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Volume 34  
Number 3 *Symposium: Internet Voting and  
Democracy*

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Article 2

4-1-2001

### Why Voting

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#### Recommended Citation

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# WHY VOTING?

*Frank I. Michelman\**

## I. INTRODUCTION: THE NORMATIVE QUESTION

Here is a premise that I expect not everyone will accept, or maybe even let pass without a derisory hoot or two: The onset of Internet voting calls for normative stock-taking.

A symposium on "Internet Voting" is summoned, I assume, with the hope of contributing to thought about what best to do about Internet voting, either addressing that question here and now or laying descriptive and other groundwork for others who will take it up later. But one can't begin to think about what to do, or about how to organize information for thinking about what to do—one can't even work up a raw, gut reaction to the prospect of Internet voting, pro or con—without some prior notion, however vague, about what I'm going to call the Normative Question: What is the point of holding votes? What is that practice supposed to be good for, or right for? What social goals is it supposed to advance, or moral mandates is it supposed to satisfy?

I think we all carry answers around in our heads, more or less examined. I do not see how they can help but affect our reactions, enthused or revolted as the case may be, to the rush of events presented to us by Dick Morris in his paper for this Symposium as the arrival, finally, of Democracy, its hour come round at last via Internet.<sup>1</sup> But for these takes on what voting is for (maybe it is just a game, a sport?), how could anyone react at all—as our authors

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\* Robert Walmsley University Professor, Harvard University. I wrote this in October 2000. I sit here reviewing it on November 17, in the midst of an amazing national self-examination touching on some of its central questions. I am going to let it stand as written, with the feeling that it stands up, so far, pretty well.

1. See Dick Morris, *Direct Democracy and the Internet*, 34 LOY. L.A. L. REV. 1033, 1049 (2001).

appear to do—to Internet-related prospects for diminished influence for big bucks and special interests,<sup>2</sup> or for a shift toward direct democracy,<sup>3</sup> or for the dissolution of historic American attachment to geography-bound, simple majoritarian schemes of legislative representation?<sup>4</sup> Our papers consider the possibility that letting people vote by Internet may have the effect of increasing voting participation primarily among higher-status groups who already vote at above-average rates.<sup>5</sup> How are we supposed to react to that prospect? How would James Madison have reacted to it?<sup>6</sup>

Taking the matter a little beyond Madison, we can be sure there are those among us who feel, in their heart of hearts, that the point of holding votes is to enable elites to rule while letting the masses believe they are in control. They may react differently to the unfolding events, and prescribe differently in regard to them, from those who think—however heroically—that the point is truly to honor the right of the people to rule,<sup>7</sup> or truly to allow everyone a share in authorship of the laws.<sup>8</sup> Still different appraisals and prescriptions may occur to those who think the point of holding votes is to guide governmental outcomes toward aggregate social welfare,<sup>9</sup> or, perhaps, is to find out

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2. See *id.* at 1033-34, 1049-50.

3. See *id.* at 1051-52.

4. See Eben Moglen & Pamela S. Karlan, *The Soul of a New Political Machine: The Online, The Color Line and Electronic Democracy*, 34 LOY. L.A. L. REV. 1089, 1098 (2001).

5. See *id.*; see also R. Michael Alvarez & Jonathan Nagler, *The Likely Consequences of Internet Voting for Political Representation*, 34 LOY. L.A. L. REV. 1115, 1121 (2001) (“[A]ny reform to increase turnout can increase the turnout rate among rich people by almost ten percent.”).

6. For a relayed message on this point from a “jmadison@founding.gov,” see Dennis Thompson, *James Madison on Cyberdemocracy*, in DEMOCRACY.COM? GOVERNANCE IN A NETWORKED WORLD (Elaine Kamarck & Joseph Nye eds. 1999).

7. See, e.g., RICHARD D. PARKER, HERE, THE PEOPLE RULE: A CONSTITUTIONAL POPULIST MANIFESTO 97 (1994) (writing of the “ideal” or “claim” that “‘common’ people, ordinary people—not their ‘betters,’ not somebody else’s conception of their supposed ‘better selves’—are the ones who are entitled to govern our country”).

8. See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 121-22 (William Rehg trans., 1996) (explaining that citizens are autonomous only if the addressees of the law can also see themselves as its authors).

