The Force of Majority Rule

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I will attempt to recover a line of argument that describes majority rule[1] as akin to an irresistible force of nature, before which political and legal institutions must either bend or break. On this view, originated by James Fitzjames Stephen and Justice Oliver Wendell Holmes, Jr., majority rule has political and psychological force independent of its intrinsic merits; where that force is sufficiently powerful, majority rule is inevitable, whether or not desirable. Inevitable does not mean ubiquitous. Bad weather is inevitable, but the weather is not always bad. Although majority rule does not hold sway always and everywhere, there are political circumstances in which majority rule simply will prevail, whether or not an impartial analyst or institutional designer would find it ideally superior to the alternatives. In such cases, majority rule is a political constraint, and the only possible question is how to minimize the social cost of complying with the constraint.

So I will address two questions: (1) Under what conditions will the force of majority rule prevail? (2) Where majority rule prevails regardless of its merits, or the merits of the alternatives, what can be done to minimize the social costs of majoritarianism? As we will see, Stephen identified some of the mechanisms that give majority rule its causal force, although there are others that Stephen overlooked. Holmes, elaborating Stephen's view, then articulated a least-cost principle: legal and political arrangements should ensure that dominant majorities, who will get their way one way or

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[1] By which I will mean "simple" majority rule, where two choices are on the agenda, or plurality rule, where there are more than two choices. I will use "supermajority rules" or "qualified majority rules" for forms of majority rule other than the simple form.

another, get their way efficiently -- in a manner that minimizes total social cost. Their joint account has implications for the extension of the suffrage, legislative structure, procedure and voting rules, delegation to bureaucracies, criminal law, free speech law, and the law and politics of emergency powers.

Section I describes the historical and intellectual context of Stephen's views about majority rule. Section II lays out mechanisms that give majority rule its political and psychological force. Section III describes Holmes's least-cost principle, discusses its main applications, and indicates its limits. In a brief conclusion, I argue for the utility of explanatory social choice theory, as opposed to normative social choice, and for the utility of a second-best approach to normative social choice that incorporates realistic political constraints.

I. The Triumph of Majority Rule

A. Stephen on Parliamentary Government

Stephen's best-known apercu on majority rule is that

> [p]arliamentary government is simply a mild and disguised form of compulsion. We agree to try strength by counting heads instead of breaking heads, but the principle is exactly the same. . . . The minority gives way not because it is wrong, but because it is convinced that it is a minority. (Liberty, Equality and Fraternity pp. 27-28).

The passage is from Stephen's 1873 polemic against John Stuart Mill (Liberty, Equality and Fraternity, or LEF), in which Stephen argued that all law and government are based on coercion, and used parliamentary government as an example. Yet the passage flows from a background view that Stephen articulated in a two-part paper on parliamentary government (Parliamentary Government, or PG), published in the same year as his salvo against Mill.

For Stephen, writing in the aftermath of the expansion of the franchise effected by the great Reform Acts of 1832 and 1867, it was an irreversible feature of British politics that majorities of the mass electorate, enforcing their will through majorities of the

representative assembly, would always have the possibility of having the final say.[2] The qualifier about possibility is necessary because national majorities would not pay attention to all policy questions, and would not necessarily have a preference one way or another on all questions that became salient. However, where national majorities had a clear preference on a salient question, it was inevitable that they would have their way. As Stephen put it:

> [U]pon all great national questions the ultimate decision must hereafter rest with the numerical majority of voters, expressing their will through representative assemblies. There is no use in discussing the question whether this is a good state of things or a bad one. For all practical purposes it is enough to say that it exists, and that it is the part of rational men to make the best of it, as they make the best of the climate, the soil, or the national character of their country. (PG, p. 1).

This passage not only lays out the thesis that majoritarianism is sometimes a constraint, which must be complied with voluntarily or not, but also hints at the least-cost principle that Holmes would later elaborate. I return to that principle in Part III.

Stephen's discussion of his thesis runs together two distinctions whose terms are usually kept carefully segregated. In both cases, I believe that Stephen did this quite deliberately and had respectable theoretical grounds to do so. While noting the distinctions, I will also be alert to show cases in which political forces cause them to collapse.

First, Stephen conflates majority rule as a formal decision procedure with majoritarianism as a de facto political practice. I will follow Stephen in this, at least to the extent of treating both types of "majority rule" as important. The force of majority rule is sometimes most apparent precisely when de facto majoritarianism dominates institutional outcomes even under a nominally non-majoritarian decision rule. In such cases, the nominal rule may be abandoned on the ground that it is hollow, or may persist precisely because it is widely understood to lack any real consequences.

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[2] Even before the Reform Acts, however, many others held similar views. "However little it deserved epistemic deference, public opinion would prevail. So concurred a host of observers from across the ideological spectrum" in the period 1789-1834. Herzog 1998, 284. Stephen's ideas can be seen, in this context, as advice for nondemocrats or antidemocrats about how to act once democracy has irreversibly taken hold. On the irreversibility of democracy, see *id.* at 85-88.

Second, Stephen conflates majority rule writ large, in the sense that national majorities are decisive in mass elections, with majority rule writ small, in the sense that the national legislature uses a simple majority voting rule to decide most or all questions, without external constraints. These two are not necessarily the same. National electoral majorities might themselves choose or support a lawmaking system that uses qualified majority rules or other minority-protecting institutional devices, such as constitutional judicial review. More generally, there are many familiar institutional arrangements that drive a wedge between majority rule writ large and writ small. Majority voting for legislative parties is not the same as majority voting in a series of single-issue referendums; parties are like bundles of issue-preferences, and if the electoral majority is constrained to choose either one bundle or the other, the winning party may enjoy some slack to implement countermajoritarian policies on particular issues.

The logic of Stephen's thesis, I believe, is that the divergence between majority rule writ large and writ small is more theoretical than real, and even where it is real, countermajoritarianism is not stable in the long run, at least as to questions on which sustained national majorities become politically engaged. Majority rule writ large and majority rule writ small are not logically identical but are causally connected: national electoral majorities tend over time to enforce a system in which a majority of the representative assembly has near-unfettered power when roused by a great national question, and uses that power to advance the electoral majority's desires. At least Stephen thought that to be true in a system of unwritten constitutionalism; as I shall discuss shortly, he thought that the minoritarian checks of the British constitution, such as the royal veto, had largely atrophied over time, leaving a simple majority of the House of Commons in control (PG, p. 2). And the logic of his view applies with equal force to systems with written constitutions, or so I will suggest. In either case, the force of majority rule operates over time to ensure that even nominally countermajoritarian institutions cannot get too far out of line.

