On Law's Tiebreakers

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Tiebreakers are familiar tools for decisionmaking. Ready examples include penalty shootouts in soccer matches and vice presidents breaking tie votes in the Senate. But we lack a precise understanding of the concept and a normative theory for the use of tiebreakers. This Article strictly defines a tiebreaker as a kind of lexically inferior decision rule and then builds justifications for tiebreaking decision structures. Concentrating on situations in which ties are considered intolerable, the Article suggests methods for either preventing ties or designing sensible tiebreakers. As to the latter, tradeoffs are identified for the use of random variables, morally relevant variables, and double-counted variables within a lexically inferior decision rule. Finally, the Article applies its conceptual and normative lessons to three problems: the best design for affirmative action programs, the proper interpretive method for legal texts, and the core function of adjudication. The closing sections evaluate law and adjudication as one large tiebreaker for the rest of social life, with contrasts and comparisons to some other major theories for the mission of courts in the United States.

> *Discourage litigation. Persuade your neighbors to compromise whenever you can . . . . Never stir up litigation. A worse man can scarcely be found than one who does this.*
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> —Abraham Lincoln[1]

> *If, now, the trier is operating under a system which requires him to decide the question one way or the other, then to avoid caprice that system must furnish him with a rule for deciding the question when he finds his mind in this kind of doubt or equipoise.*
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> —Fleming James, Jr[2]

> *They were men of their times, and they were responding to the norms of their times—to the hidden voices of the zeitgeist.*
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> —Lawrence M. Friedman[3]

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Thanks to Matt Adler, Douglas Baird, Omri Ben-Shahar, Lee Fennell, Barry Friedman, Jake Gersen, Aziz Huq, Dan Kahan, Saul Levmore, Anup Malani, Tom Miles, Richard McAdams, Rick Pildes, Eric Posner, Jennifer Rothman, and David Strauss for helpful conversations and comments on an earlier draft, and to workshop participants at Loyola Law School Los Angeles, The University of Chicago Law School, and New York University Law School's Constitutional Theory Colloquium. The latter workshop had to be cut short, and dramatically so, but Rick Pildes and David Golove made sure that I benefited from the participants' generous attention to the Article. Hanna Chung and Daniel Roberts provided excellent research assistance. Mistakes are mine.

1 Abraham Lincoln, *Fragment: Notes for a Law Lecture* (1850), in Roy P. Basler, ed, *The Collected Works of Abraham Lincoln: Supplement 1832–1865* 18, 19 (Rutgers 1974).

2 Fleming James, Jr, *Burdens of Proof*, 47 Va L Rev 51, 51 (1961).

3 Lawrence M. Friedman, *Law in America: A Short History* 42 (Modern Library 2002).

INTRODUCTION

Tiebreaking is a familiar practice, especially in games. At critical junctures in a sporting contest, the rules of the game will prescribe a method for declaring a winner when the competitors are otherwise even. A tennis set tied at six games might be awarded to the winner of a special one-game tiebreaker, a deadlocked soccer match might be settled with a penalty shootout, and a football game might linger into sudden death overtime. Draws are sometimes tolerated, even at the end of a game. But the desire for drama generated by a decisive result within a limited time frame seems to motivate game designers to deploy tiebreakers.

Tiebreakers exist outside the gaming context as well, in places where entertainment cannot be the justification. In a wide variety of situations, people rely on tiebreakers, at least in a loose sense of the word. Public and private decisionmaking bodies routinely break tie votes by declaring that the motion fails,[4] tied candidate elections are sometimes resolved by drawing lots,[5] and a motorist should yield right when reaching an intersection at the same time as another motorist.[6] For their part, courts respond to equipoise with an assortment of norms—such as the rule that civil defendants prevail when each side's evidence is equally persuasive, that judgments are affirmed by equally divided appellate panels, that constitutional trial errors are deemed harmful when the habeas judge cannot tell one way or the other, and that an agency's reasonable interpretation prevails when a statute seems ambiguous.[7] Even the Constitution of the United States has a tiebreaker. If and only if voting senators are "equally divided," the vice president may vote and thereby break the tie.[8]

Despite numerous illustrations, we lack a solid investigation into

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4 See Henry M. Robert, III, et al, *Robert's Rules of Order Newly Revised* 392 (Perseus 10th ed 2000) ("On a tie vote, a motion requiring a majority vote for adoption is lost, since a tie is not a majority.").

5 See note 13.

6 See text accompanying notes 30–32.

7 See text accompanying notes 201–08.

8 US Const Art I, § 3, cl 4 (stating that the vice president "shall have no Vote, unless they be equally divided"). Ordinarily, Senate approval of a bill requires majority support from a quorum of voting senators. See Walter J. Oleszek, *Super-Majority Votes in the Senate* 1 (CRS 2008), online at http://www.fas.org/sgp/crs/misc/98-779.pdf (visited Apr 8, 2010) (relying on Senate precedent). This rule produces a decisive outcome for numerically tied votes without resort to a special tiebreaker. See David R. Tarr and Ann O'Connor, eds, *Congress A to Z* 472 (CQ 4th ed 2003). But Article I, § 3, clause 4 is nonetheless a "tiebreaker" in the strict sense. See Part I.A.

the phenomenon and theory of tiebreakers,[9] especially in law.[10] There is much casual use of the term "tiebreaker" without a working definition of the concept. And there is a practice of tiebreaking without a systematic attempt to understand the forces that generate ties, the compulsion to break them, and the best way to do so.

The most fundamental issue is why anyone would design a system to ensure that ties are broken. Are ties so terrible? Even when they are, we should know the best ways to prevent or break them. In particular, we should ask whether a rational decisionmaker would break a tie with a variable that was relevant to the merits in the first place. Are variables not simply relevant or irrelevant—rather than relevant only when other variables cancel out? Other kinds of sequential decision structures make more immediate sense, such as bifurcating trials and avoiding unnecessary questions. It is no surprise when people try to prevent considerations relevant to one decision from infecting a different decision, or to save decision costs by resolving a potentially outcome-determinative part of the analysis before taking up other parts. But tiebreakers are more peculiar. They are designed to make exactly the same decision that another decision rule could not handle, and they are not as flexible as a simple aversion to unnecessary judgments.

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[9] A large literature in decision theory confronts uncertainty and other forms of indeterminacy. See José Luis Bermúdez, *Decision Theory and Rationality* 22–27 (Oxford 2009) (describing basic elements of expected-utility-maximizing decision theory for such situations); Simon French, *Decision Theory: An Introduction to the Mathematics of Rationality* ch 2 (Halsted 1986) (similar); David Kelsey and John Quiggin, *Theories of Choice under Ignorance and Uncertainty*, 6 J Econ Surv 133, 133–42 (1992) (collecting rational choice models). See also Jon Elster, *Solomonic Judgements: Studies in the Limitations of Rationality* 8–17, 107–08 (Cambridge 1989) (suggesting lotteries when reason runs out); R. Duncan Luce and Howard Raiffa, *Games and Decisions: Introduction and Critical Surveys* 278–86 (Wiley & Sons 1957) (discussing maximin utility, minimax regret, Hurwicz's best-worst state ratio, and the principle of insufficient reason for dealing with uncertain probabilities across known outcomes). Consider also Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* ch 6 (Harvard 2006) (applying many of these strategies to issues of judicial interpretation). My investigation overlaps these ideas.

