

# Supermajoritarianism and the American Criminal Jury

by ETHAN J. LEIB\*

## I. Introduction

In *Apodaca v. Oregon*<sup>1</sup> and *Johnson v. Louisiana*,<sup>2</sup> the Supreme Court allowed the relaxation of the decision rule most commonly associated with criminal jury felony verdicts and held that unanimity in state criminal cases is not constitutionally required. The Court announced that states were allowed to use 10-2 and 9-3 verdicts in non-capital state cases in contravention of the traditional rule requiring unanimity.<sup>3</sup> The Court argued that the essential function of the jury is to place between the accused and the state a commonsense group of laymen representing a cross-section of the community—and that relaxation of the unanimity requirement would not upset that function. Moreover, the Court argued that since elimination of unanimity was unlikely to affect the reliability of verdicts, the

---

\* Assistant Professor of Law, University of California, Hastings College of the Law. B.A., Yale; M.Phil., University of Cambridge; M.A., Yale; J.D., Yale; Ph.D. (Political Science), Yale. I thank Owen Fiss, Arend Lijphart, Troy McKenzie, Eric Zolt, William Rubenstein, Eleanor Swift, Shari Seidman Diamond, Stuart Chinn, and participants in a faculty colloquium at the University of California, Davis for comments on earlier drafts; correspondences with John McGinnis, Ian Shapiro, Kevin Johnson, Donna Shestowsky, Bruce Ackerman, and Saul Levmore were also helpful in thinking through some of the ideas presented here.

1. 406 U.S. 404 (1972).

2. 406 U.S. 356 (1972).

3. The unanimity requirement dates to 1367. In the 17th century, American colonies allowed majority rule, but by the 18th century it was widely understood that verdicts needed to be unanimous. See generally JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 179 (2000) (1994) (citing FREDERICK POLLACK & FREDERIC W. MAITLAND, *2 HISTORY OF ENGLISH LAW* 626 (1959); FRANCIS H. HELLER, *THE SIXTH AMENDMENT* 16-18 (1951); *Anonymous Case*, 41 LIB. ASSISARUM 11 (1367); *Apodaca*, 406 U.S. at 408 n. 3). Federal rules now allow non-unanimous supermajority verdicts but only by mutual consent of the parties; defendants rarely consent. See FED. R. CRIM. PROC. 31(a).

representativeness of the jury pool, or the deliberation in the jury room (because the majority would still need to convince the minority bloc), the Court blessed the state rules.<sup>4</sup> From the perspective of practice, however, Oregon and Louisiana are the only states that allow felony convictions without juror unanimity (though many states now have a corollary to the federal rule, where mutual consent of the government and the defendant can relax the rule).<sup>5</sup> While the Court has enabled experimentation with decision rules, most states remain committed to unanimity as the proper decision rule for the criminal jury; little experimentation is afoot domestically.

Why the obsession with unanimity here—and why is that the baseline decision rule when almost no other decision in public political life gets made by unanimous consent? Indeed, unanimity's hold upon us is so great that we require it for acquittals too: not only do we require complete agreement to convict a defendant but we also require all jurors to agree to acquit one. So much for the presumption of innocence or the idea that the unanimity requirement places the burden of proof completely upon the state. I argue here that supermajority decision rules would be more appropriate than unanimity or majority rule for criminal jury convictions and that majority decision rules would be more appropriate than either unanimity or supermajoritarian rules for acquittals. This hybrid decision rule is new to the conversation about acceptable permutations of decision rules in the American criminal jury context and it should command widespread support.

Many of the possible historical reasons for the unanimity requirement are ones that are substantially less persuasive now—and the Court itself has recognized this. If unanimity developed at common law “to compensate for the lack of other rules insuring that a defendant received a fair trial,”<sup>6</sup> American criminal procedure now has many more substantial protections for defendants. Another theory of unanimity's etiology is that unanimity “arose out of the practice in the ancient mode of trial by compurgation of adding to the

---

4. Unanimity in federal criminal cases is still protected by statute, FED. R. CRIM. PROC. 31(a), though the logic for this differential application of decision rules as between state and federal courts is hard to explain theoretically.

5. See DAVID ROTTMAN ET AL., STATE COURT ORGANIZATION, table 42 (Washington, DC: Bureau of Justice Statistics, 2000) (providing complete information on verdict rules on a state-by-state basis).

6. *Apodaca*, 406 U.S. at 407 n.2 (citing L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 347-351 (1947); Haralson, *Unanimous Jury Verdicts in Criminal Cases*, 21 MISS. L.J. 185, 191 (1950)).

original number of 12 compurgators until one party had 12 compurgators supporting his position; the argument is that when this technique of afforcement was abandoned, the requirement that one side obtain the votes of all 12 jurors remained.”<sup>7</sup> If this is right, compurgation—an ancient method of trial where certain kinds of witnesses essentially became jurors—has very little relevance to contemporary trials, where we’d never allow a witness on the jury; accordingly, we should have no allegiance to a decision rule that arose out of a jury practice that has so little to do with our own. If the unanimity requirement arose out of the medieval idea that reasonable people cannot disagree and that minority jurors must be lying, we must certainly abandon it in our pluralistic society.<sup>8</sup>

Still, many wish to retain unanimity because it seems to furnish a security in outcome—even though the security is arguably a false one. Unlike in political decisions where ‘truth’ is rarely at issue, the truth about what a defendant actually did matters a great deal in the criminal jury and may counsel for a different decision rule from that endorsed in political life more generally: sending a person to jail or to death row is a big deal and unanimity provides at least the surface appearance of certainty, conferring legitimacy upon the criminal justice system to those who view it from the outside.<sup>9</sup>

---

7. *Apodaca*, 406 U.S. at 407 n.2 (citing P. DEVLIN, TRIAL BY JURY 48-49 (1956); Ryan, *Less than Unanimous Jury Verdicts in Criminal Trials*, 58 J. CRIM. L. C. & P. S. 211, 213 (1967)).

8. *See Apodaca*, 406 U.S. at 407, 407 n.2, 408.

9. States are much more willing to experiment with non-unanimous verdicts in civil trials, where presumably less is at stake. I do not discuss civil juries here; my only concern in this Article is the criminal jury. Just for contrast, “[t]wenty-one states, the District of Columbia, and federal courts require unanimous verdicts in all civil cases, while 29 states require a supermajority.” National Center for State Courts, *Jury Decision-Making FAQs*, available at <http://www.ncsconline.org/WC/FAQs/JurDecFAQ.htm> (last modified on July 18, 2005). Thus, supermajoritarianism is the rule in civil juries.

It is also worth noting that criminal convictions by courts martial in the United States Armed Forces do not require unanimity (unless it is in connection with a capital crime); they require a two-thirds supermajority. The failure of two-thirds of the jury to reach agreement on a conviction results in a “not guilty” verdict. *See* Uniform Code of Military Justice (“UCMJ”), Article 52, *codified at* 10 U.S.C. § 852 (2005) (requiring, *inter alia*, unanimity for capital convictions and death sentences, two-thirds supermajorities for conviction on almost all other crimes, and three-fourths supermajorities for sentences of life imprisonment or incarceration for more than ten years); *United States v. Jones*, 14 U.S.C.M.A. 177, 179 (1963) (“The Manual for Courts-Martial, United States, 1951, paragraph 74d(3), in effect provides that there may be no ‘hung jury’ on the question of guilt or innocence.”). These unique decision rules may have something to do with unique jury composition rules in the court martial context: all jury members are from the Armed Forces so are, in a sense, pre-screened, *see* UCMJ, Article 25, *codified at* 10 U.S.C. § 825 (2005); they are chosen by a convening authority for their qualifications “by reason of age,

Yet, there remains no obvious reason that unanimity is to be preferred: most agree that the outcomes of verdicts do not significantly vary with decision rule<sup>10</sup> and that juries decide concurrent value questions alongside their fact-finding much of the time.<sup>11</sup> Because we almost never expect unanimity on non-trivial value questions in our society—indeed, if everyone agreed on such values, we'd have little use for our liberal scheme of governance—it is odd to demand it from our criminal juries. Because the jury is routinely conceived as a “political institution,”<sup>12</sup> a “mini-legislature,”<sup>13</sup> and a

---

education, training, experience, length of service, and judicial temperament,” *id.*; and there are few challenge opportunities, *see* UCMJ, Article 41, *codified at* 10 U.S.C. § 841 (2005) (allowing “for cause” challenges and entitling each party to a single peremptory challenge). Thanks to Robert Don Gifford for encouraging me to explore UCMJ decision rules.

10. *See, e.g.*, MICHAEL SAKS, *JURY VERDICTS: THE ROLE OF GROUP SIZE AND DECISION RULE* (1977) (decision rule does not effect verdicts, deliberation time, or the ability of jurors to recall testimony); Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1, 27-28 (2001) (studies “show that the overall ratio of convictions to acquittals does not differ for unanimity and majority-rule juries”); P. D. P. Velasco, *The Influence of Size and Decision Rule in Jury Decision-Making*, in *PSYCHOLOGY, LAW, AND CRIMINAL JUSTICE: INTERNATIONAL DEVELOPMENTS IN RESEARCH AND PRACTICE* 344 (G. Davies et al. eds., 1995) (decision rule does not influence verdicts); A.M. Padawer-Singer et al., *An Experimental Study of Twelve vs. Six Member Juries Under Unanimous vs. Non-unanimous Decisions*, in *PSYCHOLOGY IN THE LEGAL PROCESS* 77 (B. D. Sales ed., 1977) (decision rule does not effect verdicts); Charles Nemeth, *Interaction Between Jurors of [Super]Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCHOL. 38 (1977) (same); Tatsuya Kameda, *Procedural Influence in Small-Group Decision-Making: Deliberation Style and Assigned Decision Rule*, 61 J. PERSONALITY AND SOC. PSYCHOL. 245 (1991) (same). There is some empirical evidence to the contrary too. *See* Norbert L. Kerr et al., *Guilt Beyond a Reasonable Doubt: Effects of Concept Definition and Assigned Decision Rule on the Judgments of Mock Jurors*, 34 J. PERSONALITY AND SOC. PSYCHOL. 282 (1976) (non-unanimous jurors convict more often); R. Buckhout et al., *Jury Verdicts: Comparison of 6- vs. 12-Person Juries and Unanimous vs. Majority Decision Rule in a Murder Trial*, 10 BULL. OF THE PSYCHONOMIC SOC'Y 175 (1977) (same).

11. *See* HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 163-64 (1966) (decision rule does not effect verdicts). Examples of value judgments often decided by juries include: excusing defendants for contributory fault of the victim (when it is not a legal excuse), *id.* at 242; excusing defendants because the harm was *de minimis* (even when the law recognizes no *de minimis* exception), *id.* at 258; excusing defendants because they are being subjected to unpopular laws, *id.* at 286; excusing defendants because they have already been subjected to enough punishment, *id.* at 301; considering that the punishment for a conviction is too severe, *id.* at 308; excusing defendants because other defendants are getting preferential treatment, *id.* at 313; excusing defendants for improper conduct by the police, *id.* at 318; passing judgment on the validity of excuses and justifications, *id.* at 329; passing judgment on whether drunkenness should be mitigation, *id.* at 335; and treating crime in subcultures differentially by applying standards appropriate (or inappropriate) to different cultural contexts, *id.* at 339.

12. AKHIL REED AMAR, *Reinventing Juries: Ten Suggested Reforms*, in *THE*

forum for ordinary citizens to have input into political life, there may be good reason to harmonize the jury decision rule with the decision rules otherwise prevalent in our democratic polity. Moreover, now that the jury pool is far more diverse than it once was, pluralism rather than the homogeneity presumed by unanimity seems warranted.<sup>14</sup> We don't all agree about the soundness of our laws; and it is odd to expect us all to agree that a particular individual "deserves" to be found guilty of a certain crime. Finally, there is evidence that the pressure for unanimous agreement can result in preference falsification, where dissenters simply lie and go along with a verdict or decision they do not prefer, either because they are intimidated, they are embarrassed, they collapse from peer pressure, or they are eager to reach a decision—any decision.<sup>15</sup> The pathologies of unanimity are compounded when we consider the symmetrical nature of the requirement: jurors in the minority—especially when that minority is small—find themselves with little hope to turn the verdict around. The best these jurors can hope for is a hung jury, which leaves few people (save some defendants) very happy. Accordingly, the somewhat puzzling persistence of the unanimity requirement and its symmetry commands our attention.<sup>16</sup>

---

CONSTITUTION AND CRIMINAL PROCEDURE 161, 165 (1997) (1994) (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273, 274 (George Lawrence trans., J.P. Mayer ed., 1969) (13th ed., 1850) (claiming that "[t]he jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule")). The Supreme Court thinks this aspect of the jury is important too. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Williams v. Florida*, 399 U.S. 78 (1970).

13. WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* 354-55, 357 (1994) (1875).

14. As I suggested *supra* note 9, the military's choice to allow non-unanimous verdicts may be related to its relatively restricted peremptory challenge policy. Since court martial panel membership cannot be controlled by the lawyers, pluralism likely reigns and counsels for more relaxed decision rules.

15. *See generally* CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* 14-38 (2003) (noting that "people are extremely vulnerable to the unanimous views of others"); TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION* (1995).

16. To the extent that the preference for unanimity is bound up with the concern that non-unanimous verdicts will appear less legitimate to citizens and other players in the criminal justice system, it is worth noting that many countries have legitimate criminal justice systems without unanimity; indeed, no other country has a symmetrical unanimity requirement. More, the states that have experimented with non-unanimous verdicts have not reverted back to the unanimity rule—and there is little evidence in those states of a desire to return to the unanimity requirement. *But see* Ashbel S. Green, *Experts Ponder Crime-Issues Vote; Surprised Political Observers Say the Split Result Doesn't Indicate that People Are Less Tough on Crime than They Used To Be*, *THE OREGONIAN*, Nov. 4, 1999, at C1 (reporting that Oregon's "Measure 72," an initiative that asked voters to relax the jury decision rule for murder convictions from unanimity to 11-1 verdicts, failed to garner

Often the debates about the proper decision rules for the criminal jury take place among social scientists, who offer either experimental evidence—usually from mock juries of college students where ‘jurors’ know that no one’s fate hangs in the balance<sup>17</sup>—or

---

the support of the majority of the electorate despite having done so in a prior initiative (“Measure 40”) passed by the voters in 1996 but struck down by the courts).