None of this implies that majorities always prevail, or that countermajoritarian institutions are never feasible. Stephen's thesis is limited to "great national questions" – highly salient issues on which majorities have a clear preference (PG, p. 1). Where a great national question is not implicated, Stephen recognized that institutional design can

protect minorities by exploiting the majority's simple inattention, rational ignorance, or normative ambivalence. To understand this view and its qualifications, however, we need to look more closely at the mechanisms that give majority rule its force.

II. Mechanisms of Majority Rule

Why, exactly, is majority rule triumphant? In what domain, exactly, is it triumphant? Under what conditions will majority rule or instead some alternative prevail?

Stephen spends little time on these questions. His relentlessly pragmatic cast of mind would have dismissed them as academic in the pejorative sense. If majoritarianism is a force of nature, the politician or institutional designer may have an interest in predicting where and when it will constrain desirable action, yet explanation per se is irrelevant except insofar as it aids the predictive task. Yet there are hints of mechanisms in Stephen's account, and we can supplement his account with modern social science.

A. Unwritten Constitutionalism

One suggestion that Stephen does offer is relatively narrow: majority rule is more likely to prevail under an unwritten constitution than under a written one. Of course the written one might simply provide for majority rule, but that misses Stephen's basic point, which is that under unwritten constitutionalism, at least in the British case, customary checks on majority rule tend to atrophy:

> [O]wing to particular circumstances, the constitution of this country is very much more democratic than it would have been if the constitution had been expressly framed on a democratic basis. Public opinion here acts on the Government much more forcibly and directly than it does in the United States. . . . Most of the parts which make [the British constitution] look complicated have long since been struck with paralysis, and have sunk into the condition of fictions. . . . Very few Englishmen appear to see that the result of our passionate love for constitutional fictions, and of our determination in every case to leave the old forms untouched, while we alter the substance of all our institutions, has been to establish in this

> country one of the most direct, stringent and unqualified authorities in the whole world. (PG, p. 2).

The mechanisms implicit in this argument are obscure. Stephen may be saying that under written constitutionalism, constitutional designers will tend to incorporate some nonmajoritarian safeguards even into a generally majoritarian constitution, and those safeguards will endure because they are explicit. By contrast, under unwritten constitutionalism, checks on majority rule erode gradually and with low visibility; there is no single salient event, like the adoption of a new written constitution, that would cause the public to perceive that the old nonmajoritarian fictions have become hollow.

However, this contrast between unwritten and written constitutionalism seems overdrawn, and it fits poorly with the logic of Stephen's view. Stephen contrasts the British constitution with the American one, arguing that under the latter, the Supreme Court has countermajoritarian power that has no real British analogue. He might instead have argued, with greater consistency, that even within a system of written constitutionalism expressly incorporating countermajoritarian protections, majoritarianism operates relentlessly to gradually erode those protections, at least where highly salient issues are involved.

The Supreme Court is itself an example: majoritarian influence over the presidents who appoint, and the senators who confirm, Supreme Court justices ensures that the Court rarely gets too far out of line with dominant public opinion on great national questions, although it follows public opinion with some lag time.[3] For another example, the Electoral College, explicitly designed as a nonmajoritarian check on the public's electoral preferences, has become a cipher, with electors generally bound by statute to follow the choices of electoral majorities in the states they represent. Even under written constitutions, majoritarianism not only constrains the choices of nonmajoritarian actors by the threat of backlash,[4] but also operates gradually to select

[3] Dahl 1957. Mishler & Sheehan 1993 find that Dahl's effect holds for the period 1956-1981, but that in the period 1981-1989 the effect disappears or reverses, meaning that a conservative court was out of step with public opinion.

[4] Klarman, forthcoming; Sunstein 2007, 157-158.

judges and other officials whose very preferences and beliefs accord with the majority's views.[5]

B. The Threat of Violence

A central motif in Stephen's general vision of politics is that rational argumentation has little power to produce agreement, at least on questions that engage widespread public sentiment. In both PG and LEF, Stephen is openly and contemptuously skeptical of deliberation as an engine of consensus: "There is a great deal to be said for an Established Church, and a great deal to be said against it; and if its advocates and its antagonists were left to convince each other by mere force of argument, they would wrangle until the end of time" (PG, p. 5).

On this view, bargaining in the shadow of political violence, not rational argument, is what produces consensus -- or at least the apparent consensus that arises when cowed minorities silence themselves or falsify their preferences[6] or their judgments.[7] Consensus on majority rule is no different. Stephen suggests, in both LEF and PG, that majority rule is an equilibrium arrangement arising from an implied threat that majorities will hurt or kill minorities, enforcing "the unanimity of the graveyard."[8] On this reading, the dictum that "[p]arliamentary government is simply a mild and disguised form of compulsion" (LEF p. 27) takes on a rather literal and sinister cast. The alternative to majority rule is not a more sophisticated voting rule, even if such a rule is superior from the standpoint of overall welfare; rather it is mass violence against minorities. Anticipating this, minorities make the best of a bad business by accepting majority rule, calculating that their preferences will not be respected in any event, and that virtual rather than physical majoritarianism will at least minimize their suffering. As Stephen put it,

[5] Norpoth & Segal 1994 argue that public opinion influences the Court only through the indirect effect on judicial appointments, rather than directly, by causing the justices to fear public backlash against countermajoritarian rulings. Mishler & Sheehan 1994 disagree, and the latest work finds a clear direct effect, see McGuire & Stimson 2004.
[6] Kuran 1995.
[7] Asch 1952; Baron et al. 1996.
[8] *West Virginia Board of Education v. Barnette* 1943, 641.

> [A]ll questions which have a strong and obvious bearing on questions of sentiment . . . are ultimately questions of power. . . . Such questions are settled in rough times by physical force, or the threat of it. We have substituted, as I have elsewhere remarked [i.e. in LEF], the practice of counting heads for the practice of breaking them – at least in most cases. But minorities give way in reality, not because they are convinced, but because they are overpowered (PG, p. 5).

On this picture, parliamentary government with majority rule is a Pareto-superior bargain, an "agree[ment] to try strength" (LEF, p. 70) through counting votes rather than warfare, just as a jury trial is a substitute for trial by battle. All are better off, the minority because actual violence is left off the equilibrium path, the majority because it obtains by the threat of violence most of what it would have obtained, at greater cost, in any event.

Stephen's idea, charitably read, is not that majorities can always defeat minorities through violent action. Over the sweep of history minority rule is the norm, and even in the age of democracy minorities have often ruled by force, at least for a time. Minorities may be superior in wealth, or armaments, or organization; conversely, majorities may find it difficult to coordinate on mass violence at a given time, even if they could prevail once coordinated. Stephen is merely pointing out that, in important cases, minorities anticipate a real risk that in the event of outright conflict they will be overwhelmed by sheer numbers, and thus bend to majority preferences. Where they do so, no actual violence will be observed, and minorities may even seem to rule, but the implicit threat of violence decisively shapes minorities' behavior.