[10] For some narrower treatments in the law literature on related topics, see Michael P. Healy, Communis Opinio *and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 Wm & Mary L Rev 539, 571–74 (2001) (distinguishing certain canons of construction that operate as tiebreakers); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L J 353, 382–84 (1988) (discussing compensation and consumer autonomy tiebreakers that judges might use to fashion products liability law); James, 47 Va L Rev at 51–52 (cited in note 2) (discussing preponderance of the evidence). See also generally Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 Wm & Mary L Rev 643 (2002) (defending the rule that judgments are affirmed whenever the justices are evenly divided); David Kaye, *The Limits of the Preponderance of the Evidence Standard: Justifiably Naked Statistical Evidence and Multiple Causation*, 1982 Am Bar Found Rsrch J 487 (1982) (discussing the costs and benefits of various proof burdens, including for situations of equally persuasive evidence in two-party cases); Michael Coenen, Comment, *Original Jurisdiction Deadlocks*, 118 Yale L J 1003 (2009) (assessing options for breaking ties when there is no lower court judgment to affirm).

This Article lays a foundation for a theory of tiebreakers, with special attention to law's tiebreakers. Insofar as a legal institution must serve as a dispute resolution mechanism, ties are acutely troublesome in that setting. More than fifty years ago, Fleming James suggested that ties are a sign of distress within a system that cannot eliminate doubt, that condemns decision by whim, and that nevertheless requires decisionmakers "to decide the question one way or the other."[11] Legal institutions need strategies for preventing or breaking ties, especially when selection effects leave them in charge of the most intractable disputes. Moreover, legal institutions will likely respond to the threat of a tie in special ways. Mature legal systems might be uniquely able to end a dispute as a practical matter, yet uniquely unable to acknowledge indeterminacy on issues that are supposed to govern outcomes on the merits. In any event, law's tiebreaking strategies may differ from the suggestions of abstract decision theory, and understanding law's tiebreakers will help us understand legal institutions.

The Article begins by strictly defining a tiebreaker as a type of lexically inferior decision rule. It also indicates that randomization is often an ideal tiebreaker, assuming that a tie must be broken and that there is no moral reason for demoting a relevant variable to tiebreaker status. When randomization is unacceptable, the Article explains how the probability of a tie can be reduced by moving a relevant variable into a lexically inferior position. The reduction in ties from lexical ordering is usually greater than the reduction from adding the same variable to the mix of other relevant considerations. The cost, however, is a higher error rate. A partial solution is to double count a relevant variable in the case of a tie. This kind of double counting might generate problematic incentives, but sometimes it is the best response when ties must be broken and when randomization is unavailable.

With these tradeoffs identified, the Article comments on three applications. The first involves affirmative action. These programs are sometimes designed as tiebreakers and sometimes not. The second application involves interpretive method. Some interpretive canons are formulated as tiebreakers instead of presumptions, and many scholars suggest that judicial ideology operates in similar fashion. The third application is much broader and more speculative. I suggest that the institutions of law—and, more specifically, judicial adjudication—can be viewed as one large tiebreaker for disputes left unresolved by

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[11] James, 47 Va L Rev at 51 (cited in note 2). James identified the burden of persuasion as a device for resolving all cases of doubt or equipoise on questions of fact in litigation. See id at 51–52. His point is important. Adjustments to the proof burden, however, are "tiebreakers" only in a loose sense of the word. See Part I.A. My goal is to explore the larger option set for both preventing and breaking ties.

other arenas of social life. When law and courts are evaluated from this angle, arbitrariness in adjudication becomes less problematic, while law's incorporation of values from the rest of society becomes a potentially beneficial form of double counting.

The Article is organized into three parts. Part I presents loose and strict definitions of a tiebreaker, and it acknowledges difficulties in specifying the concept. Part II sketches justifications for tiebreaking decision structures, including the prevention of system overload through screening, the presence of variables that are relevant but nevertheless morally and categorically less important than others, the convenience of political compromise, and the threat of otherwise intolerable stalemate. This Part also identifies types of tiebreakers that are especially attractive when ties are considered intolerable. If not altogether random, tiebreaking variables meant to resolve episodic stalemates should be relatively unimportant, cleanly decisive, and perhaps costly to evaluate; sometimes they should amount to double counting a relevant variable in the case of a tie. Part III applies these lessons to affirmative action, interpretive method, and judicial adjudication.

I. IDENTIFYING TIEBREAKERS

The sort of tiebreaker in which I am interested is easy to grasp as an intuitive matter, but not so easy to define with the precision necessary for detailed normative evaluation. This Part begins with a general description of the concept, illustrative examples, and some relatively formal definitions before proceeding to the resulting complications.

A. Definitions

The gist of the concept involves a decisionmaker resorting to a special rule of decision to rank options that are somehow indistinguishable without it. The decisionmaker is faced with mutually exclusive options that are equally good, or that seem the same in relevant ways, or that are incomparable under a prior rule of decision, and yet she is compelled to select one option over another—to break the tie. This setup indicates a looming and unwelcome stalemate, along with a deliberate attempt by decisionmakers to prevent the system from grinding to a halt. The envisioned system has a method for identifying indeterminacy and a mechanism for moving forward regardless.

At the end of regulation time in soccer, for example, the ordinary metric for victory is goals scored. But if the two teams are tied on this measure, and if a draw is unacceptable, then a so-called penalty shootout

might be prescribed as the method for selecting the victor.[12] The shootout clearly is a tiebreaker, having no other role than identifying the winner after regulation-time scoring fails to do so. Another example involves candidate elections, where the ordinary metric for victory is the number of lawful votes cast on or by some date. In some jurisdictions, if the top vote-getters are judged to have received the same number of votes, the victor is selected by a game of chance.[13] Here, lots are the tiebreakers. A soccer fundamentalist might scoff and say that penalty shootouts are no different from drawing lots,[14] but the key thought is that tiebreakers of some kind are used to pick winners in the wake of both tie scores and tie votes. We can draw on these examples to build working definitions of ties and tiebreakers.

Put simply, *"tie" means any equality relevant to an observer*.[15] Ties come in many forms. The soccer and election examples show numerical equalities that are the consequence of uncomplicated evaluative methods. Only one measure is relevant to ranking the competitors, and this measure is reduced to a whole number. If, however, we are interested in the more general topic of options that are difficult to distinguish, then there is no good reason to restrict the inquiry to examples like these. There are several well-known impediments to rank ordering aside from indifference or equipoise with complete

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12 See Fédération Internationale de Football Association, *Laws of the Game* 50–52 (2009), online at http://www.fifa.com/mm/document/affederation/federation/81/42/36/lawsofthegameen.pdf (visited Apr 24, 2010) (describing three approved tiebreaking methods: alternating kicks from the penalty mark, doubling the value of away goals, and extra time).