17. Rarely does the experimental design even involve the drama of a trial; mock jurors are often asked to read evidence or watch videos of fake trials. *See generally* Brian H. Bornstein, *The Ecological Validity of Jury Simulations: Is the Jury Still Out?*, 23 LAW & HUM. BEHAVIOR 75 (1999) (surveying jury research design and finding that simulations are “becoming less realistic over time”); *but see* Shari Seidman Diamond, *Illuminations and Shadows From Jury Simulations*, 21 LAW & HUM. BEHAVIOR 561 (1997) (remaining optimistic about increasing sophistication in research design). To be sure, Bornstein argues that at least with respect to the objections associated with experimental participant demographics (participants in most jury research are college students) and the media of presentation (most simulations are not life-like), there is some empirical and comparative evidence suggesting that these factors do not furnish good reason to challenge the validity of generalizing from the experimental scenario to real-life juries (to which researchers have very limited access). *But see* Bornstein, *supra*, at 78-79, 82-83 (acknowledging that in 5 of 26 studies there were differences in results that could be traced to whether the participants in the mock juries were students rather than adults (though emphasizing the 21 cases in which no differences could be found) and acknowledging that in 3 of 11 studies that could be used to assess whether presentation media resulted in different verdicts, presentational media did have an effect (though emphasizing the 8 cases where no difference could be found)). Still, Bornstein appreciates that there are very few studies that can be used to measure the external validity of jury simulation and that the “potential impact of other factors, such as variations in whether or not the mock jurors deliberate and the consequentiality of the task, require further investigation.” *Id.* at 88. Although his conclusions are ultimately optimistic about validity, he is up front about the limited nature of the proof.

For Bornstein’s more extended thoughts on the “consequentiality” problem—that fake jurors only decide the fate of a fake defendant and rarely need to expend as much time and effort as real jurors—see Brian H. Bornstein & Sean G. McCabe, *Jury Decisionmaking: Jurors of the Absurd? The Role of Consequentiality in Jury Simulation Research*, 32 FLA. ST. L. REV. 443 (2005) (surveying five “consequentiality” studies, three of which involved no deliberation, and concluding that the studies are indeterminate but that “consequentiality” can affect outcome, participants’ memory of evidence, and internal decision-making processes); *see also id.* at 460 (suggesting that “consequentiality” may be somewhat more relevant in the criminal rather than civil context).

On the other hand, we are starting to get new data on *real* civil juries. *See* Shari Seidman Diamond, Mary R. Rose, & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201 (2006). Still, this data has somewhat limited value for the study of the *criminal* jury; and Diamond and her co-authors acknowledge as much. *See id.* at 208-10.

I should make clear that I do not wish to denigrate empirical work on the jury—and find much of it instructive and useful. Indeed, when I turn to summarizing some of the reasons others offer for their views about decision rule policy, I draw upon empirical evidence. *See generally* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL., PUB. POL’Y, & L. 622 (2001) (reviewing the empirical literature on juries, summarizing findings of 11 studies that specifically focus upon decision rules, and concluding that “juries not required to be

formal models—using unverified assumptions<sup>18</sup>—to argue for particular permutations of rules. More central to my approach here is how proposed rules for the criminal jury link up with democratic political theory more generally—and how the decision rule for the jury can be made sense of in light of the political decision rules of the society in which the criminal jury finds itself. In the case of the United States, there is a clear disjunct between our general democratic decision rules and our criminal jury decision rules: we tend to remain committed to unanimity in the context of the jury but we seem to use majority rule for major political decisions, on our Courts of Appeals, and on our Supreme Court. Americans use seemingly majoritarian procedures to settle hotly contested questions of value; resort to such an extreme rule as unanimity is virtually unprecedented in American political life.

Yet, I argue here that taking simple majoritarianism as the baseline in American society would also be an error. I argue instead that *supermajoritarianism* is far more entrenched in our political and constitutional culture than is usually assumed, and that a supermajority rule for conviction by criminal juries makes sense against this background. Once I can show that the unanimity rule's anomaly is not that it isn't majoritarian but that it isn't supermajoritarian, I can provide more support for the argument to relax the unanimity requirement, harmonizing the jury decision rule with the political theory of American constitutional decision rules

---

unanimous tend to take less time to reach a verdict, take fewer polls, and hang less often. Juries also tend to cease deliberating when a quorum is reached, and jurors serving on juries required to reach unanimous verdicts have tended to report being more satisfied and confident that the jury reached the correct verdict. Conversely, several studies have found little or no impact of assigned decision rule, but these studies tend to have obvious methodological weaknesses such as little or no variance in jury verdicts, severe deliberation time limits, and small samples. Although decision rule effects appear to be small but real, they are also likely to be contingent on other factors, such as the strength of the evidence.”) (citations omitted). But it remains true that researchers have very little access to actual jurors and actual juror deliberation—and claims about what might happen under a particular decision rule are invariably speculative to some extent. *See id.* at 698 (acknowledging that assigned jury decision rule is not a major variable “with sizable effects on jury decision outcomes”). Indeed, especially so in my case because the hybrid decision rule I ultimately endorse has not been empirically tested as far as I know.

Although she probably continues to disagree with my use of and attitude toward empirical work, I thank Donna Shestowsky for instruction and conversation about the empirical study of juror decision-making.

18. *See, e.g.,* Timothy Feddersen & Wolfgang Pesendorfer, *Convicting the Innocent: The Inferiority of Unanimous Jury Verdicts Under Strategic Voting*, 92 AM. POL. SCI. REV. 23 (1998) (assuming strategic voting—i.e., that jurors only care about a case if their vote can make a difference to the outcome).

more generally. I offer a “coherentist” argument for a supermajority jury decision rule for conviction, which is primarily meant to be a “thumb on the scales”: I do not mean for this account to be a slam-dunk argument for supermajoritarian rules all the time, only for it to shift the burden back onto those that favor unanimity and majoritarian rules. But do not think this is merely a positive or descriptive account; there is normative force to the argument for supermajoritarianism in particular institutional contexts—and I hope to show why the criminal jury is one such institution that should be harmonized with the more general (and principled) preference in American political theory for supermajoritarian decision rules.

In the case of acquittals, however, I reject requiring high degrees of consensus above the majority threshold so that we can (1) give due respect for the presumption of innocence, (2) lower the number of hung juries, and (3) incentivize deliberation. By lowering the number of jurors the minority (presumptively for acquittal)<sup>19</sup> must convince to get its desired verdict during the deliberation stage, we are most likely to encourage members of the minority to try to convince a few jurors in the supermajority (presumptively for conviction) to achieve their verdict preference. If a small superminority had to convince a full supermajority to get its desired result, the members of the minority would much more likely keep quiet and would not have many incentives to participate in deliberation; as soon as they see that they are outnumbered by a supermajority, they are unlikely to believe they can turn the verdict around. But if they only need to convince a few jurors to get their way, they will engage fully to achieve an acquittal. These reasons counsel us to reject supermajoritarianism in the context of criminal jury acquittals. Given that we tend to want to give defendants some benefit of the doubt, the symmetry of the decision rule is as misguided as the unanimity requirement itself; it should require fewer votes to acquit than to convict.<sup>20</sup>

---

19. I make this presumption because there is a 75% conviction rate, even with unanimity rules. See National Center for State Courts, *Jury Decision-Making FAQs*, available at <http://www.ncsconline.org/WC/FAQs/JurDecFAQ.htm> (last modified on July 18, 2005).

20. Although I do not intend to explore every aspect of “softening” the acquittal decision rule from unanimity to a majority rule here, I believe a reasonable challenge could come from within the camp of those who want acquittal verdicts to have more meaning in our sentencing practices. See, e.g., Elizabeth E. Joh, Comment, “*If It Suffices To Accuse*”: *United States v. Watts and the Reassessment of Acquittals*, 74 N.Y.U. L. REV. 887 (1999) (arguing that we ought to prevent judges from using acquitted conduct as a sentencing consideration). It is certainly possible that relaxing the number of votes needed to acquit might have effects on how an acquittal is perceived by our sentencing



Two executive summaries—and some explanation of them—follow before I get to the affirmative argument I wish to make. In the first (contained in Part II), I summarize some of the advantages and disadvantages of various decision rules as a matter of general democratic theory. The typology is rough but provides some guidance as to why regimes may select particular decision rules. I try to show why different institutional contexts may recommend different decision rules even though each can be properly considered to have democratic credentials. In concluding Part II, I explore a common classification from political science that distinguishes democracies based on their preferences for particular decisional principles. This paves the way for me to classify the United States as a regime that has a principled preference for supermajoritarianism. Americans generally assume that the United States is majoritarian and this has some trying to account for how the unanimity requirement in the criminal jury can be justified in a majoritarian regime. But by re-conceptualizing the American regime as supermajoritarian through and through, a supermajoritarian jury decision rule becomes easier to accommodate—and begs the relevant question: why we don't have supermajoritarian rules in the criminal jury context?<sup>21</sup>

---

regimes and society more generally. But Joh's article makes sense only because the acquittal has been so far debased in our society that it is hard to imagine doing it more harm: acquitted conduct shows no signs of becoming less relevant in sentencing, notwithstanding a rigorous decision rule. I agree with Joh that there is a "communicative function to acquittals," *id.* at 900, that gets undermined when acquitted conduct is used to enhance sentences. Yet, I would still like to increase the number of acquittals for repose, for coherence with other decision rules in our society, and for giving effect to the presumption of innocence beyond the "beyond a reasonable doubt" requirement.

Joh has also suggested (this time in person in October 2005) that one could get even more creative with hybridizing decision rules: one might require a supermajority or unanimity for an "innocent" verdict (one we do not currently have in the United States) and only require a majority to get a "not guilty" verdict.

21. There is a burgeoning literature in political science trying to account for the growth of supermajoritarian rules in the Senate's internal procedures. *See, e.g.*, S.A. BINDER, *MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS* (1997); David R. Mayhew, *Supermajority Rule in the U.S. Senate*, 36 *PS: POL. SCI. & POL.* 31 (2003); Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 *U. CHI. L. REV.* 361 (2004). As an unintended consequence of my argument here, I provide an indirect defense of that development in Senate procedure.

My argument could also be used to help support Bruce Ackerman's recent proposal that the "advise and consent" provisions for Senate approval of judicial nominees be read to require a two-thirds supermajority. The advantages of such a decision rule are obvious: the nominees would need to be centrists and garner a larger consensus. This rule works well for Germany's appointments to its Constitutional Court, and Ackerman thinks it could work well in the United States as well. *See* Bruce Ackerman, *Judicial Extremism: A German Antidote*, *L.A. TIMES*, February 19, 2003, at B15, *available at*

Moving from the general to the specific, the second executive summary (in Part III) outlines the arguments made for various decision rules in the context of the criminal jury. Although hardly exhaustive, the executive summary offers a fair cross-section of the landscape in this area. Unlike most discussions in this field, I subdivide the summary along the dimension of a/symmetry—whether the same vote should be required to convict as to acquit—because that aspect of selecting the proper decision rule has been underemphasized.

In Part IV, I offer an argument for supermajoritarian requirements for conviction rooted in our general constitutional commitment to supermajoritarianism. I present a coherentist account for a supermajority rule for conviction, but ultimately endorse a simple majority rule for acquittal: since the costs are asymmetric with respect to conviction and acquittal, I am persuaded that such asymmetry should be mirrored in the jury decision rule. While Akhil Amar has made an effort to teach Americans about their Constitution through the Bill of Rights—and especially the jury provisions therein—I use the opposite methodology: I hope to illuminate the criminal jury provisions of the Bill of Rights by reinforcing the underlying structure of the Constitution as supermajoritarian.<sup>22</sup> Part V concludes.

## II. Three Democratic Decision Rules

When taking to the task of institutional design, democrats need to decide on a catalogue of decision rules. While many take for granted de Tocqueville's claim that "[t]he very essence of democratic government consists in the absolute sovereignty of the majority,"<sup>23</sup>

---

[http://www.law.yale.edu/outside/html/Public\\_Affairs/353/yls\\_article.htm](http://www.law.yale.edu/outside/html/Public_Affairs/353/yls_article.htm). His colleague Judith Resnik came to the idea a few months later, but got the same idea published in the *New York Times*. See Judith Resnik, *Supermajority Rule*, N.Y. TIMES, June 11, 2003, available at [http://www.law.yale.edu/outside/html/Public\\_Affairs/384/yls\\_article.htm](http://www.law.yale.edu/outside/html/Public_Affairs/384/yls_article.htm). Of course, the recent use of the filibuster in connection with President Bush's nominations to the courts suggests that a supermajority of 60 is already needed (for cloture)—and the argument further supports this departure from majoritarianism. For more on supermajoritarianism as it relates to the judicial confirmation process, see John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARD. L. REV. 543 (2005); and Brent Wible, *Filibuster vs. Supermajority Rule: From Polarization to a Consensus- and Moderation-Forcing Mechanism for Judicial Confirmations*, 13 WM. & MARY BILL OF RTS. J. 897 (2005).

22. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). I thank Nick Daum for this methodological insight.

23. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 35 (1956).

there is considerable variation in the decision rules that can fairly be considered democratic. If stability is a goal of a democracy, more than mere majorities may be required, since majorities can shift very easily. Even if majority rule is the linchpin of democracy, there is reason to believe that the adoption of *only* majoritarian rules can actually stymie the potential for majorities to rule: for example, if popular majorities directly elect members of a parliament, and those members use majority rule as their decision procedure, the resulting legislative decisions may represent the preferences of a mere 25% of the electorate.<sup>24</sup> Another obvious reason for the democrat to desire consent of more than a mere majority is the pathology we have come to call the “tyranny of the majority”: large segments of populations may get oppressed at the hands of an insensitive majority, so various forms of consociational government, where minorities are consulted or given veto power, may be preferred to pure majoritarianism. These results (among many others) encourage democratic designers to consider a range of decision rules for political life.<sup>25</sup> The executive summary below lists some of the advantages and disadvantages of various decision rules that can be considered democratic. While any design choice will need to be context-specific because “the costs and benefits of a particular institutional choice can only be properly weighed in light of the total institutional package,”<sup>26</sup> there are very general things that can be said in support of and in opposition to each rule. Here I pick only three possible decision rules,<sup>27</sup> but they are the

---

24. This insight can be traced to JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* (1861). Mill used this insight to argue for proportional representation as the appropriate electoral system to bring about true majority rule—and many who study electoral systems emphasize that majoritarian systems often produce government coalitions that are not even endorsed by a plurality of voters. See, e.g., G. Bingham Powell, Jr., *Political Responsiveness and Constitutional Design*, in *DEMOCRACY AND INSTITUTIONS: THE LIFE WORK OF AREND LIJPHART* 9, 9 (Markus M.L. Crepaz et al., eds., 2000) [hereinafter *DEMOCRACY AND INSTITUTIONS*].

25. In a fascinating contribution to the debate about decision rules, Adrian Vermeule has most recently drawn our attention to “submajority rules” that exist within democratic regimes. See Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 *J. POL. PHIL.* 74 (2005).

26. Bernard Grofman, *Arend Lijphart and the New Institutionalism*, in *DEMOCRACY AND INSTITUTIONS*, *supra* note 24, at 43, 54-55.