C. Majority Rule as a Second-Best

A similar bargaining process may occur even if there is no dominant majority, but rather a cluster of social groups who are uncertain which group or alliance of groups would prevail in the event of violent conflict. In one standard model, antagonistic groups with sufficiently long time horizons will agree to majoritarian electoral processes in order to obtain ex ante equal chances to enjoy the rents that accrue from control of government

in future periods.[9] In a related model, egoistic and risk-neutral agents choosing a decision rule under uncertainty will adopt majority rule, as the rule that uniquely maximizes the expected advantage of each individual over the future series of collective decisions.[10] In yet a third important account, groups who would each prefer a voting rule or suffrage rule that favors them will compromise on majority rule as a universal second best. "In the presence of many different groups competing on the basis of their innate quality, only quantity can emerge as a peaceful focal-point solution."[11] In any of these cases, the resulting equilibrium need not correspond at all to the arrangements that an impartial institutional designer would choose in the circumstances.

D. Simplicity

Another factor militating in favor of majority rule is its sheer simplicity. It is a natural psychological focal point that more votes beat fewer; both hunter-gatherer groups in traditional societies and new legislative assemblies in modern societies tend to adopt simple majority rule as an implicit default option,[12] or to short-circuit the infinite regress that arises when a group must decide by what voting rule it will choose its internal voting rules.[13] By contrast, complex voting rules must swim against the current. Reformers who criticize majority or plurality voting in favor of alternative voting schemes often discover that the very features that make their preferred systems superior also make them too complex to explain and too difficult to sell to legislators or mass electorates.

In some cases, this just means that the alternative voting rule is not actually superior overall when the costs of complexity are added to the ledger. However, even where the alternative voting system would indeed be superior, net of complexity costs, public demand for simplicity will sometimes act as a constraint on the set of voting rules that can realistically be adopted. In such cases, majority voting prevails because it is the only politically feasible system, not because it is the most desirable one.

[9] Przeworski 1991, 15-36.
[10] Rae 1969; Taylor 1969.
[11] Elster 1992, 19.
[12] Hastie & Kameda 2005, 494.
[13] Cf. Elster & Landemore, forthcoming.

E. Egalitarianism and Envy

Closely related, I believe, to the second-best argument for majority rule and to the simplicity of majority rule is its inherently egalitarian quality – and the potential for envy that is the flip-side of egalitarianism. Political equality provides a normatively respectable reason to favor majority rule, while political envy proves to be a normatively dubious but causally powerful constraint on non-majoritarian decision rules.

The economist Kenneth May showed that when voters must choose between two options,[14] majority rule is the only aggregation procedure that jointly satisfies anonymity (John's vote counts for no more or less than Jane's), neutrality (a vote for the proposition counts for no more or less than a vote against the proposition), decisiveness (roughly, the voting rule always yields a unique winner), and positive responsiveness (roughly, any one person can break a tie by changing her vote). Dictatorship violates anonymity, while standard supermajority rules violate neutrality; if the supermajority rule requires a 2/3 vote to pass a treaty, then a fraction of votes equal to 1/3 + 1 is given different effect when it is cast in favor of passage (ineffective) than when it is cast against passage (decisive). The four conditions together imply that each vote counts for one, no vote counts for more than one. More simply, the egalitarian intuition underlying majority rule, and May's Theorem, is that if and only if more votes beat fewer, then all voters and votes are equal.

While political equality obviously has many normative arguments in its favor, the egalitarianism of majority rule gives it a psychological force that can operate without regard to the intrinsic power of those arguments, and which may outstrip them. Where a minority of voters exploits a supermajority rule to defeat a majoritarian proposal, a frequent political rejoinder is that the minority deem themselves superior to the majority. This rejoinder is a more-or-less transparent appeal to political envy,[15] one that plays on the majority's emotions and operates behind the backs of individuals, regardless of the intrinsic normative appeal of May's Theorem. And by the law of anticipated reactions, the threat of incurring this sort of opprobrium rooted in envy sometimes deters minorities

[14] May 1952. May's Theorem can be extended to many-option cases, and holds in such cases, on condition that the voting procedure admits only information about voters' first choices. Goodin & List 2006.
[15] On the connections between egalitarianism and envy, see Elster, forthcoming.

from invoking their legal powers, even if the supermajority rule is desirable from an impartial perspective. I will give examples shortly.

F. The Force of Majority Rule[16]

Overall, these mechanisms illustrate that majority rule has a political and psychological force independent of its merits. Even if some alternative to majority rule embodies "the forceless force of the better argument,"[17] so that an impartial and fully informed designer of institutions would deem majority rule undesirable in a given setting, majority rule can overawe the opposition, as in the case of the latent threat of violence; can provide a focal-point solution for self-interested bargaining by rival groups; or, by virtue of its simplicity and egalitarianism, can operate behind the back of citizens, triggering emotions and psychological propensities that make majority rule seem attractive regardless of whether it is optimal. That many species of nonhuman animals use majority rule for group decisionmaking[18] only underscores that the mechanisms of majority rule operate tacitly or intuitively, rather than through fully reasoned deliberation.

In practice, it may be difficult to disentangle whether majority rule prevailed, in a given case, by means of these mechanisms or instead because decisionmakers became persuaded of its intrinsic merits after due reflection. Because reasons can also be causes, it is doubtless sometimes true that the impartial arguments in favor of majority rule best explain its adoption. In other cases, however, the causes of majority rule prevail regardless of impartial reasons. A further complication is that in some cases, although majority rule in fact prevails by means of these mechanisms, an impartial designer of institutions would have adopted majority rule anyway; here the socially desirable outcome is produced by a happy political accident. Yet there is no general mechanism guaranteeing this coincidence.

The force of majority rule is most apparent when nominally nonmajoritarian institutions or voting rules become effectively majoritarian in practice. I mentioned that the Supreme Court's countermajoritarian role is constrained both by the threat of backlash and, in even greater degree, by majoritarian influence on the appointments

[16] Some of the material in this subsection is adapted from Vermeule, 2007b.
[17] Habermas 1999, 450.
[18] See Conradt & Roper 2003.

process, which shapes the preferences and beliefs of the Court's membership. In the United Kingdom, majoritarian control over appointments to the House of Lords has effectively eviscerated the checking role of that institution. In 1911, the Commons' threat to pack the Lords with compliant peers, a threat supported by the Crown, forced the Lords to surrender most of their power to veto legislation.

Even where the nominal voting rules of an institution are expressly non-majoritarian, actors frequently make political hay out of the way the majority votes. Actors who fail to carry a proposition by a supermajority can claim a "moral victory," with some political effect, if they secure a majority of the votes. In 2003, when it was clear that the United Nations Security Council would not vote unanimously to authorize the invasion of Iraq, the Bush administration made great efforts to obtain a majority of the council votes.[19] Though obtaining a majority would have no legal effect, the administration felt it would produce political benefits.

