worth, stability, and efficiency in that order—judicial majoritarianism emerges as the favored decision procedure over the plausible alternatives.

These lessons have special relevance to the U.S. Supreme Court. The Court is currently embroiled in a crisis of legitimacy, with calls for structural change. This Article considered four proposals: The Federal Statute Supermajority Invalidation Proposal, the Balanced Bench Proposal, the Court of Appeals Proposal, and the Supreme Court Lottery Proposal. Each of these proposals claimed among its primary benefits a mitigation in the politicization of the Court. Employing the framework of virtues, this Article demonstrated that, in comparison to the Court's judicial majoritarianism, each of these proposals offers some limited benefits, but exacts significant

costs. Moreover, on the problem of politicization, none of these proposals—which are indeed the most plausibly options for reform—proffer a promising solution or even substantial improvement.

The problem of the politicization of the Court is pressing and requires our attention. However, it is unlikely to be solved by departing from judicial majoritarianism or from any structural change to the judiciary alone. In structuring the judiciary, singular focus on the problem of politicization at the expense of other considerations may do more harm than good, engendering other pathologies that impair the judiciary's function. In that way, it is a Hydra problem—cutting one head brings two in its place. The problem of politicization must be tackled in other ways, principally in reforming our politics. To this end, a well-functioning judiciary is key and, as this Article has principally contended, ensuring the health of the judiciary requires attending to the virtues as a whole.