27. One could imagine a much more elaborate spectrum. See, e.g., Jack H. Nagel, *Expanding the Spectrum of Democracies: Reflections on Proportional Representation in New Zealand*, in *DEMOCRACY AND INSTITUTIONS*, *supra* note 24, at 113, 119 (arguing that the spectrum should include: Unanimity; Consensus Democracy; Supermajoritarian Democracy; Majoritarian Democracy; Pluralitarian Democracy; Factional Rule; Elite Rule; and Dictatorship). Still, Nagel’s scale extends beyond decision rules that could fairly be called democratic.

three that can be considered the building blocks of more complex democratic systems. I make an effort below the summary to explicate the main features of the lists textually. I conclude the Part by showing how one might classify complete regimes containing a multitude of decision rules based on their propensity to prefer a particular rule type.

**Rule: Unanimity**

**Theorists and Proponents:** Wolff<sup>28</sup>/ Buchanan  
& Tullock<sup>29</sup>/ Mansbridge<sup>30</sup>/ Lijphart<sup>31</sup>

**Pros:**

- guarantees individual autonomy against governmental action
- contributes to legitimacy
- suppresses conflict
- focuses attention on the common good and unity
- tries to draw minorities into coalitions and empowers them
- elicits information with strict decision rule
- encourages deliberation to garner consensus
- actively promotes consensus

**Cons:**

- results in compromises no one really wants because ideas and policies get thinned out to garner complete agreement
- privileges the status quo
- very difficult to achieve
- very time-consuming to reach
- represses conflict excessively and may lead to alienation, preference falsifying, and deep-seated hostilities

---

28. ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970).

29. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

30. JANE J. MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY (1983).

31. AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES (1984).

**Rule: Supermajoritarianism**

**Theorists and Proponents:** McGinnis & Rappaport<sup>32/</sup> King<sup>33/</sup> Mueller<sup>34/</sup> Levmore<sup>35</sup>

**Pros:**

- navigates between the advantages of other decision rules: it enhances deliberation, legitimacy, the common good, and autonomy, while incentivizing coalitions and information-revelation
- controls against easy capture by interest groups
- promotes consensus without setting bar so high as to allow lone holdouts to ruin it for everyone

**Cons:**

- results in compromises no one really wants because ideas and policies get thinned out to garner substantial agreement
- privileges the status quo<sup>36</sup>
- somewhat difficult to achieve
- may repress dissenters
- does not result in higher likelihood of “correct” answers because just as the probability of correct decision increases with move

---

32. McGinnis & Rappaport, *supra* note 21; John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995).

33. Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609 (2000); Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363 (1998).

34. DENNIS MUELLER, CONSTITUTIONAL DEMOCRACY (1996); DENNIS C. MUELLER, PUBLIC CHOICE II (1989).

35. Saul Levmore, *Conjunction and Aggregation*, 99 MICH. L. REV. 723 (2001); Saul Levmore, *More Than Mere Majorities*, 2000 UTAH L. REV. 759.

36. ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 140 (1989); Amy Gutmann, *Deliberative Democracy and Majority Rule*, in DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS 227, 230 (Harold Hongju Koh & Ronald Slye eds., 1999). This is arguably the most oft-cited deficiency of supermajority rules.

toward unanimity, so does the probability that the minority is wrong increase; accordingly, providing the minority veto power may be unwise<sup>37</sup>

- coalition-building reifies groups and can be balkanizing
- no better than simple majority at avoiding Condorcet losers (i.e., choices that might win in a ranking system but that would fail in pair-wise competition with other choices)

### Rule: Majoritarianism

Theorists and Proponents: Dahl<sup>38</sup>/ Rae<sup>39</sup>/  
May<sup>40</sup>/Michelman<sup>41</sup>

#### Pros:

- promotes the greatest good for the greatest number
- does not suppress conflict
- allows deliberation to fulfill its function practically<sup>42</sup>
- promotes equality
- promotes responsiveness
- enables discovery of the “correct” answer (Condorcet Jury Theorem)<sup>43</sup>
- tolerates dissent with open arms, leading to a

37. DAHL, *supra* note 36, at 142.

38. *See id.*

39. Douglas W. Rae, *The Limits of Consensual Decision*, 69 AM. POL. SCI. REV. 1270 (1975); Douglas W. Rae, *Decision-Rules and Individual Values in Constitutional Choice*, 63 AM. POL. SCI. REV. 40 (1969).

40. Kenneth O. May, *A Set of Independent Necessary and Sufficient Conditions for Simple Majority Rule*, 10 ECONOMETRICA 680 (1952).

41. Frank I. Michelman, *Why Voting?*, 34 LOY. L.A. L. REV. 985 (2001) (enumerating utilitarian, egalitarian, and epistemic benefits of majority rule); *see also* Anthony Downs, *In Defense of Majority Voting*, 69 J. POL. ECON. 192 (1961).

42. Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338 (1987).

43. “[A] majority vote among a suitably large body of voters, all of whom are more likely than not to vote correctly, will almost surely result in the correct outcome.” Paul Edelman, *Legal Interpretations of the Condorcet Jury Theorem*, 31 J. LEGAL STUD. 327 (2002). Of course, what it means to “vote correctly” is not clear: voters often ‘accidentally’ vote at odds with their preferences because they fail accurately to assess candidates or ballot initiatives.

more open society

- allows for quick change when change is necessary

**Cons:**

- results in compromises no one really wants because it leads to two-party competition where both parties are moderate and homogenous
- prone to the tyranny of the majority
- no promise of cost minimization because each side is incentivized to get every last vote, as a single person's vote could be decisive
- easiest to manipulate with capture
- will still select Condorcet losers (i.e., choices that might win in a ranking system but that would fail in pair-wise competition with other choices)
- presumes political equality without actually ensuring it: some minority groups may need more than one vote to have a truly equal voice<sup>44</sup>

**A. Unanimity**

Let's take unanimity first. Its credibility as a democratic decision rule is often impugned because it seems to call for a homogeneity that liberal democracies assume is non-existent and ultimately undesirable. Conceding the fact that a pluralistic society will have members who value different ultimate ends, democrats resort to non-unanimous decision procedures to enable collective action; if everyone had a veto, nothing could get done. Nevertheless, the practical opposition to the decision rule does not necessarily convince all democrats that leaving it in place as a regulative ideal or an aspiration is misguided. Indeed, unanimity plays a role in quite a few thinkers' democratic political theory.

Robert Paul Wolff defends anarchism precisely because he thinks a unanimous direct democracy is the only decision rule that preserves individual autonomy against governmental coercion.<sup>45</sup>

---

44. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32, at 730.

45. *See* WOLFF, *supra* note 28.

James Buchanan and Gordon Tullock, from a broadly conceived economistic libertarian perspective endorse unanimity as the linchpin of legitimacy in constitutional politics.<sup>46</sup> And Jane Mansbridge, from a communitarian perspective, marshals empirical evidence for the proposition that social forces can often be optimized under unanimity rules;<sup>47</sup> she prefers a unitary democracy to the adversarial democracy associated with majoritarianism.<sup>48</sup> Mansbridge thinks getting beyond adversarial democracy will help suppress conflict and focus attention on unity and the common good.

Finally, Arend Lijphart, from a comparativist orientation, is often associated with the view that there are varieties of nonmajoritarian democracies that should be preferred to the pure majoritarian form.<sup>49</sup> He is one of the foremost expositors and proponents of what he calls “consensus democracy” and “consociational democracy;” these are democracies that are functional and stable with decision rules shy of unanimity but more sensitive to minorities than pure majoritarian regimes. He writes, “An ideal democratic government would be one whose actions were *always* in *perfect* correspondence with the preferences of *all* its citizens.”<sup>50</sup> Lijphart uses this ideal of unanimous consent to argue for regimes that build in protections for electoral minorities: such regimes encourage deliberation, elicit information that may otherwise remain undisclosed, and look to build broad coalitions and empower minorities, even if they don’t give them a veto power (which they sometimes can, of course).

The disadvantages of unanimous decision rules, however, are obvious, even to those who wish to see more unanimity used; its proponents are not surprised that the rule is not often selected for political life. As the lists above suggest, unanimity often results in compromises no one really wants; it unduly privileges the status quo;

---

46. See BUCHANAN & TULLOCK, *supra* note 29.

47. See Tali Mendelberg, *The Deliberative Citizen: Theory and Evidence*, in 6 RESEARCH IN MICROPOLITICS 39 (Michael Delli Carpini et al. eds., 2000), available at <http://www.princeton.edu/~talim/TheDeliberativeCitizen.pdf>.

48. See MANSBRIDGE, *supra* note 30, at 3, 5 (arguing also for “consensus” as a decision rule, which is different from unanimity and can be assimilated to a form of supermajoritarianism); see also Nagel, *supra* note 27, at 123 (“Majoritarianism is, after all, inherently adversarial”).

49. See LIJPHART, *supra* note 31; AREND LIJPHART, PATTERNS OF DEMOCRACY (1999); Arend Lijphart, *Varieties of Nonmajoritarian Democracy*, in DEMOCRACY AND INSTITUTIONS, *supra* note 24, at 225.

50. See LIJPHART, *supra* note 31, at 1.



it is extremely difficult and time-consuming to reach such high thresholds of agreement; and it can lead to the repression of conflicts, which, in turn, can lead to alienation, preference falsification, and hostility among members who have gone along with decisions merely to end debate and go home.

### **B. Majoritarianism**

Next let's consider majoritarianism. The rule's proponents range from liberals to utilitarians. Kenneth May's defense builds on (Kenneth Arrow's) three criteria for desirable vote aggregation: *monotonicity*, *undifferentiatedness*, and *neutrality*.<sup>51</sup> *Monotonicity* requires that the social choice is not made to favor the option losing support; that is, there must be positive responsiveness—if everyone is indifferent and one person votes, the decision rule should be responsive to that one vote. *Undifferentiatedness* requires that each person's vote be counted the same, regardless of who cast the vote; anonymity is required. And *neutrality* requires that the status quo not be given any weighted advantage. It should be obvious how unanimity and supermajoritarianism do not satisfy all of these conjunctive conditions and how majoritarianism does: unanimity and supermajoritarianism both fail the conditions of monotonicity and neutrality.

More, Robert Dahl and Douglas Rae emphasize the utility and equality gains associated with majority rule: it maximizes the good of self-determination over the set of individuals making a decision and instantiates a form of political equality.<sup>52</sup> Finally, as a consequence of what is called the Condorcet Jury Theorem, there are epistemic benefits to majority rule: it is likely to discover the correct answer (if (1) it is a correct answer one is after; (2) all citizens are assumed to be equally likely to be correct; and (3) that probability is assumed to be greater than 50%).<sup>53</sup> The disadvantages of majority rule are many-fold, even if the Condorcet Jury Theorem's assumptions are unimpeachable. Some of these 'cons' are listed above and I refer the reader there.

### **C. Supermajoritarianism**

What then of supermajoritarianism? Is it merely a compromise

---

51. May, *supra* note 40, at 680-81.

52. DAHL, *supra* note 36, at 138-42; see Rae sources cited *supra* note 39.

53. See Edelman, *supra* note 43, at 327.

position or does it have a normative political theory of its own? I wish to suggest that supermajoritarianism has a catalogue of advantages that go beyond a mere navigation of the advantages and disadvantages of the other rules. This theoretical perspective, moreover, is underemphasized by political theorists and lawyers even though, as I will argue in Part IV, the United States can be usefully classified as a supermajoritarian regime.

First, there is no embarrassment in a compromise position that confers net benefits that neither other rule can. Supermajoritarian rules clearly do navigate between majoritarian and unanimous decision rules, enjoying some of the benefits of each while mitigating some of their respective disadvantages. Supermajoritarianism enhances deliberation by requiring higher levels of agreement, maximizes legitimacy by insisting on more agreement than simple majorities do, directs attention to common goods, and furnishes stability against rapidly shifting majorities, all while incentivizing coalition-formation and the publicizing of private information to garner larger majorities. Majority rules confer a degree of legitimacy as well of course, but since majorities are very easy to form, there is usually less need for coalition-forming and publicizing private information. Since a simple uninformed vote without any deliberation will routinely achieve a majority (or, at the very least, a plurality),<sup>54</sup> the decision rule has pathologies because it is so easily achieved, especially if more considered or deliberative preferences are valued. A supermajority requirement, by setting the bar higher, allows the enactment of only consensus positions, while discouraging the tyranny of simple majorities.<sup>55</sup> Unanimity also requires broad coalitions leading to deliberation and focuses attention on common goods; but it creates incentives to falsify preferences and to keep information private, rendering legitimacy suspect. Supermajoritarianism finds a way to pave a middle ground to attempt to optimize many democratic desiderata to a feasible extent; and that compromise has normative force.

The built-in preference for the status quo that a supermajority rule affords is a source of much criticism of supermajoritarianism.<sup>56</sup>

---

54. It is worth highlighting that even among 'majoritarians,' there is a general assumption that pluralities will often suffice: a candidate or policy initiative needn't always get 50.1% of the vote, only more votes than the second place finisher.

55. On the flip side, however, it also allows a relatively small group of holdouts to prevent action.

56. See DAHL, *supra* note 36, at 140; Gutmann, *supra* note 36, at 230.

There are at least two affirmative reasons democrats might want protection for the status quo in certain institutional contexts. First, stability often recommends it: if constitutions are always up for grabs by constantly shifting majorities, constitutional politics can be disorienting, distracting government from the business of normal politics. This is why written constitutions often require special majorities for their amendment. Second, if a regime wishes to privilege deliberative and representative legislation to non-deliberative directly democratic decision-making, democrats might want to privilege the status quo when that status quo has been produced by deliberative and representative legislation. This would mean requiring a supermajority decision rule for measures of direct democracy if they contravene more deliberative legislation.<sup>57</sup> Consider in this vein Switzerland, where a majority of a majority of cantons is required to pass a referendum.<sup>58</sup> This is a more specific case of the general reason to want higher threshold decision rules for change: what McGinnis and Rappaport call “attractive baselines.”<sup>59</sup> If we like the rule currently in place (or the process that brought it about), supermajority rules can benefit us—and we have no reason to shy away from the criticism that we are privileging the status quo because it sometimes makes sense to do so.

There are also structural advantages to supermajoritarianism that are revealed most clearly when considering the potential ‘costs’ of a decision rule—the costs a person might consider when deciding upon a decision rule. These costs include: (1) *error costs*, or the costs associated with making a bad or erroneous choice; (2) *decision costs*, or the time and effort it takes to make a decision; (3) *personal costs*, or the costs associated with having a rule affect the decision-maker negatively now or in the future; and (4) *transaction costs*, or the side-payments necessary to achieve the level of agreement required by the decision rule.<sup>60</sup> While the consideration of these costs doesn’t make it

---

57. See generally ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004) (arguing for a supermajority rule in the context of direct democracy and explaining the benefits of deliberative decision-making); Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 *WHITTIER LAW REVIEW* 143 (2002) (exploring republicanism and its commitment to deliberative decision-making).

58. See Kris Kobach, *Switzerland*, in *REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY* 98 (David Butler & Austin Ranney eds., 1994).

59. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32, at 742.