Conversely, when a proposal does not obtain a majority of votes, a "moral defeat" can occur even if obtaining a majority would have had no legal effect. Recently, in a crucial cloture vote to break the filibuster of an immigration bill in the U.S. Senate, 46 senators voted for cloture while 53 voted against. The Democratic leader who had brought up the bill, Senator Harry Reid, decried "obstruction,"[20] but opponents and commentators undercut this claim by pointing out that the bill did not even obtain a majority in its favor, let alone the necessary supermajority of 60 senators.

In important cases, the political and psychological force of majority rule is decisive. In a recent series of decisions, the U.S. Supreme Court has voted for conservative results by a 5-4 majority. The conservative majority is in place because Justice Samuel Alito replaced the somewhat more liberal, or at least unpredictable, Sandra Day O'Connor. The puzzle is that when the Senate voted to confirm Alito in January 2006, there were 42 no votes. Why then did the 42 not filibuster – an action which, under Senate rules, requires only 40 votes to succeed?

[19] Wilkinson & O'Sullivan 2004; Sanger 2003.
[20] Baker 2007.

First, there was an implicit threat that the Senate majority would exercise the so-called "nuclear option" by amending or simply ignoring the relevant rules, thereby overriding the filibuster. That threat underscores that even the Senate's filibuster rule, a paradigmatically nonmajoritarian voting practice, ultimately rests on, and is constrained by, the somewhat fragile consent of Senate majorities. Second, the Bush administration and the reigning Republican majority were scoring political points with a charge that the Democratic minority should "give Alito an up-or-down vote," by which they meant a simple majority vote. In other words, there was political pressure to use majority voting to settle the case, despite the nominal availability of a supermajority veto. The example is not atypical; legislation does regularly pass the Senate with more than 40 no votes.[21]

These examples are illustrative and anecdotal. The larger question they provoke involves the magnitude of the force of majority rule. Although we can, I believe, describe the mechanisms that give majority rule positive force and state in general terms the conditions under which that force will prevail, it is usually unclear exactly how much causal force majority rule exerts in a given setting, how it interacts with other causal factors, and whether it will outweigh contrary tendencies.

Majority rule writ large, in the sense of majoritarian voting in mass elections, has certainly spread widely in the age of democracy. Yet it is unclear that majority rule writ small has fared nearly as well; the period after World War II has seen the relative decline of pure Westminster-style constitutional systems resting on the supremacy of majoritarian parliamentary institutions, as compared to systems of written constitutionalism with elaborate nonmajoritarian voting rules and effectively supermajoritarian institutional checks. These impressions are vague in the extreme, however. Because social choice theory has been so heavily normative, rather than explanatory, we are a long way from being able to offer confident empirical generalizations about majority rule, let alone lawlike causal theories of its genesis, spread, and prevalence as compared to other decision rules or de facto political practices.

[21] For example, H.R. 1591, a bill making emergency supplemental appropriations for the fiscal year ending September 30, 2007, passed with 47 no votes.

III. The Least-Cost Principle

Where majoritarianism prevails by force, what can the institutional designer or legal and political actors do? In easy cases, majority rule, although prevailing by force, also happens to be optimal from the standpoint of welfare. In hard cases, which concerned Stephen and Justice Holmes, majority rule will prevail regardless of its optimality. In such cases, Stephen argued, the only rational course is to "make the best of it." (PG p. 1) I will show how Holmes amplified this idea (III.A), discuss applications suggested by Stephen, Holmes, and others (III.B), and then describe the limits of the least-cost principle (III.C).

A. Holmes on Efficient Majoritarianism

In an essay on Montesquieu, Holmes gave his most explicit statement of the least-cost principle:

> [T]he most perfect government is that which attains its ends with the least cost, so that the one which leads men in the way most according to their inclination is best. . . . What proximate test of excellence can be found except correspondence to the actual equilibrium of force in the community – that is, conformity to the wishes of the dominant power? Of course, such conformity may lead to destruction, and it is desirable that the dominant power should be wise. But wise or not, the proximate test of a good government is that the dominant power has its way.[22]

Holmes presented this principle as a gloss on Montesquieu's dictum that "the most perfect [government] is that which attains its goal with the least friction; thus that government is most perfect which leads men along paths most agreeable to their interests and inclinations."[23] Yet in context, Montesquieu's point was different,[24] and we know independently that the anglophile Holmes was heavily influenced by Stephen, whom he met as a young man[25] and whose work he cited regularly. The passage from Holmes quoted above, with its emphasis on force and power as the shapers of political possibility,

[22] Holmes 1920, 257-8.
[23] Montesquieu 1999, 136.
[24] Luban 1994, 496 n.163.
[25] Posner 1992, xx-xxi.

is better read to amplify the idea already implicit in Stephen's injunction to make the best of political constraints.

A critic says that Holmes "infers from [the least-cost principle] a proposition about what ends government ought to adopt, namely those that can be pursued with least cost, because they encounter the least opposition", and that this inference is invalid.[26] It is invalid; but Holmes makes no such inference. His point is that political constraints must be complied with, whether voluntarily or not, and that struggling against them will in the end change nothing, except that higher social costs will be incurred. Before the dominant political forces, government must either bend or break. The dominant political forces need not be majoritarian, to be sure. The least-cost principle operates without regard to the nature of those forces. But as we will see, the central applications of the principle that Stephen and Holmes identified involved cases in which majorities override whatever legal rules and political arrangements might otherwise be considered optimal.

Methodologically, the least-cost principle is a special case of the general theory of second best.[27] When a political constraint rules out part of the optimal package of rules, adopting the remaining parts of the package is not necessarily, or even usually, the welfare-maximizing procedure. Rather the social planner must make compensating adjustments by departing from optimality on other margins as well. When the constraint arises from the force of majority rule, the least-cost principle recommends adapting to majoritarianism by adjusting rules or policies on other margins – by second-best institutional design. These points are abstract; let us look at some examples.

B. Applications

1. Suffrage

Characteristically, Stephen's argument in favor of the suffrage reforms of the 19th century took a least-cost form:

> [T]he question 'Who shall have votes'? is not at bottom a question of policy, but a question of power. [The Reform Bill of 1867] was passed because it was felt universally that some such measure was necessary in order to adjust the form of

[26] Luban 1994, 497.
[27] Lipsey & Lancaster 1956.

> our Government to the great changes which had taken place in the body of the nation. In short, a step was taken with a good grace which it would have been absolutely necessary to take somehow or other, sooner or later (PG, p. 4).