9. See *infra* text accompanying note 23.

and institute true answers to questions of political justice by pooling the deliberative judgments of everyone.<sup>10</sup>

Maybe this is all too complicated. It's easy and smart to shrug off the Normative Question. Come off it, we say. We engage in the practice of holding votes because we have to—because our democratic ideology, our constitutions, and our other laws leave us no other way to get on with business we need or badly want to get on with. These things are true as far as they go, but they seem to leave the Normative Question vastly underdetermined. Laws are changeable within constitutional bounds, and constitutional bounds are loose and uncertain. Not only are laws and bounds amendable, they are interpretable; and not only are they interpretable, they are, to most practical intents and purposes, amendable by interpretation. As written, they leave us with endless, major choices about how to arrange the voting they doubtless require. So it seems that thought about how to proceed still requires some further clarification, some further specification, of what is supposed to be so "hot" about voting.

How about prevailing democratic ideology to the rescue? Can we find there the clarification and specification we need for intelligent thought about voting arrangements and related uses of the Internet? A scientist might say our democratic ideology is far too cloudy, far too contestable and contested, to determine our voting arrangements. I am not completely sure that it is, a point to be developed as these remarks proceed. I am not completely sure that we can't put the Normative Question to bed by noticing the simple facts that (a) sometimes decisions have to get made that are going to bind a lot of people whichever way they go, and (b) often there does not seem to be any close competitor to voting as a sensible or socially acceptable way to get the job done. Maybe an intelligent approach to our questions requires no thicker a normative theory of voting than the one that says that sometimes voting is socially and culturally unavoidable. I'm inclined to doubt that we can get away with that, I *want* to doubt it, but I am not sure.

It is in the spirit of testing my doubts that I devote these remarks to pursuit of the Normative Question: Why voting? Now, I am not fool enough to try for a comprehensive or definitive answer, not here

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10. See *infra* note 27 and accompanying text.

or anywhere. I am merely going to put on display, in what I hope is an interesting and helpful ordering, what I hope is something like a full array of the sorts of answers currently found in our political culture. So this will be an array of normative theories of voting—using “theories” in a very loose sense, because my array is an indiscriminate mix of crude vernacular truisms and shamelessly bowdlerized political science and political philosophy—but I am going to be pretty consistently non normative about it. I may here and there draw out an apparent prescriptive implication of one or another theory in the array, but I mainly leave for other times and places my views and arguments respecting the moral merits of the theories. I admit my distaste for some of them will be apparent.

No new discoveries are in store. One general lesson perhaps emerges, in tune with other papers we’ll be hearing: When it comes to thought about the Internet’s possible or likely uses in, or consequences for, the politics of a constitutional democracy, it may be a mistake to focus too sharply on *voting* in the usual, formal sense of that term—the “Election Day/legislative” sense, as I’ll call it. Voting, in this sense, signifies a bringing together of the entire franchised populace, or the entire legislative membership, at an appointed time, to cast official ballots on officially certified candidacies or officially worded propositions, the official tally of which will be directly and legally determinative of who shall hold office or of what the laws shall say.

## II. VOTING AND MAJORITY RULE

In these United States, any canvass of extant normative theories of Election Day voting must start with normative theories of majority rule. Intuitively, after all, to most Americans almost all of the time, Election Day voting simply is the operational side of majority rule, the ineluctable putting into practice of the idea of rule by the majority. But wherein lies the appeal to us, the hold on us, of the idea of rule by the majority? In order to answer adequately, I think we do well to notice how our everyday thought may commingle two quite distinct ways of conceiving of rule by the majority, which I shall label “substantive” and “procedural”—although I am not sure that a better set of terms wouldn’t be “essentialist” and “constructivist.”

*A. Substantive Conceptions of Rule By the Majority*

## 1. Simple substantive majoritarianism

The difference between a procedural (constructivist) and a substantive (essentialist) conception of rule by the majority starts with how we conceive of, and accordingly identify, that fraction or subset of the entire population to which we give the name of “the majority.” In a procedural conception, membership in the majority is strictly *constructed* by the procedure of taking a vote on a particular occasion. Membership in a majority, accordingly, is occasion-specific, not portable from vote to vote, not to be predicated of anyone across particular events of voting. Only after the votes are tallied can you say who, on that occasion, belongs to the majority and who does not. In the procedural or constructivist conception, what defines you as a member of the majority is nothing but the procedurally constructed fact that the number who voted as you did, on the occasion in question, exceeds the number who voted divided by two.

In a substantive (essentialist) conception of rule by the majority, that is not how it works. In a substantive conception, what defines you as a member of the majority, if you are one, isn’t how you *did* vote, it’s how you *would* vote. It is the characteristic content of certain opinions you hold or outlooks you have regarding some gamut of political choices that come before the country for decision. You are a member of the majority if and insofar as the general run of your political opinions and sensibilities coincides with what is perceived as the “majority” opinion or sensibility.