13 See, for example, Ariz Rev Stat Ann § 16-649(A) (West); Fla Stat Ann § 105.051(1)(c) (West); Mich Comp Laws § 168.851–52; Minn Stat Ann § 204C.34 (West); NM Stat Ann § 1-13-11; Va Code § 24.2-674; Wis Stat § 5.01(4)(a); Randal C. Archibold, *Election at a Draw, Arizona Town Cuts a Deck*, NY Times A1 (June 17, 2009). See also Finland Election Act pt I, ch 7, §§ 89–90 (1998) (regarding the ordering by party of candidates for parliament). In Arizona, a tied *recall* election goes to the incumbent, see Ariz Rev Stat Ann § 16-649(A)–(E), which is consistent with a kind of status quo bias present in several of law's tiebreakers. But I know of no statutes that give the tie to an incumbent in a contested *candidate* election.

14 Compare Christian Celind, *Penalty Shootouts—There Is an Alternative* (May 25, 2008), online at http://www.soccernews.com/penalty-shootouts (visited Apr 24, 2010) ("Despite its appeal for drama and excitement, . . . a penalty shootout is merely a series of random shots in the dark."). In the 1970s, coins actually were flipped to decide some soccer matches. See id.

15 See *Merriam-Webster's Collegiate Dictionary* 1233 (Merriam-Webster 10th ed 1999) (defining "tie" as, among other things, "an equality in number (as of votes or scores)"). I have added the phrase "relevant to an observer" to flag the fact that a tie depends on the metric that matters and that different metrics matter to different observers. Furthermore, even if all observers agree on the relevant metric, different observers might come up with different measurements. Thus competing parties (debaters, say, or litigants) might agree on the relevant issue and disagree on which argument is better. A third party might begin by—or even end up—thinking that the arguments of the first two parties are evenly matched. For this third party, there is a tie. And even from the perspective of the first two parties, there is a tie to the extent they experience an impasse and feel the need to resolve it somehow. Whether one or the other is correct in an objective sense is another matter and does not affect the social reality of impasse.

information. To this we can add uncertainty, ignorance, and incommensurability as other forms of indeterminacy.[16] Essential information regarding the likely consequences of possible actions might be impossible to obtain or too costly to gather; or the system might stall because the decisionmaker is unable or unwilling to rank options that differ along more than one dimension of value. The appropriate decision strategy might depend on the type of indeterminacy, of course, but we can call each a tie.

This inclusive understanding of a "tie" allows for both loose and strict definitions of a "tiebreaker." I will rule out expansive colloquial definitions, however, because they will not isolate interesting design choices regarding decision procedures. Hence, a decisive variable is not necessarily a tiebreaker for my purposes. If three variables are relevant to a decision and two of them cancel out, then the remaining variable can be dubbed "the tiebreaker" in common parlance.[17] But countless decisions turn on one decisive consideration without the decisionmaker paying any special attention to the phenomenon of ties. My interest is the structure and content of decision rules, and so a useful definition of a tiebreaker will describe decision procedures related

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[16] See Kelsey and Quiggin, 6 J Econ Surv at 133–42 (cited in note 9) (distinguishing decision under (1) risk, where the probabilities for a set of consequences in a set of states are objectively known for each proposed action, (2) uncertainty, where probabilities are not objectively known, and (3) ignorance and deeper forms of uncertainty, where not even the set of states is known or where the states–consequences structure is not known); Elster, *Solomonic Judgements* at 8–17 (cited in note 9) (itemizing ways in which rational choice theory may fail to recommend a unique result); Frank H. Knight, *Risk, Uncertainty and Profit* 20, 231–34 (Houghton Mifflin 1921) (distinguishing mere risk from uncertainty). For a brief and nontechnical discussion of uncertainty and uncertainty aversion, see Eric L. Talley, *On Uncertainty, Ambiguity, and Contractual Conditions*, 34 Del J Corp L 755, 763–69 (2009). Common definitions of incommensurability exclude cases in which the observer can say that two choices are equally valuable, see, for example, Joseph Raz, *The Morality of Freedom* 322 (Oxford 1986) ("A and B are incommensurate if it is neither true that one is better than the other nor true that they are of equal value."), so I am using the term "equality" very loosely so as to include incommensurability.

Work on actual human behavior under conditions of "uncertainty" seems focused on decision-making under known or estimated risks, especially stated risks. See, for example, Ralph Hertwig, *The Psychology and Rationality of Decisions from Experience* (unpublished manuscript, 2009), online at http://psycho.unibas.ch/en/datensaetze/departments/cognitive-and-decision-sciences/recent-publications/abteilung/cognitive-and-decision-sciences/ (making this observation and investigating how people react to their experience with risk in contrast to their reactions to described probabilities); Daniel Kahneman and Amos Tversky, *Variants of Uncertainty*, in Daniel Kahneman, Paul Slovic, and Amos Tversky, eds, *Judgment under Uncertainty: Heuristics and Biases* 509, 515–20 (Cambridge 1982) (discussing uncertainty in terms of probabilities and confidence levels).

[17] See, for example, *Metropolitan Life Insurance v Glenn*, 128 S Ct 2343, 2351 (2008) (recognizing that "any one factor will act as a tiebreaker when the other factors are closely balanced"); Matt Weiser, *California Panel Adds New Marine Sanctuary Zone*, Sacramento Bee 3A (Aug 6, 2009) (identifying the new commissioner as the tiebreaker in a 3-2 vote); Karen DeMasters, *Districting Tiebreaker*, NY Times NJ5 (July 22, 2001) (describing the nonpartisan appointee to a commission as the tiebreaker).

to ties rather than variables that happen to break them. Neither the go-ahead goal nor the swing voter will count as a tiebreaker in the analysis below.

Furthermore, only a subset of all decision rules should qualify as tiebreakers. Otherwise the territory is too large to address in one pass. But which subset? Every decision rule breaks a tie broadly speaking, in the sense that decision rules are supposed to rank options and the best option cannot be clear before the observer in question applies the rule. Even if we demand that a tie be broken beyond mere resolution of an issue through the application of a decision rule, most rules will still qualify as tiebreakers. Suppose that an observer cares about voting strength and that there are an equal number of votes for and against a motion. Any decision rule that tells us whether the motion passes could be called a tiebreaker, including: (1) unanimous consent is necessary for passage; (2) majority support is necessary for passage; (3) the side with the most votes prevails and, if the vote is tied, flip a coin. Each of these rules decisively resolves the case of a tie vote, even though some of them pay no special attention to ties.[18]

One way to draw a line between them is to consider the purposes of rule designers. The resulting definition will be somewhat vague, but it will be sensitive to conscious design choices related to ties. Thus, *"tiebreaker" can refer to a decision rule that is, at least in part, purposely designed to rank options that would otherwise be considered tied*—again, beyond the "tie" that always exists before a decision rule is applied to an unresolved issue. This definition supposes that a metric for evaluating options has been identified, that a comparison according to this metric might be inconclusive, and that rule designers have responded to this possibility. As such, the definition tends to distinguish the first voting rule described above from the other two. A unanimous consent rule falls outside of this definition, insofar as the rule is chosen for reasons independent of the tie-vote phenomenon.[19] In contrast, a majority-vote rule might well be chosen partly to deal with tie votes. When votes are the basic metric of victory, the system's designers must still decide whether to slant the voting rules toward the status quo,

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[18] Another way to make the point is to say that, theoretically, every decision rule can be disaggregated into its applications. See Richard H. Fallon, Jr, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv L Rev 1321, 1334 (2000) ("[S]tatutes often are best understood as encompassing a number of subrules, which frequently are specified only in the process of statutory application."). Some of these applications will happen to break ties beyond the mere resolution of uncertainty before application, but this does not mean that the decision rule was designed to confront the issue of such ties.