The massive Hyde Park demonstration of May 1867 had made it clear that the forces favoring reform held more power than the enfranchised elites could bring to bear through the machinery of government. Bowing to the political winds, Disraeli preempted a potentially violent redistribution of political power by offering a peaceful one. More generally, an elite capable of enlightened self-interest will at least attempt to get the credit of offering "with a good grace" what will eventually be snatched from its grasp anyway.[28]

2. Legislative structure and voting rules

For Stephen, it followed from the expansion of the franchise that parliamentary government would also be essentially majoritarian on great national questions. Once the 19th century reforms had curtailed rotten boroughs and largely aligned national with parliamentary majorities, the parliamentary voting rule would straightforwardly be majoritarian on great national questions. Any other voting rule would fail to reflect the balance of political forces.

The problem, however, was that majoritarian parliamentary government had open and notorious vices. Buffeted by electoral pressures, legislators paid too much attention to minor questions that happened to inflame public sentiment, and too little attention to important problems of low salience. Majoritarian government entailed party government, which in turn ensured the dominance of distributive politics over productive politics. British political elites spent their careers struggling with each other for the spoils of office rather than cooperating to produce public goods. Moreover, partisan politics and logrolling tended to link together policy problems that should, ideally, be considered on their separate merits. "As matters now stand, a disaster on the West Coast of Africa would very probably alter the complexion of popular education in this country, by

[28] To be sure, the 1867 reforms did not enfranchise a strict majority of the population, only a majority of adult males. However, this is consistent with Stephen's explanation: a rational strategy for elites in Disraeli's situation is to offer the franchise to the smallest fraction of the disenfranchised whose support for the regime will suffice to tip the balance of power against further reform.

changing the Ministry, which appears to me about as rational as changing your lawyer because you discharge your cook" (PG, p. 179).

Despite all this, Stephen thought that second-best solutions, on a modest scale, could ameliorate the defects of majoritarianism. His main normative project, in PG, was to suggest "[p]artial remedies" that would "alleviate" the ills of parliamentary government (PG p. 1, 165). The point was not to propose ideal arrangements, but to suggest incremental improvements of the democratic system, which was here to stay.

As Stephen recognized, legislators beholden to electoral majorities might nonetheless enjoy some slack to adopt countermajoritarian policies, where national majorities are inattentive, rationally ignorant, unorganized, or normatively ambivalent, or where a system of party competition gives majorities a choice between or among bundles of policies, none of which tracks majority preferences on every issue. I add that tools of institutional design can ameliorate the effects of majoritarianism at the margins while respecting it as a political constraint – a project very much in the spirit of Stephen's views.

Institutional designers who want to empower minorities can use close substitutes for supermajority rules, substitutes that are less visible to national majorities and hence do not trigger the political opprobrium that constrains explicit nonmajoritarian voting. Although the majority could sweep away these interstitial minority-protecting rules, should it ever become aware of them, their political salience is too low to arouse the slumbering giant; and even were they to become salient, their technical character tends to obscure their effects on controversial first-order policy outcomes. I do not argue for or against the view that it is desirable, in any particular setting, to empower minorities in this way. Of course normative democratic theory has a great deal to say for, and against, public participation in lawmaking and the political transparency of institutional design.[29] I only mean to suggest that it is sometimes technically and politically feasible to protect minorities through low-salience institutional devices, even in a generally majoritarian order.

[29] For the tradeoffs between transparency and other democratic values, see Vermeule 2007a.

One strategy is to set up multiple majority votes in sequence. Under bicameralism, the need to obtain a simple majority of two representative houses in succession has a supermajoritarian effect, one that may be less visible to national electoral majorities than either constitutional review by judges, or an explicit supermajority voting rule in a unicameral legislature. Another strategy is to create intra-legislative institutions that create vetogates or chokepoints at which minorities can exercise influence behind the scenes, and that have supermajoritarian effects in practice, such as the committee system.

The problem with large-scale structures like bicameralism, and to a lesser extent the committee system, is that the real-world institutional designer may no more be able to opt for them, where desirable, than he is able to opt for explicit supermajority rules, where desirable. In most democratic polities most of the time, institutional design writ large is already irrevocably settled; the feasible choices are restricted to institutional design writ small. I will therefore focus on a small-scale, but consequential, adjustment to the explicit voting rule itself: the use of an absolute majority rule in place of simple majority rule.

"Majority rule" is not, by itself, a well-specified voting procedure, even setting aside the possibility of supermajority voting. Even where .51 is the multiplier, one must also select the multiplicand; one must answer the question "a majority of what group"? Thus in both legislatures and direct democracy, an important design choice is whether to implement "majority rule" by means of a simple majority of all votes cast, or instead by an absolute majority of all eligible voters. Although both simple majority rule and absolute majority rule use "majority voting," the latter counts abstentions as no votes, and thus has powerful supermajoritarian effect compared to the simple-majority baseline. In a legislature with 100 voting members, if 50 vote yes, 10 vote no, and 40 are either absent or abstain, the bill passes under simple majority rule, because it obtained a majority of the 60 votes cast. Indeed, on these numbers, the bill would pass even under a rule requiring 5/6ths of the votes cast. By contrast, on the same numbers, the bill fails under an

absolute majority rule, because less than 51 votes — a majority of all eligible votes — were actually cast in favor of the bill.[30]

In cases like this, the political charge of minority obstruction is harder to make out than under a regular supermajority rule; opponents of the bill can point out, truthfully in one sense, that the bill did not obtain a majority. Moreover, legislators opposed to the bill can contribute to its defeat not only by expressly voting no, but simply by abstention or absence, combined if necessary with a plausible pretext for the abstention or absence. If in the given case majority sentiment is powerful but misguided, according to some normative political theory, the latter feature of the absolute majority rule is desirable.[31] It allows legislators to evade accountability in circumstances where accountability to a misguided majority would be bad.

3. Delegation and Bureaucracy

So far we have discussed legislation and legislatures; what of the executive and the bureaucracy? For Stephen, the ideal of "really efficient government" would require "restor[ing] a considerable degree of real power to the King." (PG, p. 179). However, this was politically impossible given the majority's domination of Parliament, and even should Parliament want to do so, "[y]ou cannot by votes infuse vigour into a paralysed limb"(Id.). As an ameliorative measure, Stephen urged that legislators create an independent, highly trained cadre of civil servants and bureaucratic experts, insulated from politics and corruption by norms, high pay and public marks of rank and honor. Incremental steps towards a thoroughly independent and professional bureaucracy were both feasible and, in a nonideal world, desirable on net as compensating adjustments to offset the vices of party government.

Stephen was, I believe, at least implicitly aware that his proposal might be self-defeating: the same majoritarian forces that constrain legislators' first-order policy

[30] This example is adapted from Wikipedia, "Absolute Majority Rules." For a full treatment of absolute majority rules, see Vermeule 2007b, 115-142.