60. This cost analysis is adapted from Grofman, *supra* note 26, at 54; BUCHANAN & TULLOCK, *supra* note 29, chaps. 15-17; and McGinnis & Rappaport, *Our*

obvious that democrats should opt for supermajority rules in every circumstance, they can recommend when such rules might be appropriate. For example, McGinnis and Rappaport argue that when minority special interests are organized and funded such that they can too easily buy a majority bloc of votes (by contributing to the dominant party, say), supermajority rules may be appropriate because they will encourage pluralism without allowing for easy capture.<sup>61</sup>

It is worth considering how these categories of costs might help us evaluate supermajoritarianism. The decision costs associated with supermajoritarianism, for example, are usually going to be higher than the decision costs majority rule imposes; but they are considerably lower than the costs exacted under unanimity, where there is a greater likelihood that a single individual will hold out and prevent an affirmative decision from being made. However, one could argue that compensation for these extra decision costs (above the costs majority rule exacts) is afforded by the rule's avoidance of error costs. By making the threshold of agreement higher, one can argue that certain errors can be avoided, errors that could come to pass if all that is required for affirmative action is a simple majority. Without a higher threshold for agreement, no deliberation is incentivized, deliberation which could reveal important and relevant information necessary to make a good decision. So the decision rule can be thought to trade decision costs for error costs, attempting to 'break even' by sacrificing some decision cost 'losses' for error cost 'gains.'<sup>62</sup>

Personal costs also require careful weighing and may recommend supermajoritarianism in certain domains. In the context of the criminal jury, for example, there are countervailing considerations associated with personal costs. Any particular individual may want to opt for a unanimity rule, thinking (perhaps wrongly)<sup>63</sup> that it will work

---

*Supermajoritarian Constitution*, *supra* note 32, at 728-50.

61. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32, at 734-39.

62. To be sure, the supermajoritarian decision rule still can be described as a version of 'minority rule.' But that is just the other side of 'supermajority rule,' with heightened degrees of consensus and deliberation. Also, 'minority rule' may be a mischaracterization if the status quo is a regime put in place by a temporally prior supermajority. If the 'dead hand' was one that once achieved a supermajority, as opposed to a mere majority, waiting until a new supermajority can be achieved for change may be less problematic. *Id.* at 796-800, discuss the "supermajoritarian solution to the dead hand problem."

63. If it is an acquittal she is after, the symmetrical unanimity requirement might work to her disadvantage, of course. Although one might think that a hung jury is a de facto equivalent to an acquittal, hung juries often lead to re-prosecution and/or plea deals

to her advantage if she commits a crime. But the same person, assuming that it will be unlikely that she will ever be charged with a crime, may want a majority rule system, thinking she is worse off with a system that allows too many criminals to roam free. The weighing of these costs can recommend a supermajority rule, as it navigates between the advantages of each rule; again, the compromise can have normative force.

Transaction costs are hard to measure in the abstract; but once one picks a context, they become easier to assess. For example, supermajoritarianism actually can be thought to be easier to corrupt than majoritarianism in certain contexts because someone who wishes to “buy” a decision will oftentimes only need to pay a superminority to hold out and prevent an affirmative decision from being made. Say a ballot initiative requires 66% of the voting public to pass. A committed individual *trying to prevent the initiative from passing* will find it cheaper to buy her result than under majority rule, where she will have to buy the votes of 50.1% of the voting public rather than 33.4% of that same pool under supermajoritarianism. On the other hand, someone in favor of the initiative will have to pay more to get it passed under supermajoritarianism than under pure majoritarianism.

Accordingly, transaction costs are hard to measure without more information about context—and depend on the desirability of the baseline as much as they do on the decision rule itself. Unanimity works the same way on the transaction cost register: if all you want is to buy a hung jury in a criminal trial under the unanimity rule, it is extremely cheap to get the result by paying off a lone juror. But if you want to buy an acquittal (or a conviction), it is the most expensive rule there is, since you’d have to pay everyone.

To be sure, supermajority rules have a catalogue of disadvantages. First, by encouraging coalitions, the resulting compromises may result in alternatives that are actually disfavored by a majority or plurality. There may be a majority available for a particular proposition that gets defanged to build more support. Also, supermajority rule, just like majority rule, still can select ‘Condorcet losers’ and eliminate a ‘Condorcet winner.’<sup>64</sup> Moreover, it

---

(for which the defendant will be punished notwithstanding the hung jury). See AMERICAN BAR ASSOCIATION, PRINCIPLES FOR JURIES AND JURY TRIALS 23 (2005), available at [www.abanet.org/juryprojectstandards/principles.pdf](http://www.abanet.org/juryprojectstandards/principles.pdf) (one-third of the cases that produce hung juries get re-tried; half lead to dismissals or plea agreements) (citing PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM?, 83-84 (2002)). From the perspective of stigma too, acquittals are not comparable to hung juries.

64. A ‘Condorcet loser’ is a decision that would lose in head-on competition with all

can, like unanimity, encourage preference falsification (though, of course, so can majoritarianism in theory). And supermajorities often confer no additional confidence in the rightness of the outcome.<sup>65</sup> Refer to the executive summary for more.

#### D. Classifying Regimes

The discussion of supermajority rules above seems remarkably context-specific, showing any rule to be recommended only for particular institutional choices. I have given a typology of decision rules that suggests that eclecticism is probably the best strategy in designing a polity: there is rarely a reason to (and there is good reason not to) decide on one uniform decision rule for all institutional

---

other alternatives; a ‘Condorcet winner’ beats all other alternatives in pair-wise comparisons. The famous ‘voting paradox’ suggests that—under very simple assumptions—neither majority nor supermajority voting helps eliminate losers or picks winners; indeed, according to a school of social choice that has extensively analyzed different voting rules, the order of presenting alternatives can lead to incoherent preference aggregation and intransitive rankings. For more on these social choice aggregation problems, see generally the work of Levmore, *supra* note 35. For a nice explanation and history of cycling problems, see, e.g., Saul Levmore, *Parliamentary Law, Majority Decision Making, and the Voting Paradox*, 75 VA. L. REV. 971 (1989). But there is recent work suggesting that cycling is much more hypothetical than empirical, at least at the macro-level of political decision-making in legislatures. See GERRY MACKIE, *DEMOCRACY DEFENDED* (2003) (exhaustively discussing the social choice literature on decision rules and their consequences for democracy); Don Herzog, *Dragonslaying*, 72 U. CHI. L. REV. 757 (2005) (reviewing and summarizing Mackie); *but see* Saul Levmore, *Public Choice Defended*, 72 U. CHI. L. REV. 777 (2005) (same, but criticizing Mackie’s focus on Congress because cycling is less likely to appear there than in other political and social contexts). In short, cycling is “the paradox that arises if, for example, there are three individuals or subgroups, 1, 2, and 3, with preferences of ABC, CAB, and BCA, respectively. With simple majority voting, A defeats B, B defeats C, and yet C defeats A.” *Id.* at 780.

65. The jury is one context where thresholds higher than simple majorities may do some work to ensure a verdicts’ rightness. If accuracy of a verdict means conformity with the “product rule,” a supermajority or unanimity helps us be sure that the defendant should indeed be held liable or found guilty. For this very interesting issue, see Levmore, *Conjunction and Aggregation*, *supra* note 35.

Here is what is meant by conformity with the ‘product rule:’ If there are multiple requirements for guilt (say, both X and Y must be true), and guilt must be beyond a reasonable doubt (say, with 90% certainty), majority rule may create a conjunction problem. If half of the jurors think X is true with 90% confidence and that Y is true with 90% confidence, it may be that there is only 81% certainty in the verdict and that the reasonable doubt threshold has not been met. But under majority rule, the majority of jurors will vote guilty. Supermajority requirements (and unanimity requirements) help protect against this anomaly. Read Levmore to understand just how. In short, the more people that are needed to reach the confidence level, the more likely it is that some jurors in the supermajority have an even greater confidence level that can help us worry about the conjunction problems less.

contexts. Nevertheless, central to the project of this Article is classifying regimes as having predispositions to selecting one class of decision rules. In Part IV, I try to describe the United States as a supermajoritarian regime. Here I simply wish to suggest that such broad classifications of regime types are possible and useful by explaining very quickly a prominent classification of regime by decision rule type: Arend Lijphart's distinction between the consensus and the majoritarian democracies.

Lijphart's classification of democracies has been extraordinarily influential in the field of political science. He distinguishes two ideal types of democracy based upon the collection of their decision rules. Lijphart's distinction between majoritarian and consensus democracy fundamentally derives from two different answers to a basic question: How many people have their preferences taken into account in the policy decisions of government? Majoritarian democracy answers 'more than half the people,' but with no requirement of a supermajority. Consensus democracy, according to Lijphart, answers 'as many people as possible.'<sup>66</sup>

The majoritarian democracy—also known as the Westminster model—has the following institutional features associated with it, even though no actual democracy has all such features: (1) executive power is concentrated in a cabinet chosen by a majority party; (2) the cabinet dominates the Parliament; (3) there is a two party system; (4) the system of elections is majoritarian (first past the post) and disproportional (single member districts); (5) interest group pluralism exists; (6) there is a unitary and centralized government; (7) unicameral legislatures make law; (8) there is no written constitution and what there is has easy amendment procedures; (9) there is no judicial review; and (10) central banks are controlled by the executive.<sup>67</sup>

By contrast, the main features of consensus democracy include: "oversized coalitions, executive-legislative balance of power, a multiparty system, multiple issue dimensions, electoral proportionality, federalism and decentralization, bicameralism, [] a rigid constitution protected by judicial review," and central bank independence.<sup>68</sup> His paradigmatic examples of majoritarian

---

66. Nagel, *supra* note 27, at 117 (citing LIJPHART, *supra* note 31, at 4).

67. See generally LIJPHART, *supra* note 49 (where the additional consideration of a central bank augments the analysis from the 1984 classification, LIJPHART, *supra* note 31, and the executive-parties and unitary-federal dimension are put in greater relief).

68. Lijphart, *supra* note 49, at 228.

democracies include the United Kingdom and New Zealand (despite its change to proportional representation in 1996), and the paradigmatic examples of consensus democracies include Switzerland and Belgium. The United States emerges in Lijphart's work "as the most prominent example of a mixed majoritarian-consensual type of democracy."<sup>69</sup> On the one hand, the United States has a majoritarian electoral system with two parties. On the other, it has a written constitution with judicial review, where the 13 smallest states with a mere 5% of the population can block constitutional amendments. More, it is bicameral, where the Senate over-represents small states.<sup>70</sup>

Lijphart is now interested in "establishing that consensus democracies are more egalitarian and participatory and offer better representation of women and minorities. They are also more welfare-oriented, more environment-friendly, and less punitive in their criminal justice systems."<sup>71</sup> If I could assimilate consensus democracy and supermajoritarian democracy—or at least show that they perform similarly on these registers—I might be able to show supermajoritarianism as conducive to yet another series of benefits. Yet I do not wish to make an effort here to engage in such assimilation. The purpose of this diversion is only to show that such classification is possible, and that one can aggregate institutional decision rules and say something useful about the decision rules prevalent in a regime as a whole. In sum, regimes are susceptible to analysis based upon their decision rule choices.

### III. Decision Rules for the Criminal Jury

Before I turn to my depiction of the United States as supermajoritarian and the coherentist argument targeted to bolster a supermajoritarian decision rule in the context of the criminal jury, I hope to provide a sense of the various arguments offered on behalf of proposed decision schemes in the particular institutional context of the criminal jury. Again here, I provide an executive summary.<sup>72</sup> To

---

69. LIJPHART, *supra* note 31, at 36. Ultimately, he classifies the United States as majoritarian.

70. *Id.* at 190.

71. David Wilsford, *Studying Democracy and Putting it into Practice: The Contributions of Arend Lijphart to Democratic Theory and to Actual Democracy*, in DEMOCRACY AND INSTITUTIONS, *supra* note 24, at 1, 2.

72. The "Southern California electoral systems mafia," "a group of political scientists working in the tradition of Lijphart and others at UC-San Diego and UC-Irvine, tends to use the chart and executive summary form to simplify and summarize the advantages and disadvantages of various decision rules. *See, e.g.*, DEMOCRACY AND INSTITUTIONS, *supra*



be sure, each year some law review article appears that retreads this territory at exorbitant length (I suppose that is what the law *reviews* are for), and I refer the reader to WESTLAW or LEXIS for those treatments. My contribution here is merely to provide quick sound-bites and citations to give a flavor for the state of the field so that I can show how my approach differs from the standard modes of approaching the question of the appropriate decision rule in the context of the criminal jury.

A few preliminary observations, however. Take note that my executive summary is subdivided along the dimension of the potential symmetry of a decision rule because asymmetric costs may militate against symmetrical rules. If the set of cost considerations enumerated in Part II.C are weighed, it should be easy to see that they may recommend asymmetry. As I shall argue in Part IV, the supermajority rule I wish to support is only for conviction; for acquittal, I endorse a majority rule. This permutation of asymmetry is unique to the decisional choices currently on the proverbial table; usually those in favor of supermajority requirements argue for an acquittal either upon a failure to achieve the relevant supermajority or upon a supermajority voting affirmatively for acquittal. To be sure, symmetry is usually presumed without careful consideration, irrespective of an analyst's preferred decision rule.

Taking a/symmetry into account, the executive summary has five parts. The first analyzes the arguments for the symmetrical unanimity rule, which is the norm in most United States jurisdictions for felony trials: it requires unanimity to convict and unanimity to acquit—or the jury hangs. The second analyzes the arguments for a one-way unanimity rule: it would require unanimity to convict, with any vote shy of unanimity providing a defendant a full acquittal, disabling the prosecution from trying the defendant again. No one I have ever come across professionally or otherwise endorses this rule, suggesting that our commitment to the presumption of innocence may be less than whole-hearted. The third column analyzes a symmetrical supermajority rule, proposing supermajority requirements for both conviction and acquittal. The fourth summarizes the arguments for and against a one-way supermajority rule, requiring a supermajority to convict but allowing any vote shy of the supermajority to acquit the

---

note 24, at 50-51, 57-58, 156, 173. I adopt their strategy in this Article even though I am not a comparativist by training and even though I find myself in Northern, rather than Southern, California. For more on the labeling of this group of scholars, see Grofman, *supra* note 26, at 61 n.9.

defendant.<sup>73</sup> The final column considers the virtues and disadvantages of a pure majoritarianism in the criminal jury context.

Another notable feature of the comprehensive (though not exhaustive) list below is the parallels that can be traced with Part II's analysis. The following considerations appear in both analyses: the desire (1) to incentivize deliberation in the voters or jurors, (2) to procure accuracy of decision, (3) to reveal private information about the subject matter under debate (information that only some members may have or remember), (4) to confer legitimacy both internally to the decision-makers and to the public at large, (5) to achieve representativeness of the views of the decision-makers, and (6) to pay sufficient sensitivity to minority dissent and majority tyranny. In both the general and specific cases, there is a desire to remain attentive to the pathologies associated with the balkanization and excessive decision costs that may result from giving holdouts too much power, as well as the problem of preference falsification that sometimes results when consensus is required.