[19] See, for example, Robert D. Cooter, *The Strategic Constitution* 61–62, 111–14 (Princeton 2000) (observing that unanimity rules prevent coercive redistributive contests while increasing transaction costs for reaching agreement on even socially beneficial cooperation schemes).

toward change, toward the vice president, or toward something else. Demanding majority support for a motion to pass instead of majority opposition for a motion to fail can reflect an aversion to instability where motions and countermotions can return to the agenda. And a purpose-based definition will certainly reach the introduction of a new variable, such as a coin flip, solely to resolve ties.

But there is reason to prefer a more restrictive definition that captures only decision rules akin to the coin-flip alternative. That rule speaks specifically to tie votes. A definition along these lines will isolate a special breed of decision rule that is designed for nothing but breaking ties. Moreover, the presence of a decision rule that singles out ties indicates that a prior decision rule could not settle the matter. When a decision rule breaks down, it effectively identifies a tie for which a tiebreaker might be needed—a tie beyond that faced by every decision rule before it is applied to an unresolved issue. As such, a tiebreaker in the strict sense will come packaged with another rule that speaks to the same issue but that is lexically superior.[20] In our voting rules example, only the third alternative has this quality: one subrule tells us to compare voting strength, and a second subrule turns to a coin flip only when voting strength is equal. Such tiebreakers are part of a decision structure with lexical ordering. *Strictly speaking, then, "tiebreaker" refers to a lexically inferior decision rule that is designed to rank options if and only if a lexically superior decision rule fails to rank those same options*.

To be clear, the strict definition does not require that the lexically superior rule be normatively superior as well. This will be true in many cases but not all. The first letter of a word is not morally superior to the second letter within the rules for alphabetizing. Furthermore, lexically superior rules can be mere gateways to important variables. A lexically superior rule might be the preferred basis for merits decisions, while an inferior rule tidies up a small set of close calls; or a lexically superior rule might be a crude screening device, while an inferior rule includes every variable relevant to a sound decision. Nor does the definition exclude decision procedures that use the same variable in both lexically superior and inferior rules. The content or application of the two rules must differ in some way for ties to be broken,[21] but the same variable might appear in both rules.

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[20] Lexical (or lexicographical) ordering categorically prioritizes one factor or set of factors over others. Alphabetizing is the paradigmatic form of lexical ordering: ordering indicated by an earlier letter in a word always trumps anything suggested by a later letter. See John Rawls, *A Theory of Justice* 37–38 n 23 (Belknap rev ed 1999).

[21] "Do overs," including new trials, are excluded from my definition of a tiebreaker.

What the strict definition does require is a segmented decision structure in which a different decision rule takes over when a prior rule breaks down. This demand is satisfied by soccer shootouts and candidate coin flips, but not by many of the most well-known decision rules in law. The strict definition cannot reach interest balancing, multifactor tests, or all-things-considered judgments. Thus, neither the Hand formula for negligence[22] nor the *Mathews* factors for due process[23] contain a tiebreaker, only a set of variables that are processed together. Similarly, a presumption cannot generate a tiebreaker in the strict sense so long as it is mixed with other variables. If the jury in a criminal trial is instructed to evaluate evidence in light of a presumption that the defendant is innocent, neither the presumption nor the evidence of guilt is reserved for tiebreaking purposes.[24] Nor do elements of a crime, a civil claim, or an affirmative defense constitute tiebreakers. Elements are variables that must point in the same direction for a given side to prevail, meaning that the relevance of any one variable is conditional on the value taken by others, but no variable is in a lexically inferior position compared to the others.[25]

Furthermore, a bifurcated decision structure is not enough. A tiebreaker must attempt to answer the same question addressed by the lexically superior rule. Either ballot counting or lot drawing may tell us who wins an election, but a bifurcated capital trial is different. In that process, a jury is asked to consider the defendant's guilt first and, if the defendant is found guilty, consider whether to impose the death penalty. The penalty phase is in no meaningful sense a tiebreaker for the guilt phase. Rather, the jury is asked to answer two different questions for two distinct purposes. Tiebreakers in the strict sense are conditionally relevant variables that are designed to resolve the same question addressed by the variables on which they are conditioned. This restriction is a bit hazy and manipulable, but it helps stop the definition short of all decision rules.

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22 See *United States v Carroll Towing Co*, 159 F2d 169, 173 (2d Cir 1947) ("[L]iability depends upon whether B is less than L multiplied by P.").

23 See *Mathews v Eldridge*, 424 US 319, 334–35 (1976).

24 See *Coffin v United States*, 156 US 432, 460 (1895) (treating the presumption of innocence as a piece of evidence in favor of the accused). See also Richard D. Friedman, *A Presumption of Innocence, Not of Even Odds*, 52 Stan L Rev 873, 879–83 (2000) (translating the presumption of innocence into Bayesian terms as a requirement that jurors begin with an assessment that the prior odds of guilt are very low).

25 See, for example, *Wiener v Southcoast Childcare Centers*, 88 P3d 517, 519 (Cal 2004) (stating that plaintiffs must show duty, breach, and proximate cause to recover for negligence). For a similar reason, one house of a bicameral legislature is not a tiebreaker for legislation approved by the other house.

A situation that totters on the edge of the strict definition involves sequencing variables to reduce decision costs. Decisionmakers sometimes realize that a theoretically relevant variable is especially difficult or controversial to evaluate and will therefore reserve evaluation of this variable unless it could make a difference. In simple terms, a decisionmaker would have to be in equipoise or only leaning in one direction before turning to the costly variable. An example might be the norm of attempting to avoid resolution of constitutional issues in adjudication.[26] Such sequencing does produce a bifurcated decision structure. But it does not include strict lexical ordering, and so it does not present the same tradeoffs as a tiebreaker strictly defined. If decision-cost sequencing happens to fully bracket some variable until a tie needs to be broken, the practice satisfies the strict definition. But the practice falls outside the strict definition if a costly variable may be added to the mix of relevant variables whenever it *might* affect the outcome. The strict definition of a tiebreaker demands that a tie arise before the tiebreaking decision rule comes into play.

B. Complications

As with many concepts, mine presents difficulties at the margins. A few of them are flagged in this section. The first complication is a risk of underinclusion in the strict definition of a tiebreaker. The others involve the possibility that the presence of a tiebreaker depends on the observer's frame of reference. My sense is that the first complication is relatively minor and that the others are either manageable or features rather than bugs.