In a substantive conception, the majority is not an occasion-specific, procedurally constructed, numerical aggregate of individuals who happen to have voted alike on some particular question. It is rather a distinct and characteristic body of opinion and sensibility quite capable of maintaining and projecting itself over time and issue-space. We’re talking here about what political pundits vaguely mean when they speak of the political wishes of “the people,” or how about “the Silent Majority”? Isn’t that a name some smarty gave to a supposed fraction of the populace defined by political opinion, outlook, leaning, disposition, or sensibility? Doubtless it’s envisioned as being the most numerous fraction of our populace, but still it’s envisioned as having a shared and characteristic leaning, evident or

easily discoverable, regarding the contents of some—not necessarily all—of the politically decidable questions that come before the country.

No doubt such a conception involves some measure of counter-factuality. No doubt we idealize matters, or perhaps one should say we imagine things, if we envision The Majority, or “the people,” as the collective holder of a characteristic and distinctive set of political wishes, dispositions, and outlooks. But—needless to say—the fact that imagination may be involved in a certain take on the idea of rule by the majority doesn’t prevent this take from being actually present in anyone’s mind.

What seems to animate this way of thinking and talking, when it isn’t naked, partisan spin-doctoring, is a genuine sense that the majority, substantively conceived, has the presumptive moral right to have its characteristic preference prevail in any political disagreement to which it extends.<sup>11</sup> We may assume that this sense of the substantive majority’s moral right to rule attaches only because and insofar as the substantive majority is envisioned as a numerically preponderant fraction of the populace. The point remains that it is envisioned also as a spiritually unified fraction, entitled—if only by numerical preponderance—to have its *esprit* translated into *l’esprit des lois*. A related attribute of what I’m calling a simple substantive conception—to be distinguished, in this respect, from the hybrid type I’ll come to later—is that it envisions or insinuates a *division* of the country’s population into those who are, and those who are not, members of the substantive majority.

For purposes of our business at this Symposium, it is more than a little interesting to notice that Election Day voting—officially tallied popular voting as the process, or a step in the process, of officially deciding political issues—is, in principle, quite collateral to the simple substantive conception of rule by the majority. In principle, the aim implied by that conception is to stay abreast of substantive majority opinion and keep official decision making tethered to it, by whatever may be the most effective means. In practice, the most effective means to those ends may or may not include Election Day voting. Almost certainly, they do not include our current standard

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11. See, e.g., PARKER, *supra* note 7, at 96-97.

form of Election Day voting, by artificially delimited, territorial constituencies, typically each electing a single Democrat or Republican to a representative assembly.<sup>12</sup> Read Dick Morris's essay and see how he thinks those ends might better be served by wide-open, unofficial, legally toothless Internet referenda, self-starting or privately sponsored.<sup>13</sup> I am not saying Dick Morris believes, much less maintains, that there *is* any such thing to be revealed or expressed as the spirit or preference of the substantive majority. I am saying he shows us how Election Day voting is not, in the age of Internet, its necessary or consummate mode of expression, assuming we conceive it to exist. If Morris has this right, then here is one place at which we see—for better or for worse—a possible significant contribution of the Internet to American politics that would lie *not* in Election Day voting but in other forms of popular political mobilization, communication, and expression—in “public opinion formation,” as Jürgen Habermas might say, as opposed to “public will formation.”<sup>14</sup>

## 2. Hybrid substantive majoritarianism

Consider Bruce Ackerman's normative conception of American popular sovereignty. In Ackerman's view, it is the People of the United States who rightfully govern here. It is We who are entitled to have Our political will prevail, to the full extent of the content of that will.<sup>15</sup> This seems different from a claim that “the majority's” opinion ought to rule, in the following respect: whereas “the majority” (substantively speaking) connotes a body of opinion to which not everyone belongs—opposite to every majority stands a minority—“the People” connotes an all-inclusive citizenry constituted by a shared political opinion.

But of course this unity of views across an entire populace cannot be envisioned as *real* in the same way as one easily, albeit possibly falsely, envisions the observable, the evident reality of substantive majority opinion. Consider, for example, the issue of amending the Constitution to allow criminal punishment of flag-burners. On

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12. See, e.g., Moglen & Karlan, *supra* note 4, at 1093-95.

13. See Morris, *supra* note 1.

14. See HABERMAS, *supra* note 8, at 170-71.

15. See, e.g., BRUCE A. ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 13-16 (1991).



this point, Ackerman himself could not be more clear. Ackerman's People, after all, are never corporately or instantaneously observable. They are counterfactual, an idea of reason. But the idea of them, Ackerman maintains, is capable of being approximately represented by time-extended courses of political events.<sup>16</sup> Sometimes, Ackerman says, a course of events can disclose the existence of a "mobilized majority" in favor of some notable shift in the country's officially recognized political orientation and practice—a majority of the populace, but counted by giving special weight to the fraction of them that in its address to the pending question is focused, persistent, informed, deliberate, public-spirited, and, finally, deeply persuaded. An Ackermanian "mobilized" majority is a clear and strong, sustained and committed numerical majority that arises, consolidates, and persists over a time during which the matters in question are publicly controverted at a high level of energy, earnestness, and concern.