But the specific institutional context of the jury triggers the consideration of other factors as well, including: (1) the potential civic virtues fostered by various decision rules, (2) the empirical consequences of various decision rules and their efficiency (as evidenced in social science experiments and modeling), (3) the sentiments of jurors towards deliberation and verdict under the various decision rules, (4) the effect that the presumption of innocence should have on the chosen decision rule, (5) the effect a chosen rule will have on a prosecutor's choice of what to charge—because the more stringent the decision rule, the more likely the jurors will pick a compromise of a lesser included offense,<sup>74</sup> (6) the

---

73. As I highlighted *supra* note 9, the military uses this rule for most non-capital offenses.

74. Doug Berman has urged me to consider that, in light of Stephanos Bibas's argument that only four percent of defendants actually get a jury trial, any argument about jury decision rules should focus on "the shadows that any proposed reform would cast over plea bargaining." Doug Berman, *As if juries really matter in criminal cases . . .*, SENTENCING L. & POL'Y BLOG, available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/10/as\\_if\\_juries\\_re.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/10/as_if_juries_re.html) (citing Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001)). Berman is right, of course, that the focus on the jury decision rule is a narrow one indeed and I have, accordingly, included consideration of how decision rule choice may influence charging decisions.

Yet it is very hard to hazard a guess about whether a symmetrical unanimity requirement in particular is doing any work to encourage defendants to go to trial. We know that very few defendants do go to trial—and one could argue that whatever discouragement is further afforded by relaxed decision rule requirements on the

degree of belief in the jury as merely a fact-finder, (7) whether it is important to make nullification easy or difficult,<sup>75</sup> (8) whether jury selection procedures should have an effect on the decision rule, and (9) an evaluation of the phenomenon of the hung jury. My intention here is not to address each of these issues at length but merely to highlight their relevance in any discussion about jury decision rules.

For example, if one finds it particularly important to avoid the waste of resources associated with hung juries, one could prefer a particular form of asymmetrical rule: requiring unanimity or a supermajority to convict and treating a failure to achieve the threshold as an acquittal. A majority rule may also suffice.<sup>76</sup> If one finds it especially important that a presumption of innocence should be institutionalized, requiring unanimity or a supermajority to *acquit* seems virtually indefensible, though that is our current practice, of course. If the jury merely finds facts, perhaps unanimity is more defensible because factual truths should garner full consensus. If, however, the jury decides many questions of value, value pluralism usually encourages a decision rule shy of unanimity. If jury selection procedures continue to make it harder and harder to remove jurors,<sup>77</sup>

---

conviction side could be offset by the relaxed agreement requirements on the acquittal side. In short, although Berman's point is well taken, it is really just guesswork and many other facets of decision rule choice are worth considering as well. I suppose it would be an interesting empirical project to see if Louisiana and Oregon defendants' decisions to go to trial are at all influenced by the relaxed decision rule. However, since the rule I propose is not one in place in any jurisdiction, it would remain challenging to evaluate how my proposed rule would affect defendant decision-making.

75. Nullification is when juries refuse to convict (or affirmatively acquit) a defendant of a charged crime not because the jury is convinced of the innocence of the defendant but because jurors are convinced of the injustice of the laws under which the defendant is being charged or of the injustice of the application of the laws to the circumstances of the defendant. Jurors have the power of nullification, for better or worse, and the exercise of that power (when it is clear that it is being exercised) can be used by the state to garner information about what members of the citizenry think of a law, its scope, a prosecutor's techniques, and the like. We'll have to bracket the debate about the "legitimacy" and inherent "illegality" of nullification, as well as the argument that juries *should* settle questions of law rather than questions of fact. Reasonable people can disagree about whether it is a practice to be encouraged. For a nice summary of the history and issues surrounding nullification, see ABRAMSON, *supra* note 3, at 67-88. The Supreme Court is said to have repudiated the practice in *Sparf v. United States*, 156 U.S. 51 (1895), but there can be no question that its practice is nearly impossible to police effectively and that the power continues to be exercised by juries to the chagrin of prosecutors everywhere.

76. Of course if we maintain juries of even numbers (are we superstitious about 13? Is 11 really too few?), we can still imagine hung juries with simple majoritarianism.

77. See, e.g., *Batson v. Kentucky*, 476 U.S. 79 (1986); *Powers v. Ohio*, 499 U.S. 400 (1991); *Georgia v. McCollum*, 505 U.S. 42 (1992); *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994).

more obstinate and politically active jurors may be seated, suggesting that unanimity might be too much to expect. If peremptory challenges are to be disfavored altogether because they cannot be exercised in anything but a discriminatory or prejudiced fashion,<sup>78</sup> unanimity may be unattainable.

Let me proceed to map the decisional options and their rationales and weaknesses; I do not suggest that this executive summary is fully exhaustive, only that it is representative of views one is likely to encounter in the literature, with arguments cutting in many different directions.

### **Rule: Symmetrical Unanimity**

**Theorists and Proponents:** Smith<sup>79</sup>/ Primus<sup>80</sup>/  
Kassin<sup>81</sup>/ Hastie et al.<sup>82</sup>/ Abramson<sup>83</sup>/  
The American Bar Association<sup>84</sup>

### **Pros:**

- more thorough verdicts, eliciting more information from every juror; extensive deliberation serves a function of bringing out as much independent knowledge of evidence as possible<sup>85</sup>
- inculcates moral-educative virtues (especially the civic virtue of deliberation) and forces

78. See, e.g., ABRAMSON, *supra* note 3, at 139-41; AMAR, *supra* note 12, at 170-71; Toni M. Massaro, *Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 560-563 (1986); see also *supra* note 9 (highlighting courts martial, where each side gets only a single peremptory and the decision rule is non-unanimous in non-capital cases).

79. See Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposal for Reform*, 48 ALA. L. REV. 441 (1997).

80. See Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARD. L. REV. 1417 (1997).

81. See Saul M. Kassin, *The American Jury: Handicapped in the Pursuit of Justice*, 51 OHIO ST. L.J. 687 (1990).

82. See REID HASTIE ET AL., *INSIDE THE JURY* (1983).

83. See ABRAMSON, *supra* note 3.

84. See THE AMERICAN BAR ASSOCIATION, *PRINCIPLES FOR JURIES AND JURY TRIALS* 21-25 (2005), available at <http://www.abanet.org/juryprojectstandards/principles.pdf>.

85. See Nemeth, *supra* note 10 (using 6-person juries); see also James H. Davis et al., *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. PERSONALITY AND SOC. PSYCHOL. 1 (1975) (finding that although verdicts did not vary under different decision rules, average deliberation time was increased under unanimity).

- jurors to look past their 'group' interests<sup>86</sup>
- political function is reinforced by having community speak with one civic voice
- patina of legitimacy to the public relies on reaching unanimity<sup>87</sup>
- in 10% of cases using a unanimity rule, the first ballot minority convinces the majority,<sup>88</sup> proving that the minority does not get railroaded under this decision rule
- the objective truth should be subjectively convincing, and, inversely, the full agreement of subjective convictions is the criterion of objective truth<sup>89</sup>
- jurors under unanimity are more satisfied than their majority rule counterparts that deliberation was fair and complete<sup>90</sup>
- even under unanimity, only 6.2% of juries deadlock,<sup>91</sup> a reasonable price to pay for the certainty unanimity affords<sup>92</sup>
- governing others in the jury may be different from self-government, where rules other than unanimity are acceptable; although in politics we are engaged in self-government, a jury is a unit of other-government, where different rules should prevail<sup>93</sup>

---

86. See, e.g., DE TOCQUEVILLE, *supra* note 12, at 273-74.

87. See Gary C. Jacobsohn, *The Unanimous Verdict: Politics and the Jury Trial*, 39 WASH. U. L.Q. 48-57 (1977). This is probably the most common justification for the unanimity rule. For empirical evidence that citizens link legitimacy and unanimity, see Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333 (1988) (finding perceptions of fairness to be related to decision rule design, but finding a willingness to trade procedural costs and thoroughness of deliberation depending on seriousness of crime).

88. KALVEN & ZEISEL, *supra* note 11, at 488-89.

89. See GEORG SIMMEL, *The Phenomenon of Outvoting*, in *THE SOCIOLOGY OF GEORG SIMMEL* (Kurt Wolff ed. & trans., 1950) (1908).

90. See generally SAKS, *supra* note 10.

91. National Center for State Courts, *Jury Decision-Making FAQs*, available at <http://www.ncsconline.org/WC/FAQs/JurDecFAQ.htm> (last modified on July 18, 2005).

92. For experimental evidence that unanimity is likely to lead to a higher rate of hung juries (as if you needed any), see generally SAKS, *supra* note 10; Nemeth, *supra* note 10; Kerr et al., *supra* note 10; and Buckhout et al., *supra* note 10. But see Padawer-Singer et al., *supra* note 10 (finding non-unanimous juries to hang more often).

93. Primus, *supra* note 80.

- deliberation should be emphasized over voting and representation; using political decision rules is inappropriate in the jury context, where value pluralism should give way to searching for the truth<sup>94</sup>
- unanimity is part of the beyond a reasonable doubt standard
- the rule has been around for a long time
- it was fine to have less severe rules when juries were very large (as in Athens), but smaller juries need to compensate with unanimity
- there is evidence that jurors that don't deliberate under unanimity consider their deliberations less thorough and tend to think their fellow jurors are less open-minded<sup>95</sup>
- since jurors are still overwhelmingly male and white, unanimity forces white men to listen to minority jurors who are often members of minorities that have suffered exclusion from juries in the past<sup>96</sup>

**Cons:**

- higher chances of deadlock and wasted resources
- leads to *Allen*<sup>97</sup> charges, which intimidates the minority
- giving everyone a veto is too radical and too high a cost to pay
- groups told to use unanimous rule polarize by gender<sup>98</sup>

---

94. ABRAMSON, *supra* note 3, at 205.

95. Diamond et al., *supra* note 17 (analyzing 50 civil juror deliberations in Arizona, with 16 non-unanimous verdicts). It should be noted that although less and lower quality deliberation ostensibly took place under non-unanimous verdicts in Diamond et al.'s sample, the rules at issue were all symmetrical; accordingly it is impossible to ascertain whether the jurors in the minority might have deliberated more if they had a better chance of getting the verdict they wanted with a lower threshold requirement for their preferred verdict. Of course, the hybrid I ultimately propose could not neatly be applied in the civil jury context.

96. See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000).

97. *Allen v. United States*, 164 U.S. 492 (1896) (allowing judges to charge a deadlocked jury with a firm instruction to work toward a verdict).

- minority jurors deliberating under unanimity feel uncomfortable during deliberations<sup>99</sup>
- with very few exceptions, the first ballot determines the outcome of the verdict, regardless of the decision rule, so unanimity is unnecessary<sup>100</sup>
- fetishizing unanimity puts process over outcome: just because some want to incentivize deliberation doesn't mean the jury system can dispense with the task at hand: deciding the fate of the defendant without hanging
- juries don't only decide facts (even if that is their official role); they decide norms too, where unanimity is simply too much to ask for
- if commonsense is the virtue, why not side with 9, 10 or 11 people over the few?
- historians suggest that the rule is an historical accident<sup>101</sup>
- England, Australia, Ireland, and South Africa all relaxed the requirement even though they once adhered to the unanimity rule<sup>102</sup>

**Rule: Asymmetrical Unanimity**

**Theorists and Proponents:** No one I've ever read.

**Pros:**

- would do away with all hung juries
- gives full force to the idea that proof needs to be beyond a reasonable doubt; even if a second jury were to achieve unanimity after the first hangs, the full panel of 24

---

98. Martin F. Kaplan & Charles E. Miller, *Group Decision-Making and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule*, 53 J. PERSONALITY & SOC. PSYCHOL. 306 (1987).

99. See Nemeth, *supra* note 10 (finding that conflict is more intense under unanimity rules).

100. See KALVEN & ZEISEL, *supra* note 11, at 488.

101. See, e.g., SIR P. DEVLIN, TRIAL BY JURY 48 (1988).

102. Edward P. Schwartz & Warren F. Schwartz, *And So Say Some of Us. . . What To Do When Jurors Disagree*, 9 S. CAL. INTERDISC. L.J. 429, 445-46 (2000) (citing local laws).

- could still not be said to be unanimous
- gives full effect to the presumption of innocence
  - nullifying would be easy, getting more information from the citizenry
  - the prosecution should never get two bites at the apple if the jury is there to protect the accused against the state
  - on the European Continent, juries use one-way rules<sup>103</sup>

**Cons:**

- seems too likely to let people off the hook
- forces the prosecutor to under-charge
- this voting rule has attracted no proponents; no country uses the rule in the criminal jury context<sup>104</sup>
- symmetry seems fairer
- Americans don't actually assume innocence; it is a heuristic for jurors so that they keep an open mind

**Rule: Symmetrical Supermajority**

**Theorist and Proponent:** Morehead<sup>105</sup>

**Pros:**

- even when unanimity is the required decision rule, many groups will unanimously opt to bind themselves to a supermajority rule<sup>106</sup>
- the minority has a better chance of flipping the vote under supermajority, which will in turn incentivize deliberation; in any case, there are external mechanisms available to enforce deliberation so we do not need to rely solely on the decision rule<sup>107</sup>

103. *Id.* at 446-47 (citing local laws).

104. *Id.* at 448.

105. See Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933 (1998).

106. See Davis et al., *supra* note 85.

107. When the British began to allow supermajority verdicts in 1967, they required jurors to deliberate for at least two hours. See JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 206 n. 65 (1977).



- assigning supermajority or unanimous decision rules makes little consistent difference to verdicts
- 55% of all hung juries are estimated to be split 6-6, 7-5, 8-4, or 9-3;<sup>108</sup> accordingly, a 10-2 requirement would trigger deliberation in most cases.
- it is harder to remove bizarre jurors from the panel owing to restrictions in jury selection procedures, so a supermajority helps control against holdouts
- reinforces an ideal of allowing dissent, which we do among judges and in politics
- provides an opportunity to track citizen preferences better, providing more information to the state about particular defendants and particular laws
- allows for nullification to happen more easily
- compromises are less likely than under unanimity so greater accuracy is actually more likely<sup>109</sup>
- supermajorities ensure that aggregation will cohere with the product rule, something simple majorities do less well<sup>110</sup>
- while the 6.2% hung jury number is an average, there are cities that report rates as high as 30%. By contrast, in Oregon (a state with supermajority rules), eight counties report a rate of .4%<sup>111</sup>
- since Americans care more about getting decisions right efficiently than paying for lessons in civic virtue, it makes sense to prefer a cheap and accurate decision

---

108. James Kachmar, *Silencing the Minority: Permitting Non-unanimous Jury Verdicts in Criminal Trials*, 28 PAC. L.J. 273, 302 (1996)

109. HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* 215 (1996).

110. See the explanation of the product rule *supra* note 65.

111. Schwartz & Schwartz, *supra* note 102, at 438. "A recent study undertaken by the National Center for State Courts and National Institute of Justice examined hung jury rates in 28 state and federal courts from 1996 to 1998. The overall average hung jury rate for the jurisdictions was 6.2 percent." National Center for State Courts, *Jury Decision-Making FAQs*, available at <http://www.ncsconline.org/WC/FAQs/JurDecFAQ.htm> (last modified on July 18, 2005).

rule; that is what due process requires<sup>112</sup>

- would harmonize American practice with other common law nations

**Cons:**

- hung juries still result
- nullification may happen more easily than Americans are comfortable with—and too much nullification undermines the rule of law
- less deliberation may happen than it would under unanimity<sup>113</sup>
- deliberations may become verdict-centered rather than evidence-centered
- jurors will feel less satisfied with their verdicts, and will be more combative and more closed-minded
- there is no obvious proper supermajority rule: why should 10-2 be any more desirable than 9-3 or 8-4? Unanimity and majority are bright-line rules and seem more principled
- as a criminal defendant, each citizen would probably want a unanimity rule
- minority members may be less likely to speak under supermajority rules than under unanimity because their voice may become irrelevant<sup>114</sup>

**Rule: Asymmetrical Supermajority  
Theorists and Proponents: Menard<sup>115</sup>/Courts  
martial<sup>116</sup>**

**Pros:**

- does away with all hung juries.
- only asymmetry gives effect to assuming innocence
- nullification is easier to achieved, allowing more

112. See *Mathews v. Eldridge*, 424 U.S. 319 (1976).

113. *Diamond et al.*, *supra* note 17.