1. Functional equivalence.

Some decision procedures that include tiebreakers are functionally equivalent to others that do not. To illustrate, compare (1) a majority-vote rule, with (2) a rule that awards victory to the side with more votes plus a rule that motions fail on a tie vote. Only the second alternative has the lexical ordering required by the strict definition of a tiebreaker, yet both alternatives produce the same outcomes in all cases.[27] If the vote is, say, 50-50, the second decision procedure tells us

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[26] See, for example, *Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936) (Brandeis concurring) (asserting that the Court's practice was consistent with this norm). This norm might also effectively skew the first-order decision rule, as when statutes are interpreted to avoid the risk of a constitutional problem if reasonably possible. Such skewing is akin to increasing the vote requirement for approval of legislation; it does not entail a tiebreaking decision structure.

[27] I am assuming the same quorum rule for both alternatives and that the denominator for the majority-vote rule is the number of people actually voting.

that the motion fails by resort to a tiebreaker in the strict sense, while the first decision procedure tells us the same thing because the motion failed to achieve a majority vote.[28] And both are probably driven by the same purposes. It seems as if the two alternatives should be treated as one.

The functional equivalence problem is real but, in the end, not large. In some cases, the purpose-based definition of a tiebreaker will capture a functionally equivalent decision procedure. Majority-vote rules are candidates for this looser definition. More important, the functional equivalence problem is confined by practical considerations. It is most problematic when decisionmakers use a simple scoring system that cleanly reduces all variables to one metric, such as group voting, but this does not exhaust the phenomenon of indeterminacy. When more subjective judgments must be made, such as the persuasiveness of competing normative arguments, indeterminacy problems can be present regardless of how convincing one side must be to prevail. In these situations, it is not clear how adjusting the decision rule could mimic a lexically inferior tiebreaker. If the tiebreaker would be "defendant wins in cases of indeterminacy," we cannot exactly match those results by incremental increases in the plaintiff's burden of persuasion. The possibility of indeterminacy will reappear at each level.[29]

More generally, the content of many tiebreakers cannot be mimicked without a bifurcated decision structure. For tiebreakers that introduce new variables, such as flipping coins to resolve tie elections, there will not be a plausible functional equivalent. No one will argue for adding a randomly determined vote for one side or another in every election, and doing so would still fail to provide functional equivalence. The results would not be the same in every possible case. Adding a random vote to every candidate election instead of reserving it for tiebreaking purposes can *cause* tie votes, and then leave them unbroken. The same is true for making the vice president a full voting member of the Senate, rather than restricting his voting right to the case of a tie. As a full voting member, the vice president might create ties when an odd number of senators vote. The real differences between

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[28] See Robert, et al, *Robert's Rules* at 392 (cited in note 4). The same observation can be made for baseball. It is sometimes said that a "tie goes to the runner" at first base, but the applicable rule states that a batter is out if "he or first base is tagged *before* he touches first base." Official Baseball Rules 6.05(j) (2008), online at http://mlb.mlb.com/mlb/downloads/y2008/official_rules/06_the_batter.pdf (visited Apr 24, 2010) (emphasis added). Even if ties at first base are possible, this rule purports to offer a decisive resolution without a separate tiebreaker.

[29] Requiring the plaintiff to prove his case to an absolute certainty, however, does seem to mimic the comparable tiebreaking decision structure—that is, plaintiff must be certainly correct, which will never or rarely occur, plus plaintiff loses if the decisionmaker is uncertain whether plaintiff is certainly correct. The results should be the same in all cases.

tiebreaking and other decision structures are a principal concern of this Article.

2. Framing the decision.

The strict definition of a tiebreaker requires lexically ordered rules that address the same decision. These conditions were imposed to prevent the definition from covering every bifurcated or sequential decision structure. But there is no orthodox way to identify the relevant "decision," so tiebreakers may disappear and reappear depending on how an observer frames the decision in question.

Although the requirement of lexical ordering will stop the uninhibited proliferation of perceived tiebreakers, many rules that look like tiebreakers from one perspective can be eliminated by shrinking the frame to excise any lexically superior decision rule. Isolating the task of evaluating a single variable ignores the connection that variable might have to any other. Radically small frames might be oddly small minded, but there is a related complication. Candidates for tiebreaker status might be recharacterized as discrete rules applicable to particular situations—as, in a sense, all rules are.

Take the yield-right rule for intersections. Traffic laws usually provide that, when two vehicles "approach or enter an intersection from different roadways at approximately the same time, the driver of the vehicle on the left must yield the right-of-way to the vehicle on the right."[30] Yield right can be counted as a tiebreaker for a rule that the first driver to enter an intersection may proceed if safe to do so.[31] That is, a yield-right rule takes over when a first-in-time rule breaks down. But one might instead say that there is one traffic rule for hotly contested intersections and a separate rule for others.[32] (One might even claim that the first-in-time rule takes over when the yield-right rule breaks down, although that perspective preserves lexical ordering.)

Framing decisions might be more art than science, but it is not so problematic that an investigation into tiebreakers is fruitless. The significance of such framing is hardly confined to tiebreakers,[33] and it

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30 Ill Ann Stat ch 625, § 5/11-901(a) (Smith Hurd).

31 See *Rupp v Keebler*, 175 Ill App 619, 620 (1912) (stating the first-to-enter rule). See also *Lauman v Vandalia Bus Lines, Inc*, 681 NE2d 1055, 1063–64 (Ill App 1997) (indicating that stop-sign intersections may be governed by both rules).

32 See Edward C. Fisher and Robert H. Reeder, *Vehicle Traffic Law* 154–55 (Traffic Institute, Northwestern 1974) (placing the yield-right rule into a category of right-of-way rules that deal with collision risks). Consider Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 671–74 (Aspen 3d ed 2006) (summarizing the tiers of scrutiny in which different state classifications trigger different burdens for defending them).

33 See, for example, Richard H. Fallon, Jr and Daniel J. Meltzer, *New Law, Nonretroactivity, and Constitutional Remedies*, 104 Harv L Rev 1731, 1758–64 (1991) (discussing when

does not appear that people are incapacitated by the possibilities for reframing what seems like the relevant decision. Indeed a subdiscipline of decision analysis is devoted to identifying discrete decision nodes within the same decision tree and, at least incidentally, distinguishing different decision trees.[34] In any event, some decision structures are so plainly designed for the same problem that the presence of a tiebreaker will be uncontroversial. That the yield-right rule might be challenging for some observers to categorize should not explode the categories entirely. There should be consensus that lotteries have been used as tiebreakers to resolve candidate elections after a tolerable amount of ballot counting fails to do so. And there should be consensus that the penalty phase of a capital trial is not a tiebreaker for the guilt phase.

Even when there is not general agreement on an example, the analysis that follows can be useful. If an individual is willing to consider more than one variable within a frame and is personally satisfied with the coherence of grouping two lexically ordered decision rules together, the analysis may proceed along the lines suggested below. In addition, the ability to accept large frames of reference permits critical evaluation of more decision structures. The closing pages of this Article exploit the possibility of large frames so as to evaluate all of law or all of adjudication as a single unit resembling a tiebreaker. I hope to show that this strikingly large frame is, if nothing else, provocative.

II. DESIGNING TIEBREAKERS

The foregoing discussion raises several questions. First, why would someone design a decision procedure with a tiebreaker in the strict sense? Every variable thought relevant to the merits of a decision can be grouped into a single stage of evaluation, instead of stowing a variable in a tiebreaker position. Second, if a tiebreaking decision structure is justified and can be implemented, what should the tiebreaker look like? It must be that some tiebreakers are better than others. This Part develops answers.