[31] I assume away here the views that (1) majoritarian accountability is intrinsically desirable, regardless of its consequences, and that (2) on rule-consequentialist grounds, institutions should be designed to maximize majoritarian accountability even if it is not desirable in particular cases. Instead, I assume that at least sometimes, majoritarian accountability trades off against the welfare benefits of enacting a first-order policy that the current majority would reject.

choices might also constrain their ability to create an insulated bureaucracy exercising delegated authority, and for the same reasons. Whether this is so depends in part upon whether delegation is less visible to electoral majorities than substantive legislation, especially in a repeated game.[32] Although not all departments could be "set free from party" or completely immunized from political interference (PG, p. 179), Stephen seems to have thought that in fact legislators would sometimes enjoy political freedom to employ the second-order tactic of delegation even if majoritarianism would constrain their first-order policymaking. Although the truth of the assumption is unclear, it is at least a plausible conjecture about political psychology.

4. Criminal Law

Stephen famously wrote that "[t]he criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite."[33] This too is a second-best account: even if the passion for revenge has no utility for the individual or society,[34] it is a brute fact that it exists and it constantly threatens to disrupt civil peace. Given this, the state cannot simply ignore the threat of vigilante justice; rather the state's best strategy is to attempt to channel the passion for retribution through legal forms of punishment, with the hope of securing civil peace while producing less brutality overall.[35] As expressed by Stephen this idea had no necessary or explicit connection to majoritarianism. Holmes, however, took up the same theme in The Common Law and gave it a more majoritarian cast:

> The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law would not help

[32] For skepticism about this possibility, see Mashaw 1985, 87-88; Posner & Vermeule 2002, 1748-1753.
[33] Stephen 1863, 99.
[34] On its possible utility for the individual, see Frank 1988, 66-67; for a critique of its putative utility for society, see Elster 1989, 129-140.
[35] Needless to say, Stephen's objection to brutality was not that the infliction of pain was intrinsically objectionable; it was just that brutality was a messy and inefficient tool for producing social order.

them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution.[36]

By linking Stephen's point to the "demands of the community," a formulation reminiscent of the "dominant forces" that drive the least-cost principle, Holmes seemingly suggested that majoritarian sentiment might sometimes demand vengeance against minorities, and that judges or other officials would have no choice but to channel that demand through the rules and procedures of the legal system. In cases of transitional justice, this problem becomes especially acute. In France after World War II, a populace seized by a passion for retribution engaged in extralegal punishment of armed collaborators and of women who had slept with occupying soldiers. French officials were thus forced to "establish[] summary martial courts to prevent people from taking justice into their own hands."[37]

5. Free Speech

Holmes extended the least-cost principle into a domain that had no direct analogue in the English legal system: judicial review of statutes for constitutional validity. In Gitlow v. New York, a majority of the Supreme Court upheld a conviction for distributing a socialist manifesto, on the grounds that it unlawfully advocated the overthrow of the government, and that free speech should not allow agitators to "kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."[38] Holmes dissented, arguing that "[i]f in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."[39]

Holmes's argument here[40] is, I believe, an implicit paraphrase of his essay on Montesquieu. Free speech protection for socialist manifestos is a good idea because criminal punishment of socialist manifestos is a costly, and potentially fruitless, struggle

[36] Holmes 1999, 41.
[37] Elster 2004, 221.
[38] *Gitlow v. People of New York* 1925, 669.
[39] Id. 673.
[40] In other writings, Holmes advanced an epistemological rationale for free speech protection. See Richard Posner 2003, 359-61.

against an irresistible majoritarian preference for socialism that either is or is not "destined" to arrive. If it is destined not to arrive, then punishment for its advocates is all cost and no benefit. If it is destined to arrive, then as Stephen said about the suffrage, it would be better to "take a step with a good grace which it would [be] absolutely necessary to take somehow or other, sooner or later" (PG, p. 4). In such cases, there is no point in complaining that liberalism should not undermine itself by allowing illiberal forces to come to power, or in agonizing about toleration of the intolerant. If a dominant majority wishes to abolish liberalism, then in the long run there is little that a liberal minority, especially judges, can do about it.

Critically, Holmes assumes here that socialism either is or is not "destined" to arrive, whether or not the law suppresses socialist manifestos. This exogeneity is hardly obvious, however. Instead the law might itself shape public beliefs and preferences, either directly by shaping the available stock of political ideas, or indirectly, via law's effects on public beliefs about the beliefs of others. If Holmes's assumption is relaxed, things are far more complicated, as I will discuss shortly.

6. Emergency Powers

Finally, the least-cost principle suggests a pessimistic analysis of the law and politics of emergency powers. Civil libertarians decry majoritarian lawmaking during emergencies, whether effected through legislatures or through nationally elected executives; they complain, among other things, that such lawmaking is chronically infected by panicky assessment of threats and discriminates against foreigners and ethnic minorities.[41] When majorities are in full cry, however, the civil libertarians are whistling into the wind. Panicky or invidious majorities, aroused by a perceived threat, will inevitably have their way, and the record of history is that they do have their way if the perception of emergency becomes sufficiently widespread and intense. The only question in such cases is how to minimize the overall costs of letting majorities prevail.

[41] For an overview and skeptical treatment of these and other arguments, see Posner & Vermeule (2007), 3-159.

A view of this sort makes some sense of Justice Robert Jackson's famous, but puzzling, dissent in Korematsu v. United States.[42] A majority decision upheld President Roosevelt's executive order, ratified by statute, that interned Japanese-Americans and Japanese aliens living in the west coast military zone. Jackson argued that the Court should simply refuse to interfere with the program, while also refusing to give it constitutional blessing; the precedent set by the Court's approval would "lie[] around like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[43] One interpretation of Jackson's idea is that the circumstances of an emergency may force the Court to bend to the will of an inflamed majority, but that the Court should minimize the costs of compliance by refusing, at least, to create a damaging precedent.

I cannot forbear to add that I think this argument is self-defeating. It is not possible to avoid creating a precedent one way or another in such circumstances. If Jackson's dissent had commanded a majority, the precedent would itself have been that in times of crisis, the Court will refuse to interfere with the emergency measures at hand. Even if the Court left such a precedent unwritten, rather than formally inscribed in the law reports, the difference makes little difference where the issue is of such high visibility and historic importance. Lincoln's defiance of a judicial order to release a Confederate agitator,[44] and his unilateral abrogation of habeas corpus during the opening phase of the Civil War,[45] both set de facto precedents more enduring than many de jure precedents proclaimed by the courts.

However, whether Jackson's argument is erroneous or not, the structure of the argument is notable in itself. Jackson implicitly counsels that in emergencies the law should bend before aroused majorities, but only in a fashion that minimizes the social costs of letting aroused majorities have their way. As such, his argument is fully in the spirit of Stephen and Holmes.