114. *Smith*, *supra* note 79, at 523.

115. Richard H. Menard, Jr., Note, *Ten Reasonable Men*, 38 AM. CRIM. L. REV. 179 (2001) (arguing for a 10-2 one-way rule).

116. See *supra* note 9.

information to get to the state about the citizenry's preferences

- prosecutors would not try to overextend with charges, serving as a check upon the practice of over-charging
- the threat of the criminal actually going free is enough of an incentive for jurors to take a searching look and deliberate
- on the European Continent, all juries use one-way rules<sup>117</sup>

**Cons:**

- may encourage prosecutor to under-charge
- nullifying will be too easy
- symmetry seems fairer
- Americans don't actually assume innocence; it is only a heuristic.

**Rule: Majority**

**Theorists and Proponents:** Schwartz & Schwartz<sup>118</sup>

**Pros:**

- does away with all hung juries (except 6-6 votes)
- since only 'close' cases fail to achieve unanimity, majority rule is only necessary for a few hard cases for which it can provide repose
- selection rules are unfair and are often used to frustrate a verdict; this would be made difficult under majority rule
- if the fair cross-section requirement of the jury is to be taken seriously, challenges must be restricted and majority rule should prevail
- insincere voting is prevalent with other rules both as to guilt and lesser included offenses<sup>119</sup>

---

117. Schwartz & Schwartz, *supra* note 102, at 446-47 (citing local laws).

118. Schwartz & Schwartz, *supra* note 102.

119. On preference falsification more generally, see KURAN, *supra* note 15 and SUNSTEIN, *supra* note 15. Even Shari Diamond's study, discussed *supra* note 17, which is

- this decision rule is consistent with the presumed American preference for majority rule and has been adopted by countries on the Continent, Scotland, Latin America, and Russia<sup>120</sup>
- in groups assigned an objective problem-solving task, majority rule may be better at neutralizing inequalities of influence within the group<sup>121</sup>
- if the vision of the jury as a mini-legislature has any purchase, majority rule is the norm
- hung juries are a bigger problem than many think
- current fair cross-section requirements produce disagreement and the need for new, more pluralist rules<sup>122</sup>
- reinforces centrism<sup>123</sup>
- deliberation will happen because the minority is always close to victory<sup>124</sup>

**Cons:**

- we should discourage thinking of the jury as a site of pluralism, only truth-seeking
- the rule minimizes deliberation because it would only be necessary in 6-6 splits
- supermajority rules already get rid of most hung juries so there is no good reason to relax the rule further
- just because those who serve are more diverse doesn't mean simple majorities are sufficient; even under pluralism, some

---

targeted to support unanimity rules in the context of the civil jury, shows evidence of preference falsification by minority jurors.

120. Schwartz & Schwartz, *supra* note 102, at 447 (citing local laws).

121. The robustness of this finding is a matter of debate. See Mendelberg, *supra* note 47, at 40 (citing G. Falk, *An Empirical Study Measuring Conflict in Problem-Solving Groups Which Are Assigned Different Decision Rules*, 35 HUM. REL. 1123 (1982); G. Falk & S. Falk, *The Impact of Decision Rules on the Distribution of Power in Problem-Solving Teams with Unequal Power*, 6 GROUP & ORG. STUD. 211 (1981)).

122. Schwartz & Schwartz, *supra* note 102, at 448-49 (citing ABRAMSON, *supra* note 3, at 99; Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861, 1862-1869, 1871 (2000)).

123. Schwartz & Schwartz, *supra* note 102, at 454. It does this by letting the median voter have her way.

124. *Id.* at 455.

consensus-building institutions are desirable

- while Socrates' jury used majority rule, it had 500 jurors;<sup>125</sup> the small size of modern juries re-commends a more stringent voting rule<sup>126</sup>
- minority members of mock juries assigned a majority decision rule are particularly dissatisfied with group deliberation<sup>127</sup>

#### **IV. An Argument To Support a Supermajority Rule for Conviction (and a Majority Rule for Acquittal) for the American Criminal Jury**

John McGinnis and Michael Rappaport have been writing articles for a decade spelling out the advantages of supermajority rules in the legislative domain, especially in the context of self-imposed rules by Congress to require three-fifth voting supermajorities to increase income tax rates and/or federal spending.<sup>128</sup> Recently, they have concentrated their efforts to discuss “our supermajoritarian Constitution,”<sup>129</sup> arguing that “the central principle underlying the Constitution is governance through supermajority rules.... Supermajoritarianism is [] a means of promoting the more general constitutional principle of promot[ing] the public good within a system of popular representation.”<sup>130</sup> I wish

---

125. See R. ALLEN, *SOCRATES AND LEGAL OBLIGATION* 56, 135 n. 24 (1980) (Socrates was convicted by a vote of 280-220); R. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS* 36, 255 (1927) (Socrates was convicted by 501 jurors; he lost by 61 votes).

126. This argument is suggested by Levmore, *Parliamentary Law*, *supra* note 64, at 975. He continues: “Note that as a probabilistic matter, a simple majority of a very large number of voters may be said to be correct at least as much as a supermajority of a smaller group.” *Id.* at 975 n. 12 (citing Kuflik, *Majority Rule Procedure*, in *DUE PROCESS: NOMOS XVIII* 305-06 (J. Pennock & J. Chapman eds., 1977)).

127. Kerr et al., *supra* note 10.

128. See the sources cited *supra* note 32.

129. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32.

130. *Id.* at 705. King's work has also focused on the supermajoritarian character of the Constitution. See the sources cited *supra* note 33. Others take as their focus supermajority rules in congressional procedure. See in this regard the sources cited *supra* note 21. Obviously, the renewed interest in the filibuster and cloture rules has generated much more attention to supermajority rules of late, especially as they pertain to the appointments process. See generally McGinnis & Rappaport, *supra* note 21; Wible, *supra* note 21.

to endorse their account here and characterize the American constitutional regime as supermajoritarian. This constitutional preference, I argue, militates against implementing a simple majority or unanimous jury decision rule for conviction in American criminal courts and supports the argument for a supermajority rule by showing it to be a proper and attractive baseline. In turn, this argument shifts the burden back upon those who wish to depart from it. However, owing to asymmetric costs associated with conviction and acquittal, I find a departure from supermajority rule warranted in the case of acquittal. First I make my affirmative case (IV.A); I then respond to some potential objections (IV.B).

**A. “Our Supermajoritarian Constitution” and Why It Recommends a Supermajority Rule for Conviction by the Criminal Jury: Coherentism**

Let me list the constitutional provisions that are explicitly supermajoritarian in the order of appearance in the document:

1. Officials and judges cannot be convicted in impeachment proceedings without a two-thirds vote in the Senate.<sup>131</sup>

2. Expulsion from Congress requires a two-thirds vote of the relevant house.<sup>132</sup>

3. Veto overrides require a two-thirds vote in each house.<sup>133</sup>

4. Deadlock in the Electoral College cannot be broken by the House of Representatives without a two-thirds quorum of states.<sup>134</sup>

5. Ratification of treaties requires a two-thirds approval by the Senate.<sup>135</sup>

6. Amending the Constitution requires a two-thirds vote of Congress for proposal and a three-fourths supermajority of states for ratification.<sup>136</sup>

7. Ratification of the Constitution itself required nine of thirteen states.<sup>137</sup>

8. Persons who served in office and then joined the Confederacy were unable to undertake various offices without a two-thirds vote of

---

131. U.S. CONST. art. I, § 3, cl. 6.

132. *Id.* art. I, § 5, cl. 2.

133. *Id.* art. I, § 7, cl. 2.

134. *Id.* art. II, § 1, cl. 3 (amended by *id.* amend. XII).

135. *Id.* art. II, § 2, cl. 2.

136. U.S. CONST. art. V.

137. *Id.* art. VII.

both houses.<sup>138</sup>

9. Congress may approve a suspension of the President for inability to serve over his objection by a two-thirds supermajority vote.<sup>139</sup>

About these provisions, McGinnis and Rappaport correctly note that:

these supermajority rules are not restricted to small or unimportant parts of the Constitution. They involve some of the most significant matters that affect the structure of the polity and the nation's political stability. . . . They also apply in a wide variety of areas (e.g., foreign and domestic affairs, constitutional and personnel matters) and apply to a broad range of bodies.<sup>140</sup>

Yet it would be too quick to characterize the American regime as supermajoritarian on the basis of these provisions alone. Congress still ostensibly uses majorities for most legislation (except when it needs to overcome the filibuster),<sup>141</sup> and most judicial panels decide their cases with majority rule (even though the judiciary's check on majority rule is one of the best arguments against thinking of constitutional democracies as majoritarian).<sup>142</sup> Supermajority rules exist elsewhere in the document, however, in places that aren't as easy to see.

McGinnis and Rappaport argue (consistent with a view held by many political scientists) that bicameralism functions like a supermajority rule because different constituencies elect the members of the two chambers and different deliberative processes and trades must be made to get the support of the respective houses.<sup>143</sup> As Julian

---

138. *Id.* amend. XIV, § 3.

139. *Id.* amend. XXV, § 4.

140. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32, at 712.

141. See generally Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997). The political scientists cited *supra* note 21 also address the way the filibuster and the committee structure may be conceived as non-majoritarian.

142. I suppose it is also fair to say that appellate judicial panels regularly use a two-thirds supermajority rule, since divided three-member courts split 2-1. *En banc* courts in the federal system decide by majority, however. See FED. R. APP. PR. 35.

143. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32, at 712-15 (citing BUCHANAN & TULLOCK, *supra* note 29, at 233-48; MUELLER, CONSTITUTIONAL DEMOCRACY, *supra* note 34, at 193-95; William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of*

Eule argues, “Bicameralism forces majorities to seek broader coalitions. It imposes something like a supermajoritarian voting rule.”<sup>144</sup> As I suggested earlier, Lijphart also considers American bicameralism distinctly nonmajoritarian because the Senate over-represents small states.<sup>145</sup>

McGinnis and Rappaport even argue that presentment effectively sets up a *tricameralism* for legislation, as the President is elected by yet a third constituency whose term, cycle of election, and bundle of preferences differ from the voters’ congressional representatives; this necessitates the coalition-building that is often considered one of supermajoritarianism’s advantages.<sup>146</sup>

More, McGinnis and Rappaport expose the ‘absolute’ prohibitions of the Bill of Rights and the Constitution (no *ex post facto* laws, no titles of nobility, etc.) as themselves supermajority rules, since they are all amendable through Article V’s supermajority procedures.<sup>147</sup> Finally, McGinnis and Rappaport prove just how entrenched these supermajoritarian rules are or were in *state* constitutions and other legal institutions in the United States, as well as show just how many more supermajoritarian rules were proposed at the Constitutional Convention. I need not restate their arguments in full. In sum, “the introduction of supermajority rules [] represents

---

*Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 956; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74-75 (2001)).

144. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1557 (1990).

145. LIJPHART, *supra* note 31, at 190. See also Richard N. Rosenfeld, *What Democracy? The Case for Abolishing the United States Senate*, 308 HARPER’S MAG. 35 (May 2004) (arguing that overrepresentation of small states recommends abolition of the Senate).

146. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32, at 715-16.

147. *Id.* at 716-17. I’ll have to leave to one side Amar’s idea that the Constitution can be amended outside of Article V with simple majorities. See generally Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). For the good reasons to ignore Amar, see King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, *supra* note 33; and Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996).

Furthermore, whatever we make of Ackerman’s esotericism in elaborating how to spot “constitutional moments,” 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998), his original notion of revolutionary politics being of constitutional magnitude surely left room for the contributions of supermajorities and consensus, even if the formal requirements of Article V could not be met. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 230-94 (1991).



one of the distinctive contributions of the United States to the science of constitutionalism.”<sup>148</sup> This perspective reinforces the supermajoritarian nature of American governance.<sup>149</sup>

But does this characterization of the United States as supermajoritarian have any implications for the choice of decision rule in the criminal jury context? While the analyses in Parts II and III showed many parallels in considerations between regime decision rule choice and jury decision rule choice, the lists just as surely showed that many new factors surface in the particularized context of the jury. What McGinnis and Rappaport haven’t done—and what I do here—is use the American commitment to supermajoritarianism to bolster the argument to require supermajority rules in the criminal jury for conviction. I wish to offer a “coherentist” account, if only to show that there is nothing anomalous about this choice as a baseline, even if others ultimately offer good reasons to depart from it.

Obviously, I cannot argue that the Constitution requires a supermajority rule for conviction in the criminal jury, only that such a rule is consistent with the Constitution’s general structure and can be made coherent by thinking through how and why the Constitution has staked out the decision rules that it has. Unanimity and majoritarianism don’t have this going for them. A unanimity requirement appears nowhere in the Constitution: the ones from the Articles of Confederation, requiring unanimity for ratification and amendment,<sup>150</sup> were explicitly rejected in favor of supermajority rules. And when the jury provisions were written into the Bill of Rights, the framers refused to specify the unanimity rule prevalent at the time; *Apodaca* found this omission to have a “substantive effect.”<sup>151</sup> Many positive reasons for adopting a supermajoritarian rule are listed in the executive summary in Part III. Furthermore, because of the supermajoritarian nature of our Constitution we should be even more comfortable with the departure from simple majoritarianism and unanimity in the context of criminal jury convictions.

However, the American constitutional structure does indeed resort to majority rule more than occasionally. Yet the underlying theory of supermajority rules gives the institutional designer some

---

148. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32, at 721.

149. *Id.* at 717-19 nn. 58-62.