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a judicial decision might qualify as new law rather than another part of the old); Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 Yale L J 1311, 1313–18 (2002) (discussing potentially determinative framing issues in constitutional adjudication); Daniel Lowenstein, *Initiatives and the New Single Subject Rule*, 1 Election L J 35, 46–48 (2002) (contending that a unitary subject is a contestable matter of convenience and social context).

[34] See Detlof von Winterfeldt and Ward Edwards, *Defining a Decision Analytic Structure*, in Ward Edwards, Ralph F. Miles, Jr, and Detlof von Winterfeldt, eds, *Advances in Decision Analysis: From Foundations to Applications* 81, 94–96, 102 (Cambridge 2007) (explaining that "a decision tree is not meant to be a complete and exhaustive representation of all future decisions and events").

A. Justifying Tiebreaking Structures

Several justifications for a tiebreaking decision structure are discussed below. Some of these arguments do not depend on a view that ties are problematic per se, and some might be unpersuasive in any event. Ultimately, I concentrate on plausible justifications that are in fact related to the conclusion that ties must be minimized or eliminated.

1. Overloaded systems.

It turns out that the strict definition of a tiebreaker reaches not only systems that experience episodic stalemates—such as candidate elections and soccer matches—but also perpetually overloaded systems where tiebreakers are constantly in use. In the latter case, decisionmakers are so swamped with options that their ability to evaluate each one thoroughly is overwhelmed. These onslaughts call for a decision procedure that will take a first cut at the available choices and whittle them down to a manageable set for more careful review. Here the motivation for a tiebreaking decision structure is not exactly the fear that a decision rule will run out, but rather that the system will be unable to make any sound decisions at all.

In the early 1980s, for instance, the City of Minneapolis received more than two thousand valid applications for only twenty firefighter positions.[35] Lacking the resources to evaluate each application thoroughly, city officials randomly selected a subset of eight hundred applicants for further competitive testing.[36] Medical screening employs an analogous decision structure. Health professionals sometimes use an inexpensive screening test to determine which patients are relatively more likely to have an illness, and then use a more costly and more accurate test to ferret out the false positives within the smaller sample.[37] We can understand the stages of civil litigation in similar fashion. Civil actions that cannot be resolved by negotiation and motions to dismiss are subject to more costly evaluative efforts, such as summary judgment after discovery or, once in a while, full-blown trial.[38] One might think that, during these stages of litigation, the decision rule is not

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35 See *Anderson v City of Minneapolis*, 363 NW2d 886, 887 (Minn App 1985).

36 See id at 887, 890 (upholding the scheme).

37 See, for example, Mayo Foundation for Medical Education and Research, *Tuberculosis: Tests and Diagnosis* (Jan 28, 2009), online at http://www.mayoclinic.com/health/tuberculosis/ds00372/dsection=tests-and-diagnosis (visited Apr 24, 2010) (discussing skin tests, blood tests, chest x-rays, gene tests, and so forth).

38 See FRCP 12(b)(6), 12(c), 56 (authorizing dispositive pretrial motions). See also 28 USC § 1914 (imposing filing fees for federal civil actions); Adam M. Samaha, *Litigant Sensitivity in First Amendment Law*, 98 Nw U L Rev 1291, 1324, 1333–34 (2004) (describing doctrine that filters out some claims and triggers further evaluation for others).

truly changing insofar as the substantive law remains stable. But that view is superficial. More rigorous testing for only those judgments that seem most difficult is a familiar strategy for economizing on decision costs, and it is notoriously tricky to distinguish the effects of changing "procedural" as opposed to "substantive" decision rules.[39]

A tiebreaking decision structure does emerge when an economical screening device is joined with a more thorough back-end evaluation on the merits. There is lexical ordering, and both decision rules seem to address the same issue (hiring firefighters, for example, or determining whether the defendant owes the plaintiff). But in these situations, the tiebreaking stages of the decision structure are the main events, normatively speaking. The hiring example involves screening with a random variable, which has no moral relevance to the issue. If decisionmakers enjoyed unlimited resources, such screening rules would probably fall away, and what was heretofore a tiebreaker would become the only decision rule. The tiebreaking decision structure is motivated by decision-cost constraints.

Screening devices for overloaded systems are worth treating separately from tiebreakers that cure episodic stalemate. The system overload scenario might be less controversial, in that a tiebreaking decision structure is more likely necessary to avoid system crashes. If an existing decision rule rarely produces ties, there is probably greater opportunity to eliminate them without adding a lexically inferior decision rule. More importantly, the tradeoffs will be different. With overloaded systems, the design question is which options to screen out given that excluded options cannot be reconsidered at the tiebreaking stage. With episodic stalemates, the design question is which variable should be used to break ties among plausible options, given a prior robust effort to rank on the merits. Overloaded systems are meaningfully different, and they are not the focus of this Article.[40]

I do not want to overstate the differences. In both situations, decisionmakers must select rules that move the system toward decision

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39 See, for example, Frank H. Easterbrook, *Substance and Due Process*, 1982 S Ct Rev 85, 112–13 ("Procedural rules usually are just a measure of how much the substantive entitlements are worth, of what we are willing to sacrifice to see a given goal attained."); Mark Tushnet, *The Newer Property*, 1975 S Ct Rev 261, 267–73 (indicating a similar reaction from a different normative perspective).

40 The overloaded system category could be excluded from the definition of a tiebreaker by requiring that the lexically superior decision rule have some probability of resolving the decision problem on its own. Aside from specification difficulties, this exclusion would mean that the existence of a tiebreaker would depend on the composition of cases facing the decisionmaker at any particular moment. Although it is not possible to ignore entirely the composition of cases in evaluating the propriety of tiebreakers, I want to avoid complicating the definition of a tiebreaker with this consideration.

without unduly jeopardizing the chance of a sound decision on the merits. Whether the system is in crisis "at the front end" because too many options are on the table, or "at the back end" because a leftover subset of options seems indistinguishable, responsible decisionmakers will address these possibilities. They will choose variables for one stage of the decision procedure with a concern that errors might increase during the other stage. The considerations discussed below are often applicable to both overloaded systems and episodic stalemates, and to situations in between.[41]

2. Morally inferior variables.

Another potential justification for a tiebreaking decision structure results from moral reasoning and hierarchical value sets. Truly fundamental values may take strong priority over others—so much so that no amount of gain or loss measured on the inferior value set could possibly alter a conclusion reached using the superior value set. If anything within the superior value set points toward one option over others, the decision is made. Note that neither incommensurability nor incomparability is sufficient to create this rigid hierarchy of values. Those concepts indicate difficulties in trading gains on one metric with losses on another, but they do not indicate that any value is categorically less important than others.[42] To achieve a lexical value

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[41] One might think that a tiebreaking decision structure can be justified by the desirability of decision-cost sequencing alone. As discussed above, it can be sensible to postpone the evaluation of costly or controversial variables until they become necessary to reach a sound decision. See text accompanying note 26. But decision-cost sequencing is often accomplished without creating a tiebreaker in the strict sense. The costly or controversial variable would have to be segregated from the other variables and considered *only* when those variables are inconclusive—and not when those variables lean toward one option over another, however slightly. For that lexical ordering to happen, an influence in addition to decision costs is probably at work—such as system overload, moral inferiority, or the imperative of breaking ties. The logic of decision-cost sequencing might help identify variables that make good tiebreakers, but it does not justify a tiebreaking decision structure.