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[42] *Korematsu v. United States* 1944, 242-248.
[43] Id. 246.
[44] *Ex Parte Merryman* 1861; for the background, see Farber 2003, 17, 119, 157-63, 188-92.
[45] Farber 2003, 17-19, 157-163, 188-92.

C. The Limits of the Least-Cost Principle

These applications show, I believe, that the least-cost principle is an important counsel of political morality under nonideal conditions. In particular, where majoritarianism holds sway by virtue of its force rather than its intrinsic merits, the least-cost principle is seemingly indispensable to rational action; what else can the decisionmaker or institutional designer do, other than to minimize the costs of letting the majority have its way? However, I believe things are more complicated than that. The principle has limits, but Stephen and Holmes did little to state those limits, or to indicate the conditions under which it is more or less appealing.

I will illustrate these problems by returning to Stephen's and Holmes's account of the channeling function of criminal punishment. Nothing in that account is inherently limited to justified or socially desirable passions; indeed the very point of the account is that it is not so limited. The consequence is that the Holmesian judge may, if consistent, be forced to stamp the law's approval on morally abominable passions. If a dominant mob in the American South of Holmes's day conceived a passion to lynch a black person, should the Holmesian official channel the mob's demands through the legal system by ginning up a false conviction of the victim, or by approving a false conviction ginned up elsewhere? In Holmes's time the Court heard several cases of mob-dominated sham trials, and Holmes wrote emphatically that "lynch law [is] as little valid when practiced by a regularly drawn jury as when administered by one elected by a mob intent on death."[46] My suggestion is that this pronouncement, while admirable, is not obviously consistent with Holmes's general view of the criminal law or with the least-cost principle. Given the circumstances of Holmes's day, the alternative to "lynch law" administered by a jury might well have been, not a fair trial, but a lynching without any law at all.

Examples like this expose a problem with the least-cost principle, which is its static character. The principle takes the beliefs and preferences of the dominant forces as a given; recall Holmes's suggestion that socialism either was or was not "destined" to prevail. But the beliefs and preferences of dominant majorities might also be, in part, an

[46] *Frank v. Mangum* 1915, 350. See also *Moore v. Dempsey* 1923 in which Holmes wrote for the Court. In both cases Holmes's view was that the Court should require a federal judicial hearing, on habeas corpus, into the validity of a mob-dominated trial.

endogenous product of the legal rules, either because law has an educative function,[47] or because law sends a signal to individuals about the beliefs of others[48] and thus shapes equilibrium behavior under conditions of pluralistic ignorance, or because legal constraints shape the available stock of public ideas, which themselves shape beliefs and preferences in the long run.

To the extent that the majority's beliefs and preferences display long-run elasticity, the decisionmaker – the judge in Holmes's situation, or a designer of legislative institutions – might decide to trade off the static social costs of bucking the majority now against the social benefits of announcing legal rules that will dampen undesirable passions or launder out bad preferences for the future. This approach leads to deep questions about how legal rules and public policies might be evaluated where beliefs and preferences are endogenous products of those rules and policies. As those questions are well-known within political philosophy, political theory and economic theory, and as I have nothing original to add, I will simply indicate their existence.[49] What I do add is that the least-cost principle can be implemented not only in a static version, but also in a dynamic version that trades off current costs against future gains.

Although this point indicates the limits of the least-cost principle, at least in its static version, I do not mean to question the principle's utility within those limits. There is doubtless a large domain in which majoritarian feelings and demands are at least partly exogenous to political arrangements and legal rules, or inelastic even in the long run; in such cases the logic of the least-cost principle is indeed unavoidable. Recall that in Gitlow v. New York, the free-speech case, Holmes's precise statement was that criminal punishment was a bad idea if socialism was destined to prevail in the long run, which would imply that punishment would have no effect except to cause pointless suffering.

Moreover, trading off current costs against future benefits will seem unacceptably harsh to those who incur the costs in the first period. Imagine a judge who insists upon enforcing first-best legal rules by refusing to convict, or by overturning the conviction of,

[47] See, for example, Brandeis' claim in *Olmstead v. US* (1928, 468) that "government is the potent, the omnipresent teacher."
[48] McAdams 2000.
[49] For an overview of the problems and possible solutions, see McDonnell 2006.

a black defendant in the Old South, in the hope that the educative power of the law will have beneficial long-run effects. If the mob's racist passions then express themselves outside the law, so that the defendant is lynched, a static version of the least-cost principle starts to seem rather attractive – especially to the defendant, who would presumably prefer a false conviction, with a chance for eventual exoneration or pardon, to the immediate and grim results of first-best justice.

Conclusion

In broad sectors of political theory, political science and social choice theory, analysts debate whether majority rule is more desirable than the alternatives, such as supermajority rules. Ideal social choice theory has exposed many flaws of majority rule and gone a long way to stating the conditions under which majority rule is optimal. However, in a nonideal world, the force of majority rule outruns its intrinsic appeal in an important class of cases. The force of majority rule is both political and psychological, resting upon the ultimate threat that majorities will overpower minorities by violence, upon political envy, and upon the intrinsic simplicity of majority rule. In cases where majority rule is not optimal, but prevails anyway, the best second-best strategy is the least-cost principle of efficient majoritarianism – although there are difficult questions about whether the principle should be implemented in a static or dynamic version.

The background methodological issue involves the benefits and costs of social choice theory. At present that body of theory is overwhelmingly normative, with honorable exceptions,[50] and also relentlessly axiomatic. Section II of this paper, on the causal force of majority rule, is intended to illustrate the utility of explanatory social choice theory, which can fruitfully be pursued in a historical mode and which asks how and why social mechanisms for aggregating beliefs and preferences do actually arise, spread, and flourish or wither. I do not at all claim that I have answered these questions for the central case of majority rule; our current knowledge of even the simplest facts is far too crude for that. I only claim to illustrate a general mode of analysis whose marginal utility is, I believe, much higher than that of further ultra-subtle refinements to normative and axiomatic social choice theory.

[50] See, for example, Regenwetter et al. 2006.

Even within the domain of normative social choice, the analyst can proceed essentially without constraints, as by assuming that any profile of preferences is possible ("universal domain"). In contrast to that approach, Section III is intended to illustrate the utility of second-best social choice theory that, although normative, proceeds under the assumption of realistic political constraints. Here again, I do not claim to have succeeded in offering a second-best argument that is demonstrably correct. By their nature, second-best arguments are rarely such. However, I do hope to have illustrated that this mode of nonideal analysis is plausibly more fruitful than a rigidly ideal treatment.

References

Asch, Solomon. 1951. Effects of Group Pressure Upon the Modification and Distortion of Judgments. In *Groups, Leadership, and Men*, ed. Harold Guetzkow, 177-90. New York: Carnegie Press.

Baker, Peter. 2007. Bush May Be Out of Chances for a Lasting Domestic Victory. *Washington Post* A1, June 29.