150. ARTICLES OF CONFEDERATION pmb., art. III, & art. IX.

151. *See Apodaca v. Oregon*, 406 U.S. 404, 410 (1972) (citing *Williams v. Florida*, 399 U.S. 78, 96-97 (1970)).

guidelines in figuring out when supermajority rules are appropriate and when majority rule should suffice; I have suggested that we should try to weigh the costs outlined in Part II.C when taking to the task of decision rule design. While it would be tiresome and unnecessary to rehearse how these costs recommend the supermajority rules actually selected by the Constitutional Convention (because McGinnis and Rappaport do it quite nicely),<sup>152</sup> perhaps explaining one will provide the reader with a feel for how the analysis goes, facilitating my application of these cost considerations to the criminal jury. Recall from Part II that these costs include *error costs*, *decision costs*, *personal costs*, and *transaction costs*.

Consider the provisions in the Constitution for the impeachment of judges and officers, requiring a two-thirds supermajority for conviction in the Senate. It is worth noting in the first instance that this is an asymmetrical rule: failure to achieve the supermajority leads to an “acquittal” of sorts (though I suppose a failure to convict could be followed up with future impeachments). Accordingly, the Constitution furnishes some support for the idea that supermajoritarian rules needn’t be symmetric for conviction and acquittal; this constitutional provision supports my ultimate endorsement of an asymmetrical rule.

This decision rule choice can be illuminated by a consideration of *error costs*. “The [f]ramers had a plausible ground for requiring a stringent supermajority rule because of the asymmetry of dangers: convicting wrongly on impeachment is more dangerous to the republic than mistakenly failing to convict because wrongful convictions could threaten the independence of the President and judiciary and lead to partisan, destabilizing cycles of reprisals.”<sup>153</sup> American constitutional design remained sensitive to the reality that a majority rule for impeachment would too easily threaten the stability and integrity of the political sphere; if pluralism were allowed to have its way in removing officers, the regime could not function efficiently because too much partisanship and instability could undermine the adjudicatory context.

On the other hand, unanimity would not allow room for political judgment, central to the impeachment proceeding: “A supermajority

---

152. See McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 32, at 750-91 (executing the analysis for impeachment, expulsion, the treaty power, bicameralism, adoption, and amendment, using some (but not all) of the cost considerations offered here).

153. *Id.* at 750.

rule provide[s] a method of infusing political judgment into impeachment while tempering political partisanship and preserving independence.”<sup>154</sup> This compromise was struck because the errors associated with ‘false positives’—convicting innocent officials—was deemed more important to avoid than extra *decision costs*, which are higher when the threshold is increased from majority rule and lower when decreased from unanimity.

*Personal cost* considerations may have also played a role in the decision rule adopted for impeachment. The members of the Constitutional Convention surely saw themselves as potential—if they were not already—office-holders and party members. Accordingly, they were aware that whatever rule they chose might directly influence their prospects or the prospects of their party for surviving impeachment trials. Against this background, their choice of supermajority rules makes sense: while majority rule would enable easy removal, unanimity would be too high a threshold for each member to feel that removal of truly guilty officials would happen when necessary. To be sure, as McGinnis and Rappaport note, “the case for supermajority rule for convictions on impeachment might have been even stronger when the Constitution was originally written than it is today,”<sup>155</sup> because now the Vice-President is usually a member of the same party as the President. Alas, removing a President leaves the same party in control of the Executive and this was not always so.

Finally, consideration of *transaction costs*—understood here as the side payments necessary to get a result through the decision rule threshold—again recommends a role for a supermajority rule in the impeachment context because majority blocs are easier to manipulate and corrupt (through campaign contributions to parties) than are broad-based supermajoritarian coalitions. Since the principal worry is with false positives rather than with false negatives, transaction cost considerations are less relevant in the context of *preventing* an impeachment; it would be easiest to prevent an impeachment under unanimity and hardest under majoritarianism; supermajoritarianism is a clean compromise choice on this dimension.

While I could try to carry out this analysis for every supermajoritarian feature in the Constitution, I hope by now I have established both that the Constitution has a generalized preference for supermajoritarian voting rules and that there is some underlying

---

154. *Id.* at 752.

155. *Id.* at 753.

theory of decision rule selection that can guide a particularized institutional choice. The only question that remains is whether the jury is an institution that can be fruitfully analyzed with the framework of the cost considerations explored here.

Let me consider *error costs* first. It is a standard mantra of American life that convicting the innocent is substantially more costly to a polity's legitimacy than letting the guilty go free; the costs are asymmetric and treating people as innocent until proven guilty is an 'attractive baseline.'<sup>156</sup> This fact alone recommends a departure from simple majority rule in the direction of supermajorities. However, letting the guilty go free too often—more likely to occur when the threshold for conviction is more stringent than majority rule—presents error costs of its own: if too many guilty go free (as might be argued can also happen under unanimity because hung juries often result in the prosecution giving up), there are costs associated with the diminished legitimacy associated with an inefficient legal system that fails to punish wrongdoers. A supermajority rule might strike the right balance, and that calculation has normative significance.

Likewise, this calculation suggests a simple majority rule for acquittals: we want an efficient way to bring government accusation to a close in the criminal context, especially if agreement cannot be reached that the state is correct and that the defendant should be punished. If we keep the decision rule too difficult to achieve for acquittal, we do not properly respect the attractive baseline of the presumption of innocence. Although sustained failures to achieve a conviction may lead to effective exoneration in the press and by the prosecution's failure to continue to prosecute, the repose and acquittal that the innocent deserve counsel us to depart from supermajoritarianism in the direction of majoritarian rules to reach verdicts of not guilty.

*Decision costs* in the context of the jury come in various forms. First, they come in the form of time: it can take a long time to get a unanimous verdict—and if hung juries are allowed, the time associated with subsequent trials must be considered as well. Second, decision costs may be assessed through considering the efficiency in getting a verdict that would likely be achieved under a less time-intensive decision rule. They also may come in the form of compromise verdicts, where juries convict on lesser-included offenses just to get the minority to go along with the verdict. Finally, they may

---

156. For an interesting and entertaining rumination on letting the guilty go free, see Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997).

come in the form of juror preference falsification or juror refusal to fully deliberate and reveal information garnered throughout the trial.

Decision costs of all these sorts seem potentially at their highest under a two-way unanimity rule, which will likely produce lengthier deliberations and more hung juries. Moreover, most unanimous verdicts reflect a vote that could have been achieved much more quickly under a different decision rule. Under unanimity rules, if a supermajority can be achieved by an early poll, the verdict will almost always ultimately reflect that supermajority.<sup>157</sup> Since hung juries generally raise decision costs, two-way unanimity rules probably perform the worst under that register, since more hung juries are associated with that rule than under any other. Still, some think the trade-off worthwhile because unanimity would likely lead to more deliberation and more revealed private information all things considered.

Ultimately, decision costs are relatively high under any symmetrical rule (supermajorities included). Symmetrical majority rule, in fact, can also have unexpectedly high decision costs—even though one might think otherwise because it is very easy to form a mere majority on a first ballot—because under such a rule, deliberations may actually alter one or two votes and that may be all that is necessary for a change in the verdict. This is one of the most interesting suggestions offered by those in favor of majority rule in the criminal jury: by keeping the votes necessary for conviction and acquittal close, the rule can incentivize deliberation and keep the *net* decision costs relatively low (even if it takes a long time) because the verdict could not have been produced with less effort.<sup>158</sup>

These considerations recommend both *against* symmetrical supermajority and unanimity rules and *for* keeping the tally needed for conviction close to that needed for acquittal. By doing so, preference falsification can be minimized and the revelation of private information can be maximized because only a small number

---

157. See KALVEN & ZEISEL, *supra* note 11, at 488. We don't know if the *superminority* is really convinced or whether they just falsify their preferences because they realize they have no chance of 'winning;' their only hope would be to hold out and hang the jury, something that may be third-best to the dissenters, who would rather reach a verdict than stay three extra days, say, just to get a hung jury result.

158. See generally Schwartz & Schwartz, *supra* note 102. It would be an interesting empirical exercise to test whether countries with majority decision rules actually save decision costs—or whether because one vote can really make a difference, jurors are willing to argue with one another for longer. The latter assumption coheres with the idea that jurors are only willing to get involved in the deliberations if they can see themselves or one another as a pivotal voter. See Feddersen & Pesendorfer, *supra* note 18.

of jurors need to change their mind to change the verdict; and deliberation would naturally result from such decision rules. Accordingly, I argue for supermajority rules for convictions and majority rules for acquittals: we may pay a price in one form of decision cost but we achieve a net benefit because the decision will much more likely be the product of authentic preferences (the dissenters never need to lie about their preferred verdict) and authentic deliberation (the rules being close ensures that the minority has a real chance to get their desired result simply by changing a few minds).

I have already explained how *personal costs* can be analyzed in the jury context in Part II.C. There, I suggested that countervailing considerations militate against both unanimity and majority rule, which parallels the discussion of impeachment above: a citizen might want a strict decision rule as applied to herself, but not want to be subject to too many acquitted criminals in the midst of her community; a supermajority rule for conviction is a good compromise with normative significance. Personal cost considerations also highlight why my proposed hybrid makes sense: we are likely to want heightened agreement requirements for our convictions but would generally be satisfied with a somewhat relaxed standard for our achieving an acquittal.

Finally, consideration of *transaction costs*—here, buying off juror votes—focuses our attention on whether we are more worried about ill-intentioned people trying to buy convictions or about defendants trying to buy themselves acquittals or hung juries. It is probably fair to say that (unlike the impeachment context) more people are worried about corruption coming from defendant-buyers who would like to get an acquittal or a series of hung juries than they are worried about people in the market to buy convictions against their enemies and competitors. This is likely why most people seem not to favor asymmetrical rules that allow defendants to go free simply upon a failure to reach unanimity or a supermajority. Not only do we worry about a few odd holdouts getting defendants acquittals, but we also worry about potential corruption.

Given these considerations, supermajoritarian rules for conviction seem preferable to unanimity rules: requiring all jurors to agree allows defendants to find one loose link to stand in the way of their own conviction through corruption; and unanimity too easily allows a single hold out (who may or may not be sensible) to hold up a verdict. But these considerations just as surely recommend two other conclusions: that some critical mass be necessary to reach an

acquittal verdict and that a substantial critical mass be necessary to reach a conviction verdict so it is not too easy to buy. Since the costs are presumed to be asymmetric (and we wish to give some weight to the presumption of innocence), supermajority rules for conviction seem most appropriate and majority rule for acquittals seems warranted.

In conclusion, taking all these considerations into account against the background of a general predilection for supermajority rules in American constitutional and political culture recommends a supermajority rule for conviction in the criminal jury context. Yet, since the cost analysis yields certain asymmetries between the decision rules for conviction and for acquittal, a particular kind of asymmetrical decision rule may be most consistent with the theory of supermajority rules, one that has not been offered before in the long-running debate about appropriate decision rules for the American criminal jury:<sup>159</sup> mere majorities should be given the power to acquit and a supermajority should be required for convictions. In the first place, asymmetrical rules are good for minimizing the extra costs associated with hung juries. Usually, those who offer asymmetrical rules want to do away with hung juries altogether. Given that there is evidence that a *symmetrical* supermajority rule produces a hanging rate of .4%,<sup>160</sup> the hybrid rule I offer will likely produce even fewer hung juries because only a very few vote tallies would be considered inconclusive. Moreover, the hybrid I offer here will provide *superminority* blocs for acquittal a real chance to get their desired verdict, incentivizing deliberation and discouraging preference falsification, two cardinal virtues that any reform proposal should inculcate—virtues that those in the majoritarian camp appropriately emphasize. Finally, my hybrid rule would give some effect to the presumption of innocence Americans wish to claim as a foundation for their system of criminal justice. While the supermajoritarianism promulgated by the Constitution recommends a supermajority rule for conviction, the implicit cost considerations of decision rule selection encourage the institutional designer to adopt a simple

---

159. Russia and Spain, two countries whose criminal juries are the newest among the civilized countries, both recently selected asymmetrical rules that are not radically different from the ultimate conclusion I endorse here: In Spain, 7 out of 9 votes are required for unfavorable decisions against defendants and 5 out of 9 votes are required for favorable decisions; in Russia, a guilty verdict requires 7 out of 12 votes, while not guilty verdicts require 6 out of 12 votes. See Stephen C. Thaman, *Europe's New Jury Systems: The Cases of Spain and Russia*, in *WORLD JURY SYSTEMS* 319 (Neil Vidmar ed., 2000).

160. Schwartz & Schwartz, *supra* note 102, at 438.

majority rule for acquittal.

Now that I have arrived at the end of my affirmative case, it should be plain that my coherentist account carries normative weight only to set up a presumption. I have concluded that the presumption should hold in the institutional context of the jury and that the burden should shift to those who wish to support other rules. There is nothing anomalous about supermajority rules—and the reasons our Constitution opts for them generally provide particularized reasons for the American criminal jury system to embrace them as well. I parry some objections in the next sections of this Article.

## B. Possible Objections

### 1. *Are You Playing Word Games with Me?*

First, one might argue that a more broadly conceived supermajoritarianism bolsters the unanimity requirement because unanimity is itself a form of supermajority rule. As McGinnis and Rappaport themselves acknowledge, there are many different forms and levels of supermajority rule, and the unanimity requirement might still be justified for the jury as an especially rigorous supermajority rule for a special legal entity. Although this seems like a promising argument for those who just can't give up on unanimity, the framers and other political scientists understand that the political theory supporting supermajority and unanimity rules are clearly different and that the Constitution opts for no unanimity rules.<sup>161</sup>

From the opposite direction, it could be argued that using *majority* rule in criminal juries could itself be considered a supermajority rule because the judge usually has discretion to set aside a verdict. Just like presentment to the President, which

---

161. I would be remiss if I failed to mention that congressional procedures do seem to contain a few provisions that contemplate unanimity. There is a "Consent Calendar," "which consists of bills involving spending of less than \$1 million on [other] Calendar[s] that a member anticipates will be passed by unanimous consent. Minor bills on the Consent Calendar are considered by the House twice a month." WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 31 (3d ed. 2001). Additionally, "[t]here is no Rules Committee in the Senate, and expedited consideration [of bills] is usually accomplished by a *unanimous consent agreement* (Senate Rule V). Like a House rule, a unanimous consent agreement is a roadmap for the bill's consideration: when it may be brought up, what amendments may be proposed, and how much time may be spent on it. Unlike a House rule, a Senate unanimous consent agreement must be acceptable to all Senators; the objection of a single Senator torpedoes it." *Id.* at 32. Obviously, these provisions for unanimity only work because they are used for ministerial functions and they are not constitutional in nature or gravity.



McGinnis and Rappaport consider suggestive of an implicit supermajority rule, the further protection of the judge could be viewed as supermajoritarian; two can play at this semantic game, the camp for 'majority' rule might say.