Similar comments apply to variables that are peculiarly subject to cognitively biased evaluation. See generally Amos Tversky and Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, in Kahneman, Slovic, and Tversky, eds, *Judgment under Uncertainty* 3, 4–18 (cited in note 16). Such variables might be excluded from consideration in ordinary circumstances without making them tiebreakers. In addition, justifying a tiebreaking decision structure based on the risk of cognitive bias might incorporate a self-defeating assumption. If a decisionmaker will sometimes handle a particular variable poorly, there is reason to suspect that the decisionmaker will sometimes not respect the dictates of a tiebreaking decision structure. I note this concern in the discussion of interpretive method, see Part III.B.2, but I ordinarily—sometimes generously—assume that decisionmakers can follow instructions.

[42] See Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 Mich L Rev 779, 796, 798 (1994) (explaining that incommensurability, in a relatively weak sense, "occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized"); Jeremy Waldron, *Fake Incommensurability:*

ordering, one or more values must be drastically demoted into a fully inferior status.

Utilitarian purists might not accept that any two relevant values can, will, or should be lexically ordered,[43] but the idea has taken hold elsewhere. The most famous example is probably John Rawls's theory of justice. Rawls described (1) a set of equal basic liberties, such as freedom of thought, which takes priority over (2) a principle that social and economic inequalities must be attached to positions that are available under conditions of fair equality of opportunity, which in turn takes priority over (3) a principle that such inequalities should afford the greatest benefit to the least-advantaged person[44]—in other words, that systems can be ranked according to how they treat the very least well-off person.[45] Evaluative frameworks such as this have a tiebreaking structure insofar as lower priority grounds for judging systems come into play only if higher priority grounds are satisfied. And this structure comes about because of reflective moral reasoning, not because of any aversion to ties per se.

Now, Rawlsian justice is not a perfect example of a tiebreaking decision structure. The former establishes goals for justice-seeking societies, while the latter is a mechanism for avoiding stalemates within society. A proponent of Rawlsian justice would want a system, indeed all systems, to run the gauntlet of every priority listed above and to satisfy every principle therein. Reaching the tiebreaking stage of a decision structure, on the other hand, is commonly associated with a sense of regret and a fear of calamity. Tiebreakers are often safeguards in a way that lower priority principles in a Rawlsian scheme are not. And when a tiebreaking decision structure is used to prevent system

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A Response to Professor Schauer, 45 Hastings L J 813, 815–16 (1994) (distinguishing the dilemmas posed by strong incommensurability from ordering by lexical priorities). On different specifications for the term, see, for example, Matthew Adler, *Incommensurability and Cost-Benefit Analysis*, 146 U Pa L Rev 1371, 1383–89 (1998) (offering various definitions and reasons); Henry S. Mather, *Law-Making and Incommensurability*, 47 McGill L J 345, 348–58 (2002) (defining incommensurability for lawmakers and for others).

43 But see John Stuart Mill, *Utilitarianism* 11–16 (Chicago 1906) (originally published 1863) (asserting that certain higher pleasures can safely be judged superior in kind by those with experience).

44 See John Rawls, *Justice as Fairness: A Restatement* 42–47, 59–61 (Belknap 2001) (Erin Kelly, ed). Rawls also suggested that a principle of meeting "basic needs" might be lexically prior to all three of these principles. See id at 44 n 7.

45 See id at 59–60. A moderated version of Rawls's third (maximin) principle is leximin, which allows comparison of the next-least well-off person if two options yield the same treatment of the very least well-off person. See Amartya Sen, *Choice, Welfare and Measurement* 24–25 (MIT 1982). For other versions of "prioritarianism" that incorporate some value for equality among people, including a weak version where greater equality is merely a tiebreaker, see Bertil Tungodden, *The Value of Equality*, 19 Econ & Phil 1, 23–32 & table 2 (2003). For a sophisticated review of prioritarian social welfare functions and competitors, see Matthew D. Adler, *Well-Being and Equity: A Framework for Policy Analysis* *ch 4 (Oxford forthcoming 2011).

overload, it has even less in common with the logic of hierarchical values. Then tiebreakers are simply ensuring that decisions can be made. Nevertheless, Rawlsian justice illustrates that sophisticated moral reasoning can result in a conclusion that some values are categorically more important than others. This conclusion can be the justification for creating what qualifies as a tiebreaking decision structure, even if Rawlsian justice does not quite have a tiebreaking character.

Although lexical moral inferiority is a relatively extreme judgment, it is a phenomenon. A recent example (to which I will return) involves student assignment. The City of Seattle guaranteed that siblings could be sent to the same high school before factors such as racial composition and geographic proximity were considered.[46] As an extreme moral judgment, lexical inferiority is subject to testing with extreme hypotheticals. To be lexically inferior, the consideration must have zero power to influence a result when a lexically superior consideration points the other way, however slightly. Hence, if a university claims that no student should be admitted unless the applicant is highly likely to graduate, this must be true even when the applicant offers to donate $100 million to the university and there is a 50-50 chance that the applicant will graduate.

The larger problem with rigorous exploration of this justification for tiebreakers is viewpoint diversity. Whether one consideration is lexically inferior to a second consideration will depend on the decisionmaker's normative framework. Many frameworks exist—cosmopolitan, libertarian, utilitarian, and so on—along with disagreement over the proper application of general frameworks to particular problems. Competing frameworks and contested applications multiply the number of potential tiebreakers. This makes difficult a firm judgment on any single tiebreaker without narrowing the analysis to one moral perspective, and it makes impossible a firm judgment on many tiebreakers at once without excessive length. My response is to show how moral reasoning fits into a general analytic approach to the evaluation of tiebreakers, without attempting to settle the specific moral judgments that must be made within that analysis. In this way, the analysis will remain relevant to people with a variety of moral commitments, at the price of simple conclusions to narrow issues.

Before leaving moral reasoning, we can learn something by comparing Rawlsian justice theories to decision theory literature regarding uncertainty. Decision theorists attempting to maximize expected

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[46] See text accompanying note 102. Consider *Norwest Bank Worthington v Ahlers*, 485 US 197, 202 (1988) (describing the absolute priority rule in bankruptcy, under which unsecured creditors may object to a reorganization plan that does not make them whole before a junior class receives property).

utility have recognized special problems in rank ordering possible actions when, for example, probabilities cannot rationally be assigned to possible states of the world.[47] Various strategies have been suggested with nifty labels and more or less intuitive foundations: maximin, maximax, minimax regret, the Hurwitz α-criterion, and so on.[48] These strategies could be thought of as tiebreakers, insofar as they resolve indeterminacy and come into play when ordinary rules of decision cannot solve the problem.[49] Although it may well be better to think of decision theorists as building two different strategies for two different problems (risk versus uncertainty), the separate strategies considered together vaguely resemble the lexically ranked priorities of philosophers like Rawls.