In holding that a political opinion is entitled to prevail once proven to be the opinion of a sufficiently mobilized and sustained majority, Ackerman offers a theory of legitimate rule in America, and one that we can locate on our shelf of normative theories of rule by the majority. So regarding it, we can see in it a "hybrid" of substantive and procedural conceptions. On the level of *imagination*, its entitled collective ruler—the People—are constituted by the substance, the content, of their shared political opinion. On the level of *practice*, however, this entity and its opinion are always and only procedurally represented, never directly intuited or observed.

To illustrate: Ackerman has put on the table a concrete proposal for an improved institutional arrangement for constitutional amendment. It calls for a concatenation of approvals from the President, from supermajorities of both houses of Congress, and from supermajorities of voters on two Election Days separated by a quadrennium, voting on official propositions.<sup>17</sup> Alternatively, when we look at Ackerman's schemata for non-formal constitutional amendment—for example, at his analyses of the historical episodes for which he

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16. In regard to this statement and the balance of the paragraph, see Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1312-14 (1995), and sources cited therein.

17. See ACKERMAN, *supra* note 15, at 54-55.

has claimed the force of amendment—we see that they, too, have involved repeated Election Day votes. While the votes are on candidacies only, not on propositions, Ackerman allows them to count for purposes of constructing the People only when circumstances are, exceptionally, such that candidacies in the two-party system are tightly correlated to major public-policy choices.<sup>18</sup>

True, Ackerman's amendment schemata, formal or non-formal, never depend on any Election Day vote standing alone. They are always serial compounds of multiple Election Day votes with other events involving all three branches in our separated-and-divided-powers system of government.<sup>19</sup> Still, Ackerman evidently has had in mind that the official and formal character of law-governed, periodic and time-certain, countrywide balloting, on some kind of officially stated proposition or candidacy, is an essential part of what gives voting its crucial place and role in a legitimate procedural construction of the People's political opinion or will.

Suppose the Internet were to become, to the fullest imaginable extent, the potent, pliable, transparent, and responsive medium for political opinion formation and expression described by Dick Morris. Would Ackerman then be tempted to reconsider whether Election Day votes are an indispensable component of legitimate lawmaking by the People? I doubt it, for reasons that I'll try to convey in Part II.B.2.

### *B. Procedural (Constructivist) Conceptions of Rule By the Majority*

#### 1. Perfect/imperfect procedural justice

Start with "perfect procedural justice." Two or more disagreeing parties face a necessity to decide, in terms that will bind them all, some practical question in which they all have legitimate stakes. A method for decision satisfies *perfect procedural justice* when the following two conditions hold: "First, there is an independent criterion for what is a [just or correct outcome], a criterion defined

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18. See BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS passim* (1998).

19. See, e.g., Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION* 63, 78-84 (Sanford Levinson ed., 1995).

separately from and prior to the procedure which is to be followed. And, second, [the procedure in question] is sure to give the desired outcome."<sup>20</sup> The standard example is the division of a cake among two or more persons who are all presumed to want as much as they can get. The independent criterion of justice is equal shares. In order to achieve it, you make one of the parties cut the cake into as many portions as there are parties, and you make that person take the piece that is left after everyone else has picked. Assuming satisfaction of certain ideal conditions such as, for example, adequate I.Q. and surgical skill on the part of the cutter, the cutter will divide the cake equally. As Rawls says, cases like this are rare and of little practical interest.<sup>21</sup>

Much less rare are cases of *imperfect* procedural justice—in which, again, there is an independent criterion for the just or correct outcome, but the procedure employed, although recognizably chosen in virtue of its perceived tendency toward the correct outcome, is by no means guaranteed to produce it. Rawls offers, as an example, the procedure of deciding accusations of crime by adversary trials.<sup>22</sup>

It is easy to find in American political thought a variety of ways in which political decision making by procedurally constructed, occasion-specific, simple majorities figures as a practice of imperfect procedural justice. The following brief survey may not be complete, but it should suffice to convey the idea.

#### *a. utilitarian theories*

Suppose your theory of justice aims at political outcomes that maximize, over time, the net sum of satisfactions of desire across the population. It may be that, given fulfillment of certain empirical conditions, a deftly devised set of arrangements for periodic, simple-majoritarian, Election Day and legislative votes can be shown to be roughly conducive to the utilitarian goal. By this I mean conditions and arrangements such as unimodal preference functions and a well-discriminated two-party system. What—if any—are the sufficient conditions, and what—if any—are the relevantly deft voting arrangements, are matters studied by some theorists of collective

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20. JOHN RAWLS, A THEORY OF JUSTICE 74 (rev. ed. 1999).