The first rejoinder is perhaps too evasive: if simple majority rule checked by the judiciary were the current rule, or one with a serious chance of adoption, my supermajoritarian perspective might also bless that decision rule. But I hope I was able to show that the preference for supermajoritarianism *within the jury* is principled and is not merely endorsed because of a completely generalized commitment to supermajoritarianism. In any case, since the real problem diagnosed here is the persistence of the unanimity rule, I hope exposing the polity to be supermajoritarian is instructive.

Second, an 'internal' majoritarianism results in substantial pathologies (see the lists in Parts II and III for a summary); irrespective of the potential for an external check, majority rule within the jury has undesirable consequences that an 'internal' supermajoritarianism can help cure.

The judge, finally, is very differently situated from the jury: she can only force an acquittal and never a conviction—and there is a wide power disparity among the institutional actors (for juries can never override a judge's directed acquittal and judges can never take part in juror deliberations). Even if "[i]t is useful to think of the relationship of the judge and jury in a criminal trial as a system of checks and balances,"<sup>162</sup> the internal decision-making process of the jury should trigger a supermajoritarian rule for conviction.

## 2. *Will You Commit Yourself to a Number Already?*

The previous objection has revealed that the supermajoritarianism advocated here suggests nothing about what the proper numerical rule should be. Showing the Constitution to sanction a wide range of supermajority rules does not help guide us in divining the right supermajoritarian vote tally that should be required: I have furnished no reason to prefer 8-4 (two-thirds) verdicts over 9-3 (three-fourths) verdicts or 10-2 verdicts over 11-1 verdicts. This is the slippery slope argument supermajoritarians hear often: "Any theory that might justify the use of a three-fifths (60%) or two-thirds (66.6%) decision rule should be equally effective at justifying a nine-tenths (90%) decision rule, or even the rule of a

---

162. KALVEN & ZEISEL, *supra* note 11, at 417.

single person (99.9999%).”<sup>163</sup> While this argument might have purchase if I were looking to endorse a particular rule, in the current context it is beside the point: all I aim to show is that the choice for supermajority rules for conviction by criminal juries ought to be preferred to unanimity and majority rule, and that supermajority rules should be the baseline, using the cost analysis highlighted here as a guide for when supermajoritarian rules should be adopted. The particulars of that rule should be settled by the standard democratic (supermajoritarian!) channels.

3. *Isn't the Jury an Institution of Other-Government, Triggering a Different Decision Rule from Institutions of Self-Government?*

Richard Primus's argument for unanimity rests heavily on the insight that juries are doing something quite different from the decision-making processes that take place in legislatures. Whereas majoritarianism makes sense in the context of self-government, he argues, other-government—adjudicating others' fates—should require a more rigorous decision rule, where the potential to get the facts right can be maximized.<sup>164</sup> I have included elements of this argument in my analyses in Parts II and III.

Primus, however, makes two mistakes: First, nothing in Primus's argument affirmatively shows that unanimity is the proper decision rule; all it does is show how unanimity can be explained away as not particularly counter-majoritarian, given a theory of democratic governance that requires consensus on fact questions (a highly idealized theory of democracy, to be sure). As I've already noted, juries do much more than decide questions of fact,<sup>165</sup> and there is no good argument for why a consensus requirement cannot be met with supermajoritarian rules. On the contrary, to avoid the compromises and preference falsification unanimity inspires, supermajoritarianism may be more consistent with Primus's ultimate desiderata.

Second, since adjudication is always other-government, Primus should expect unanimity as the decision rule in all adjudicatory contexts. Yet, he does not explain why the Supreme Court or Courts of Appeals do not need to decide with unanimity when entertaining disputes involving mixed questions of law and fact.<sup>166</sup> Nor does he

---

163. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, *supra* note 33, at 611.

164. Primus, *supra* note 80, at 1422-25.

165. See *supra* note 11.

166. For an argument that voting rules on the Supreme Court should be changed to

explain why the Senate, when it sits as a court of impeachment, need only reach a supermajoritarian decision. In each of these cases, Primus's theory of other-government should trigger his unanimity rule. Accordingly, I don't think the argument distinguishing self-government from other-government ultimately supports the unanimity rule.

#### 4. *Isn't Non-Coherence the Rule in Other Countries Too?*

A comparativist might wish to see if jury decision rules in "consensual" and "majoritarian" democracies correlate in any way.<sup>167</sup> If consensual regimes tend to have supermajority decision rules in the criminal jury, my emphasis on our supermajoritarian Constitution might make sense; my coherentist instinct could be vindicated.

A cursory analysis, however, produces the following curious result: paradigmatic majoritarian regimes—New Zealand, the United Kingdom, and Ireland—use supermajority verdicts, while paradigmatic consensual regimes—Belgium and Italy—use majority rule in the criminal jury context.<sup>168</sup> The Fifth Republic of France is now considered majoritarian (Lijphart originally classified it as consensual), but it has supermajority rules for the jury.<sup>169</sup> This would seem to be something slightly more than anecdotal evidence that a regime's type (in Lijphart's classic typology anyway) correlates with a jury decision rule that *diverges* from its general regime-type. Accordingly, if I have described the United States to be something like a consensual regime, a simple majority decision rule should be predicted.<sup>170</sup> No other country uses unanimity.

But is there any normative force to this finding of correlation?

---

require supermajorities (at least for invalidating acts of Congress), see MAX BOOT, *OUT OF ORDER* 206 (1998); Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893 (2003); and Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 IND. L. J. 73 (2003). None of these authors use the general supermajoritarian nature of the American polity to offer their arguments.

167. I use the typology of LIJPHART, *supra* note 31, at 216 tbl. 13.2. For this purpose, it seems fair to collapse supermajoritarian and consensual democracies, though I do not wish to assimilate them. See Part II.D.

168. The information about foreign jury decision rules is taken from Schwartz & Schwartz, *supra* note 102.

169. See Rein Taagepera, *Arend Lijphart and the Dimensions of Democracy*, in *DEMOCRACY AND INSTITUTIONS*, *supra* note 24, at 75, 82.

170. Actually, Lijphart ultimately classifies the United States as a majoritarian regime, which may predict a supermajoritarian jury rule. Remember, though, that Lijphart offers the United States "as the most prominent example of a mixed majoritarian-consensual type of democracy." LIJPHART, *supra* note 31, at 36.

An interesting post hoc rationalization might be offered: Since electoral minorities have greater access and veto power in the general legislative process under consensual regimes, minorities in jury deliberations (who may be from the same electoral minorities) get less protection in the administration of the laws through the use of supermajority rules in the jury; conversely, if simple majorities have lawmaking power, more protections are built into the “back end” in the form of supermajority requirements to apply the law in the jury context.

While this explanation seems sensible, it is not historically informed: Lijphart’s majoritarian regimes tend to emerge from the British tradition and his consensual regimes tend to emerge from the Continental tradition. This etiology is relevant because the separate traditions inherit very different jury systems, which predate their democratic forms; accordingly, their starting points may explain much more than their current regime type. Indeed, Louisiana, one of only two states to experiment with supermajority verdicts in the criminal context, inherited a civil law system rather than the common law system, where unanimity was presumed to be the proper rule. Other historical variables may be producing the seeming anomaly and it is unlikely that institutional designers think enough about how their jury rules cohere with their regime-type and decision rules in political life more generally.<sup>171</sup> Indeed, that is part of the point of the argument I am trying to make here: not enough attention is paid to harmonizing jury decision rules with general regime rules. An asymmetrical supermajority jury decision rule (facilitating majority acquittals) would harmonize nicely with American constitutional norms and values.

##### 5. *Can’t the Incoherence Be Defended?*

But perhaps the post hoc rationalization I hypothesized above was so attractive that it can be used against me. Perhaps supermajoritarianism throughout the American legislative process suggests that mere majorities can be trusted in the context of the criminal jury because supermajorities in politics ensure that electoral minorities are protected.

---

171. In e-mail correspondences with Ian Shapiro and Bruce Ackerman (February 22, 2003), both agreed that the anomaly could probably be explained by the historical account offered above. More, what the correlation predicts suggests nothing about what is normatively desirable or what is coherent. In any case, the small-n problem with many confounding variables counsels against being too political science-y about this here.

My answer to this challenge is as follows: The governmental institutions that make law—even when ‘consensual’—are institutions controlled by elites.<sup>172</sup> If the jury, on the other hand, is a populist institution,<sup>173</sup> its decision rule should not be relaxed in service of what goes on at the elite level of decision-making—at the very least, protections built in for the elite representatives should not get a government out of putting real power into the hands of the people through the jury and its populist ideal. Instead, the decision rule should be harmonized with the general regime type, especially if the implicit cost considerations themselves warrant conformity with the presumption for supermajoritarianism. In the American case, I have urged that the presumption holds for conviction but not for acquittal.

Let us not fool ourselves: whether the United States is supermajoritarian or not, American electoral minorities still fare pretty badly in the criminal jury context and probably require the benefit of a supermajority rule for conviction rather than a simple majority rule. By the same token, criminal defendants who are not found guilty by a supermajority of their peers deserve the repose and the closure of actually being acquitted; accordingly, we should change the decision rule for acquittal to a simple majority requirement.

## V. Conclusion

Perhaps, by way of summary and conclusion, it would be useful to highlight the best case that can be made for my proposed decision rule, synthesizing the insights of Parts III and IV. First, and most directly related to the thesis here, a supermajoritarian rule for conviction would harmonize our jury decision rule with the decision rules prevalent in political and constitutional life more generally (as well as with the rules prevalent in other common law countries and newer polities that have more self-consciously picked jury decision rules anew). To be sure, there are unique features of the jury that may counsel for departure from the decision rules in political and constitutional life. But I presume here that the jury is a political institution through and through—and it is becoming even more so as we recruit more diverse members of our communities to serve, as we

---

172. Lijphart’s enthusiasm for consensualism at the law-making level is often diffused by his critics, who are eager to point out that the only consent consensual democracies garner is the consent of the elite; accordingly, consensus democracy is rarely populist enough. *See, e.g.*, Wilsford, *supra* note 71, at 2.

173. For more on the jury as a “populist protector,” see, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 83 (1998).

make it more difficult to avoid jury service, and as we make it harder and harder to challenge jurors lawyers may not like. There is no question that the stakes are high when the criminal jury issues verdicts: a person's liberty is often at stake (if not their life). Yet, the general laws under which law-abiding citizen live undeniably coerce us every day.

Admittedly, there is likely a perception that "legitimacy" gains accrue from having verdicts that require unanimous agreement. Still, I have suggested here that there are three reasons to be suspicious of the appearance of "certainty" unanimity furnishes. First, most empirical evidence concludes that the *verdicts* reached under various decision rules do not vary in any dramatic way: unanimity requirements seem to produce the same number of convictions that supermajority requirements do. Second, there is empirical evidence that people assigned a unanimous decision rule will often agree to decide by supermajority (albeit unanimously). Finally, there is substantial evidence that people are willing to falsify their preferences—and the incentives for doing so are especially high when one is a holdout juror. For all these reasons, our security in the "certainty" afforded by unanimity should be questioned. In fact, because supermajorities may have less incentive to "compromise" to win the support of holdouts, greater accuracy might be accomplished through supermajority rules.

To the extent that one likes unanimity not for actual help in getting the right answers but because one thinks it is good PR for the jury system, I do not have an easy rebuttal. It may be true that the public associates unanimity with legitimacy—but I have argued here that this is not a well-founded association to make. No other modern country has such stringent rules; we don't have such rules in the context of the civil jury or courts martial; and the few states that have experimented with relaxed jury decision rules for the criminal jury do not show evidence of especial legitimacy deficits (or efforts to return to unanimity). Nor do unanimity's proponents seem to mind if a first jury hangs leading to a re-trial that then convicts unanimously: the final tally in such a case cannot be considered unanimous—but no advocate of unanimity truly feels that the ultimate supermajoritarian result is illegitimate. Finally, the phenomenon of the hung jury—beyond the financial and resource inefficiencies it costs the criminal justice system—can also be thought to exact legitimacy costs; supermajoritarian rules (especially with the relaxed acquittal decision rule I endorse) will cut back on hung juries and bring more repose to the accused in our society.

Quite apart from the *results* a decision rule produces in the way of verdicts, however, one can reasonably be concerned with the quality of deliberation that would take place under a given decision rule. And the empirical evidence, while not univocal, suggests that unanimity conduces to better (i.e., longer and more satisfying) deliberation—with jurors feeling better about themselves and their fellow citizens—under unanimity than under less exacting decision rules. It is certainly possible that deliberation could suffer under a relaxed rule.

Two possible replies: First, one could simply have courts adopt a policy of refusing to accept any verdict in the first few hours of deliberation, counteracting the propensity supermajorities might have to get their required vote tallies and pack it in. By refusing to consider verdicts before 4 hours of deliberation transpires, for example, courts can more or less encourage higher quality deliberation. This is effectively what the British did when they relaxed their unanimity requirement in 1967. Second, we can also stimulate deliberation by simultaneously relaxing the acquittal decision rule, as I've recommend here. Assuming a supermajority for conviction from the beginning of deliberation, the superminority for acquittal may disengage if they see no hope of turning the tide. Under a majority acquittal rule, however, the superminority will be encouraged to engage because their preferred verdict seems much more attainable. That engagement can lead to higher quality deliberation.

One final point: Some may be opposed to a supermajority conviction rule because those in the superminority—who may be members of otherwise disenfranchised minorities—might be rendered to have “empty votes.”<sup>174</sup> At least under unanimity, it could be argued, these minorities must be heard. Under a relaxed rule, they can more easily be ignored.

I think we must conclude that this argument oversimplifies jury dynamics. But, more importantly, it fails to see the empowerment a dissenting voice can offer those in the superminority. First, supermajoritarian rules for conviction combined with majority rules for acquittal actually render it easier for these minorities ultimately to ‘win.’ Far from giving minorities only empty votes, the hybrid rule proposed here actually empowers minority jurors because it gets them closer to their preferred verdicts. Second, even when

---

174. See, e.g., Taylor-Thompson, *supra* note 96.

superminorities lose, being able to be ‘on the record’ as dissenters actually gives them concrete voices. If the members of a headstrong superminority could only hang a jury (as they would do under symmetrical unanimity), no real record remains and their voices just as easily get thwarted: the accused often either stands trial again or pleads to a lesser offense. Finally, the feedback the government could potentially reap from dissenters ‘on the record’ could help it make better laws and better policies. Making political decisions with the input of a pattern of juror dissents would ultimately be empowering to the dissenters—and would make for more deliberative policies than using public opinion polling and interest-group lobbying alone. We are a culture that prizes dissent:<sup>175</sup> we expect it from our legislators and our courts—and there is no good reason not to reinforce dissent in our criminal juries. At the very least, it is better than a false consensus.

I hope by now that I have made out my *prima facie* case and that I have responded adequately to major objections. My client—a rule requiring a supermajority to convict and a majority to acquit for the criminal jury—beseeches you, the jury, to take her position seriously. While it doesn’t think it can hope to convince everyone, it never hopes for unanimity anyway.

---

175. See generally SUNSTEIN, *supra* note 15; Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005).