Baron, Robert, Sieg Hoppe, Chuan Feng Kao, Bethany Brunsman, Barbara Linneweh, and Diane Rogers. 1996. Social Corroboration and Opinion Extremity. *Journal of Experimental Psychology* 32: 537-560.

Conradt, L. and T.J. Roper. 2003. Group Decision-Making in Animals. *Nature* 421: 155-157.

Dahl, Robert A. 1957. Decision-Making in a Democracy: The Supreme Court as a National Policy Maker. *Journal of Public Law* 6: 279-295.

Elster, Jon. 1989. *The Cement of Society: A Study of Social Order*. Cambridge, Cambridge University Press.

Elster, Jon. 1992. On Majoritarianism and Rights. *East European Constitutional Review* 1: 19-24.

Elster, Jon. 2004. *Closing the Books: Transitional Justice in Historical Perspective* Cambridge: Cambridge University Press.

Elster, Jon. Forthcoming. *Tocqueville: The First Social Scientist*.

Elster, Jon and Hélène Landemore. Forthcoming. Ideology and Dystopia. *Critical Review.*

Ex parte Merryman. 1861. Taney 246, 17 F. Cas. 144-53. C.C. Md.

Farber, Daniel A. 2003. *Lincoln's Constitution*. Chicago: University of Chicago Press.

Frank v. Mangum. 1915. 237 U.S. 309.

Frank, Robert. 1988. *Passions Within Reason: The Strategic Role of the Emotions*. New York: W. W. Norton.

Gitlow v. People of NewYork. 1925. 268 U.S. 652.

Goodin, Robert and Christian List. 2006. A Conditional Defense of Plurality Rule: Generalizing May's Theorem in a Restricted Informational Environment. *American Journal of Political Science* 50: 940-49.

Habermas, Jürgen. 1999. A Short Reply. *Ratio Juris* 12: 445-53.

Hastie, R. and T. Kameda. 2005. The Robust Beauty of Majority Rules in Group Decisions. *Psychological Review* 112: 494-508.

Herzog, Don. 1998. *Poisoning the Minds of the Lower Orders*. Princeton: Princeton University Press.

Holmes, Oliver Wendell, Jr. 1920. Montesquieu. In *Collected Legal Papers*. New York: Harcourt, Brace and Howe.

Holmes Jr., Oliver Wendell. 1991. *The Common Law*. New York: Courier Dover Publications.

Klarman, Michael. Forthcoming. Backlash.

Korematsu v. United States. 1944. 323 U.S. 214.

Kuran, Timur. 1995. *Private Truths, Public Lies: The Social Consequences of Preference Falsification*. Cambridge: Harvard University Press.

Lipsey, R.G. and Kelvin Lancaster. 1956. The General Theory of Second Best. *The Review of Economic Studies* 24: 11-32.

Luban, David. 1994. Justice Holmes and the Metaphysics of Judicial Restraint. *Duke Law Journal* 44: 449-523.

Mashaw, Jerry L. 1985. Prodelegation: Why Administrators Should Make Political Decisions. *Journal of Law, Economics and Organization* 1: 81-100.

May, Kenneth O. 1952. A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decisions. *Econometrica* 20: 680–684.

McAdams, Richard. 2000. A Focal Point Theory of Expressive Law. *Virginia Law Review* 86: 1649-1729.

McDonnell, Brett. 2006. Endogenous Preferences and Welfare Evaluation. Minnesota Legal Studies Research Paper No. 06-50. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=933089.

McGuire, Kevin T. and James A. Stimson. 2004. The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences. *Journal of Politics* 66: 1018-1035.

Mishler, William, and Reginald Sheehan. 1993. The Supreme Court as a Countermajoritarian Institution? *American Political Science Review* 87: 87-101.

Mischler, William, and Reginald Sheehan. 1994. Popular Influence on Supreme Court Decisions. *American Political Science Review* 88: 716-722.

Montesquieu, Charles de Secondat. 1999. *Persian Letters*. Trans. George Healy. Indianapolis: Hackett Publishing.

Moore v. Dempsey. 1923. 261 U.S. 86.

Norpoth, Helmut, and Jeffrey Segal. 1994. Popular Influence on Supreme Court Decisions. *American Political Science Review* 88: 711-716.

Olmstead v. U.S. 1928. 277 U.S. 438.

Pierce, Emily. 2008. Cloture, Filibusters Spur Furious Debate. *Roll Call*, March 5.

Posner, Eric and Adrian Vermeule. 2002. Interring the Nondelegation Doctrine. *University of Chicago Law Review* 69: 1721-1762.

Posner, Eric and Adrian Vermeule. 2007. *Terror in the Balance: Security, Liberty, and the Courts*. New York: Oxford University Press.

Posner, Richard. 1992. Introduction to *The Essential Holmes*, by Oliver Wendell Holmes, Jr., ix-xxxi. Chicago: University of Chicago Press.

Posner, Richard A. 2003. *Law, Pragmatism, and Democracy*. Cambridge: Harvard University Press.

Przeworski, Adam. 1991. *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*. Cambridge: Cambridge University Press.

Rae, D.W. 1969. Decision Rules and Individual Values in Constitutional Choice. *American Political Science Review* 63: 40-56.

Regenwetter, Michel et al. 2006. *Behavioral Social Choice*. Cambridge: Cambridge University Press.

Sanger, David. 2003. Threats and Responses: The Path Ahead; A Decision Made, and Its Consequences. *NY Times* A12, March 17.

Stephen, James Fitzjames. 1863. *A General View of the Criminal Law of England*. London: Macmillan and Co.

Stephen, James Fitzjames. 1873. *Liberty, Equality, Fraternity*. New York: Holt & Williams.

Stephen, James Fitzjames. 1874. Parliamentary Government. *Contemporary Review* 23: 1-19 & 165-181.

Sunstein, Cass. 2007. If People Would Be Outrage by Their Rulings, Should Judges Care? *Stanford Law Review* 60: 155-212.

Taylor, M.J. 1969. Proof of a Theorem on Majority Rule. *Behavioral Science* 14: 228-31.

Vermeule, Adrian. 2007a. *Mechanisms of Democracy: Institutional Design Writ Small*. New York: Oxford University Press.

Vermeule, Adrian. 2007b. The Moral Force of Majority Rules. *OUP Blog*. http://blog.oup.com/2007/07/law.

West Virginia Board of Education v. Barnette. 1943. 319 U.S. 624.

Wilkinson, M. James and Christopher O'Sullivan. 2004. The UN Security Council and Iraq: Why it Succeeded in 1990, Why it Didn't in 2003, and Why the United States Should Redeem it. *American Diplomacy*. http://www.unc.edu/depts/diplomat/archives_roll/2004_01-03/wilkinosull_unsec/wilkinosull_unsec.html.