21. *See id.*

22. *See id.* at 74-75.

choice.<sup>23</sup> Whether these conditions and arrangements exist or are specifiable, and whether the Internet has anything to contribute to their fulfillment or achievement, I do not attempt to say.

*b. egalitarian theories*

Maybe you think justice in political outcomes consists in everyone's enjoying, over time, the same *ex ante* or *ex post* measure of a positive match between actual and preferred political outcomes. Of course, that's a very hazy notion, which cannot be operationalized without a great deal of further, no doubt contestable specification. Whether the practice of periodic, majoritarian, Election Day and legislative votes has any worthwhile tendency to achieve it as specified, or could be modified so that it would, is at best unclear.<sup>24</sup> Whether or how the Internet might help or hinder this project is a question I must leave to others. Professors Karlan and Moglen think it might help, in a way that I will come to.<sup>25</sup>

*c. epistemic theories*

There is at least one more way in which one might value instrumentally, for the sake of the outcomes to which it is believed to tend, a constitutional practice of allowing political issues to be decided by simple-majority voting. Whether one should class this last way as an instance of perfect/imperfect procedural justice is not clear to me. To my ear, that term has a mechanical ring. It smacks of constitutional contrivance to wring just outcomes out of men who are not angels—out of political actors none of whom intentionally pursue just outcomes. The utilitarian and egalitarian theories I've just reviewed both fit that mechanistic mold. Far from assuming that any voter is

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23. For a sophisticated review and analysis, see Brian Barry, *Is Democracy Special?*, in *PHILOSOPHY, POLITICS AND SOCIETY*, FIFTH SERIES 155, 161-68, 176-84 (Peter Laslett & James Fishkin eds., 1979).

24. We know by now that one-off, "winner take all," simple-majority votes don't measure up to any plausible specification of equal outcomes or equal chances. The only hope for this project lies in a translation of simple-majority voting into "minorities rule," by focusing attention on a time-extended, constitutional practice of holding such votes periodically, within a population lacking a stable majority faction, in which no interest group is systematically excluded from coalition-building. See, e.g., Moglen & Karlan, *supra* note 4.

25. See *infra* note 37 and accompanying text.

aiming at political outcomes that maximize social utility or equalize political payouts, those theories assume that no voter is, and try to suggest how the voting practice might nevertheless be, or be made, conducive to one or another of those sorts of outcomes.

What I'm calling *epistemic* theories are in this respect quite different. Such theories assume that each voter casts her vote as an expression of a *judgment*, not a *preference*—a judgment, for example, about which of the political options on the table will be the utility-maximizing one. Condorcet showed that if each voter has a better than 0.5 probability of being right, then we maximize the chances of getting the right answer by following the judgment of the simple majority.<sup>26</sup> But the requisite assumptions will strike many as pretty heroic. The heavy preponderance of voters have to be envisioned as all of the following: adequately informed, adequately intellectually competent, and sincerely expressing honest personal judgments all aimed at the same conception of a correct outcome, and all unaffected by systemic and strategic considerations such as agenda manipulations and explicit or implicit vote trades.<sup>27</sup>

Thus baldly and nakedly presented, epistemic theories look hopeless—even more so than the preceding, ostensibly more realistic, accounts of how majority-voting conceivably could help get you to utilitarian or egalitarian outcomes. In Part III, below, I'll suggest that epistemic approaches may possibly look more promising—and more harmonious with vernacular American democratic ideology—when combined with some intuitions about majority voting as pure procedural justice.

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26. See David Estlund, *Beyond Fairness and Deliberation*, in *DELIBERATIVE DEMOCRACY: ESSAYS IN REASON AND POLITICS* 171, 185-89 (J. Bohman & W. Rehg eds., 1997).

27. If some participants give their judgments about what course will maximize social utility while others give their judgments about what course will equalize payouts, and still others give their judgments about what course will respect the rights of individuals, then the Condorcet theorem won't work, no matter how high the probability that every participant will judge correctly what he or she is trying to judge. For full discussions of the Condorcet "jury theorem," see DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* 156-84 (1958); H.P. Young, *Condorcet's Theory of Voting*, 82 AM. POL. SCI. REV. 1231 (1988).

## 2. Pure procedural justice

I have just passed in brief and crude review a variety of ways in which one might value instrumentally, for the sake of the outcomes to which it is believed to tend, a constitutional practice of providing for plenty of political decision making by procedurally constructed, occasional, popular and legislative majorities. These ways tend distinctly away from the vernacular and toward the academic. They all seem strained, artificial, to the point where one cannot help doubting how much of a role they really play in American attachment to governance by Election Day and legislative majority-voting. On reflection, I find it hard not to think that the larger role belongs to inchoate ideas about pure procedural justice.

Pure procedural justice—as distinguished from perfect/imperfect procedural justice—obtains when

[T]here is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly followed. . . . If a number of persons engage in a series of fair bets, the distribution of cash after the last bet is fair, or at least not unfair, whatever this distribution is.<sup>28</sup>

Now, one can devise cases in which voting stands in place of the flips of the coin, cuts of the deck, and rolls of the dice that Rawls evokes. *Survivor*, with its weekly series of votes determining the ultimate million-dollar winner, comes to mind. But that's because *Survivor* is a *game*. And the point about games, which brings them to mind when we're trying to illustrate pure procedural justice, is that they are activities in which people join voluntarily, just for the sake of submitting themselves—their luck, skill, or mettle—to the particular sort of test that is defined by the rules of the game they join. If you ask why playing by the rules is the sole criterion of justice in the determination of winners and losers of games, the obvious and sufficient answer lies in the fact that the players choose to play the game constituted by those very rules, presumably because that is the game they wish to play.

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28. RAWLS, *supra* note 20, at 75.

We needn't belabor the point that no parallel explanation holds for the sometimes so-called game of politics. Some people do play it for sport, of course, but the overwhelming preponderance of those caught up in it are caught willy-nilly, for what may be very high stakes. And it is not immediately clear that, or how, the rule of decision by majority-rule can turn politics into an event of pure procedural justice for its non voluntary participants and victims. It is not immediately clear how a political outcome, with the coercive edge that political outcomes always have, can be counted right, fair, just, or correct just because a majority voted it.

But now I think we must take care not to let ourselves be trapped by the verbal distinction of "pure" procedural justice from the perfect/imperfect kind. That distinction can trick us into searching in a set of rules for some *strictly* procedural attribute of fairness, some attribute we think a set of rules can possess just as such, just as a purely procedural thing of beauty and joy forever, divorced from every last taint of pollution by human purpose or substantive aim. Whether any such thing is conceivable I don't know, but John Rawls's notion of pure procedural justice does not imply it.

Let us ask: What causes (so to speak), or grounds, the justice of letting the outcome of a crapshoot be decided by a true application of the rules of craps? It isn't, surely, the crystalline beauty or egalitarian perfection of those rules or of the game they constitute. It is, surely, the desire and free agreement of the players of the game to play that game.<sup>29</sup> And agreement—consent—as a ground of justice surely is not a purely procedural notion. It is rather an intuition closely tied to some notion we have of human purposes or human flourishing—of human freedom, dignity, autonomy, responsibility.<sup>30</sup>

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29. There is no equality inside the rules of craps. If, as a result of my first roll, my "point" is twelve, it's not even-steven whether twelve (1:36 on each roll) or seven or "snake eyes" ( $6:36 + 1:36 = 7:36$  on each roll) will be first to turn up in the ensuing series of rolls. The equality in the game is external to the rules. It lies only in the equal opportunity each player has to decide whether or not to play—that is, to decide what bet to place, if any, on each upcoming roll or series of rolls. Equality in this game is non-severable from—it is constituted by—free consent.

30. Someone loses the ranch on a roll of the dice he agreed to, but only in order to ransom his kidnaped child. Try to specify the sense of injustice according to which we would say: That is unjust if the dice were loaded, but not if they were true. Or in which we would say: If the dice were loaded, then

So the question is: What, if anything, can take the place of free agreement as the ground of our intuition of the pure procedural justice—the outcome-disregarding justice—of letting a set of outcomes be decided by the true application of a given set of rules? And the answer, for better or for worse, that I think inheres in the strong American attachment to the constitutional practice of majoritarian, Election Day and legislative voting is a compound of rough intuitions of necessity with rough intuitions of human dignity and autonomy.

Political disagreements arise, and sometimes they have to be resolved—formally, officially—so that the country and its people can get on with their lives. Some form of intentional human decision is inevitable. Hobbes's contention that it's far, far better to provide for this constitutionally than just leave it to nature is, among us, unanswerable. Now, to put the matter crudely, but maybe not too crudely for present purposes, the basic constitutional option lies between committing the power of decision to a hereditary rulership and committing it to periodic votes and elections. Democratic ideology not only rules out the first option, it narrows the second option to periodic *popular* votes and elections. In our civilization, people have a burning need, and they make a morally cognizable demand, to be treated, individually and formally, as equals in the business of governing the country, and simple majority voting does that in a way that is maximally transparent, for our culture, now.<sup>31</sup> When, toward the end of a strenuous faculty meeting, with consensus nowhere in sight, someone sings out "let's vote," he is making an Americanly irrefutable plea for pure procedural justice.

Please don't misunderstand me. I would be the last to deny that simple-majority voting is, in the current conditions of American politics, very often open to very serious objection on grounds of inefficiency, inequality of both chances and outcomes, and insensitivity to human rights.<sup>32</sup> I am strongly inclined to believe that alternative

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there were two injustices, but if they were true there was only one.

31. See Jeremy Waldron, *The Majority Principle*, in *THE DIGNITY OF LEGISLATION* 148 & n.38 (1999) (citing sources of technical demonstration that decision by majority rule gives "each individual's view the greatest weight possible . . . compatible with an equal weight for the view of each of the others").

32. See, e.g., Moglen & Karlan, *supra* note 4, at 1093-1100.



voting arrangements, of the kind that interest Professors Karlan and Moglen, would do much better along all those fronts.<sup>33</sup> But the arguments to that effect appear to lack full transparency in our constitutional culture, and it's arguable that full transparency here is itself a dimension of justice. As I said, in our civilization, people make a morally cognizable demand to be treated, individually and formally, as equals in the business of governing the country.

It is not beside the point to notice how the instrumentalist theories, the ones I classed as "imperfect procedural justice," may return here in a kind of secondary role. Suppose Americans by and large saw decision by simple majority voting as fraught with dreadful consequences for government in the general interest of the people or for a decent distribution of political chances and payoffs. Then I think we may be sure that "let's vote" would not have for Americans the ring of pure procedural justice. The fact, though, is that we don't and it does. As long as procedural majorities of the electorate—no matter how baroquely mediated by districting, electoral colleges, etc.—can turn rascals out of office, Americans of our times will perceive some tendency of simple-majoritarian politics to constrain government toward aggregate social welfare.<sup>34</sup> As long as coalition-building remains broadly necessary to political success, we'll perceive some tendency of simple-majoritarian politics to achieve a decent distribution of power and payoff—which is not to say we won't, in so perceiving, be partially blinded by prejudice.

Obviously, those are far from perfect resolutions on the fronts of social utility and equality. Some of us in this Symposium believe strongly that better ones are available, and maybe we have quite good, scientific arguments to that effect. But what we have not had, and what we would need in order to strip simple majority voting of its luster of pure procedural justice, is this: alternatives to offer that will *feel* as natural, as indubitably expressive of every citizen's equal political standing, as non-devious and just plain fair on a gut level, as simple majority voting now does feel to most Americans.

Where does all this leave us on the question of the Internet's possible contribution to the improvement or the impairment of

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33. See *id.* at 1100-01.

34. See JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269-83 (3d ed. 1950).

American politics? One might think, nowhere very interesting. The question as I've posed it is this: Why simple-majoritarian Election Day voting? If the answer were as I have just been suggesting—the practice satisfies a morally respectable impulse for pure procedural justice in politics, and does so in a way that has at least gross apparent tendencies in the directions of efficiency and equality—then nice calculations of the effect of Internet voting on sectoral voting-participation rates would seem beside the point, unless and until someone can show that such effects were designed and intended for reasons of prejudice or partisan strategic advantage. The Supreme Court's embattled "because of"/"in spite of" distinction<sup>35</sup> will feel just right for the occasion.

But note, please, that I've tried hard to avoid suggesting that simple-majoritarian Election Day voting is connected in some *transcendent* way to the impulse for pure procedural justice in politics. I think that connection exists in America now, but I view it as a historically contingent matter, and one of our papers—that of Professors Karlan and Moglen—speculates that it may not exist for much longer, because the Internet experience may dislodge it.<sup>36</sup> I'll leave it to them to elaborate, saying here only that if it really does come to pass that the Internet experience breaks up the American impulse to make simple majority voting the palladium of pure procedural justice in politics, the consequences could be epic.

### III. CODA: DISCURSIVE DEMOCRACY

But suppose Professors Karlan and Moglen are wrong, and American constitutional-democratic practice is destined to retain its profound attachment to simple majoritarian, Election Day and legislative voting. I'm guessing that many people—I think again of Dick Morris's paper—share a hope that the Internet will have something substantial and beneficial to contribute to that practice, and I'd like to end by trying to cast that hope in what I would regard as its best light.

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35. See, e.g., *Pers. Adm'r v. Feeney*, 442 U.S. 256, 258, 278-80 (1979) ("'[D]iscriminatory purpose' requires that the decisionmaker selected a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.").

36. See Moglen & Karlan, *supra* note 4.

Democracy, a proudly democratic citizenry might think, is not for every country at every historical moment. Rather, it is an ideal fit only for a citizenry prepared to rise to its challenge, a citizenry mainly composed of politically reasonable persons. Politically reasonable persons have two traits. First, they accept the primordial freedom and equality of each person, along with the ineluctable corollary of political reciprocity, which means that one doesn't claim or seek, in the arrangements for deployment of coercion that politics inevitably involves, any kind or degree of special privilege for one's own vision or one's own interest. Second, politically reasonable persons, taking for granted that every significant political outcome will probably be bitterly unwelcome to some party, including sometimes one's own, nevertheless believe, on essentially Hobbesian grounds, that some worlds in which the practice of coercive political government prevails are better for everyone than any world in which it does not.

Democracy, then, becomes an ideal of a political practice in which coercive political outcomes are justifiable, or maybe one should say they are tolerable to everyone—and I mean to *everyone*, not just to a substantive majority or even the Ackermanian mobilized majority that stands in for the People—because the practice is as well contrived as a political practice can be to produce outcomes that are *acceptable* to every politically reasonable person.<sup>37</sup> Democracy becomes an ideal in which substantive and pure-procedural elements and themes are inextricably mixed, even fused. On the substantive side, at least some political outcomes—the *constitutional* ones, the ones that fix the arrangements by which all further political outcomes are decided—have to pass directly the substantive test of acceptability to every politically reasonable person.<sup>38</sup> On the pure-procedural side, it could be that they will fail that test unless they make

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37. In other words, democracy is the ideal according to which, if you uphold and support the practice, you do so believing that it meets the stated test. Democracy, on this view, is inseparable from an ideal of public reason. See generally JOHN RAWLS, *The Idea of Public Reason Revisited*, in COLLECTED PAPERS 573 (Samuel Freeman ed., 1999).

38. The idea is that sub constitutional political outcomes can inherit acceptability from the universal substantive acceptability of the procedures that produced them. See, e.g., Frank I. Michelman, *Morality, Identity and "Constitutional Patriotism"*, 76 DENV. U. L. REV. 1009, 1015 (1999).

provision for periodic Election Day voting, and the reason why might lie beyond any hoped-for mechanical virtue of producing efficient outcomes or equal distributions of satisfactions. It might be traceable to an intuition as procedural as it is substantive and as substantive as it is procedural, that is, the intuition of the equal self-governing dignity of every affected person.<sup>39</sup>

Now, there is nothing in this argument that says the Election Day voting *has* to be simple majority voting, “first past the post” voting. But neither is there anything in it that says it *can’t* be that, or that the transparency advantages of simple majority voting—as long as it retains them, which Professors Karlan and Moglen think may not be for too much longer<sup>40</sup>—have to be sacrificed to some other more pressing moral consideration of efficiency or equality. That latter inference is easily avoided. You can avoid it by refusing to think of Election Day or legislative votes as concluding any issues for all time, or as announcing resolutions that anyone should accept as correct on the merits just because the most recent Election Day and legislative majorities voted for them. You might rather think of the pursuit of correct decisions as longer-term work, work that proceeds by interchange among persons and groups of diverse history, situation, and vision. You might think of Election Day and legislative votes as way stations in that process, designed to provide us with the institutional settlements we need, when political disagreements simply have to be resolved for official purposes and for the time being. But you think of the *real*, the deeper work of democracy as being the ongoing work of political communication, debate, and opinion-formation, lying mainly outside of Election Days although surrounding them and expected to influence them.<sup>41</sup>

I say, you might expect the process of political exchange and debate to influence Election Days, and yet it might not necessarily follow that you try to build that influence mechanically into Election Days, for example through plural or transferable voting schemes. You might refrain because, frankly, you can’t right now explain your reasons with enough force to make whatever result we’d end up with

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39. *See id.* at 1017, 1021.

40. *See* Moglen & Karlan, *supra* note 4, at 1100-01.

41. *Cf.* FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 58-62 (1999) (applying a related analysis to the debate over judicial review).

sufficiently transparently formally equal to satisfy the pure-procedural-justice term in the full democratic equation.

No doubt such a loose conception of discursive democracy does itself involve a very strong idealization—that is, of the ultimately justice-serving, or reciprocity-serving, motivations of participants in politics. I began this discussion, after all, with an attribution to whoever thinks this way of a belief that democracy is a fit ideal only for a population of politically reasonable persons. But that does not mean that no one who is not himself or herself a really-truly politically reasonable person can fancy the ideal. Americans at large could fancy it, as an ideology. I don't know that we do, but I'm not sure that we don't. It seems to me a question one wouldn't want architects of our future politics ignoring.