There is another way to distinguish decision theory, however. The goods that Rawls prioritizes do not seem to reappear in other parts of the ordering. Free thought might be necessary to make lower-ranked goods valuable, but that is not to say that free thought is part of the criteria at those lower ranks. In some contrast, the values that animate strategies for uncertainty, such as minimax regret—perhaps the special pain of regret when a decisionmaker learns that he could have chosen a better action—probably can be incorporated into expected utility analysis when there is only risk. I know of nothing in decision theory that prohibits the use of regret to estimate the utility associated with different outcomes in different states of the world. These strategies might then allow for a kind of "double counting": the decisionmaker might take account of a value such as regret aversion in every decision situation where regret is possible and then, if uncertainty becomes a problem, reintroduce that value to help rank one course of action over another. Regardless of the present state of decision theory, the possibility of double counting variables turns out to be important, and I address it later in this Article.[50]

3. Politics and strategic behavior.

The discussion above emphasized moral principle. But decision rules can be the product of politics, negotiation, compromise, and further dynamic interaction among people with very different goals.

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47 Literally speaking, probabilities always can be assigned. The question is whether some assigned probabilities are basically worthless.

48 See French, *Decision Theory* at ch 2 (cited in note 9). Here "maximin" simply refers to the action with the highest lowest utility, rather than the well-being of the least-advantaged person.

49 See Isaac Levi, *Hard Choices: Decision Making under Unresolved Conflict* 110–11 (Cambridge 1986) (relating decision rules for situations of uncertainty to lexicographical decision structures).

50 See Part II.B.2.

These dynamics can yield a tiebreaking decision structure. That is, people with different interests might settle on a decision procedure that demotes certain variables to a lexically inferior position, perhaps while fine tuning the lexically superior rule to ensure that "ties" will happen with some probability. This is partly an explanation for tiebreakers and partly a justification, insofar as this kind of negotiation and compromise is socially beneficial.

An example of political interaction creating tiebreakers appears at the Founding, when US House delegations were given the task of selecting the President if no single candidate received an outright majority of electoral votes.[51] House participation was expected to happen frequently enough that the Electoral College would tend to function as a screening device rather than the decisive stage of an election.[52] A compromise explanation also helps account for affirmative action programs that are designed as tiebreakers rather than part of a unitary, all-things-considered judgment.[53] Securitized debt instruments can be portrayed in similar fashion, to the extent that different tranches are created with different risks and investors decide whether and where to buy in.[54] If things go badly, the stakes of those who bought into less-favorable tranches are tapped out before those in other tranches take losses. In any case, the general idea is that counterintuitive decision procedures are sometimes best explained and even justified by interactive politics rather than abstract principle.

This leads to an observation about incentives and strategic behavior. Tiebreakers are effective only when they differ from the lexically superior decision rule, and the difference might matter to interested parties. Knowing that the basis for decision will shift if the tiebreaker is used, some people might be relieved to reach the tiebreaking stage while others might seek to avoid it at all costs. Creating a tiebreaking decision structure therefore opens another possibility for strategic behavior, by parties and by decisionmakers. Thus one political party will not mind if the Senate deadlocks and the vice president decides the matter, while another will work harder to attract the fifty-first vote; and one admissions officer might be satisfied with a large set of ties that allow consideration of applicant income or race, while another might look harder for distinguishing features relevant to the first cut.

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51 See US Const Art II, § 1, cl 3.

52 See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 264–65 (Knopf 1996).

53 See Part III.A.2.

54 See Kathleen C. Engel and Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 Fordham L Rev 2039, 2045–46 (2007).

Whether such adjustments are troublesome depends on a given normative perspective. Perhaps competing pressures to avoid or prompt a tiebreaker are unimportant, acceptable, or even useful. In any case, it is difficult to offer a global evaluation of the strategic opportunities generated by tiebreakers. More specific information is needed. For instance, if the lexically superior decision rule is a variable such as age or race, participants might not be able to manipulate the process into the tiebreaking stage. The important observation is that a tiebreaking decision structure, like any decision procedure, should be evaluated considering the likely reaction of interested parties. The special point about tiebreakers is that they may create unique strategic opportunities and behavioral incentives.

4. Intolerable ties.

This brings us to justifications that depend on the threat of a tie, which will be the focus of the remainder of the Article. But the first thing to remember here is that a tie might be tolerable. In fact, ties are sometimes required by law or moral theory.

Part of equal protection doctrine instructs officials to "treat like cases alike."[55] Although this command is fairly vacuous, the objective is to ensure that certain classes are treated the same as other classes with respect to certain features. Functionally, this means that all remain tied with respect to these features. In *Reed v Reed*,[56] to take one example, the Supreme Court invalidated the use of sex as a tiebreaker in appointing the administrator of an estate.[57] There might be other ways to distinguish applicant qualifications, but fathers and mothers had to remain "equally entitled"[58] absent further inquiry. Perhaps the most prominent legal equality norm is the one-person, one-vote principle for legislative districting.[59] At one point, the Supreme Court went so far as to claim that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."[60]

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55 See, for example, *Engquist v Oregon Department of Agriculture*, 553 US 591, 601–02 (2008); *Vacco v Quill*, 521 US 793, 799 (1997).

56 404 US 71 (1971).

57 Id at 76–77.

58 Id at 73.

59 See *Reynolds v Sims*, 377 US 533, 568–77 (1964) (requiring legislative districts to have "as nearly . . . equal population as is practicable"). See also US Const Art I, § 3, cl 2 (instructing that senators "be divided as equally as may be into three Classes" for election).

60 *Gray v Sanders*, 372 US 368, 381 (1963). Of course, the Court's assertion fails to explain the composition of the United States Senate. See US Const Art I, § 3, cl 2; US Const Art V.

And it is commonplace to tolerate parity in our social lives. Some people like apples and oranges equally well, some people are agnostic about the existence of a divine being, and some people try to treat each of their children equally well. Many people believe that every person is entitled to a certain kind of dignity and respect from others.[61] Nothing in these conclusions screams "error" and an urgent need for correction or precaution. To the extent that a tie is a form of indeterminacy, only the most pathologically curious among us find it impossible to rest with the answer "I don't know" or "It's not clear." The compulsion to rank order is hardly a weaker sign of mental illness than the embrace of equality or uncertainty. Even *US News & World Report*, which reflects widespread craving for differentiation along a unitary numerical measure of quality, tolerates ties when it ranks schools.[62]

Furthermore, life does not always present all-or-nothing choices. Even when we face problems of scarcity—where not everyone's justified claim to a resource can be satisfied—there often will be alternatives to ranking recipients and leaving some people out in the cold. Sometimes the resource in question can be split between deserving claimants without too much sacrifice in value. This is true of money. If instead the resource is indivisible,[63] there are other ways to share instead of rank. Occasionally a resource can be used effectively by more than one person at the same time. This is sometimes true of real property. When this is not sensible, people might take turns using the resource, thereby sharing across time. There is even the possibility of denying the resource to equally entitled claimants.[64] And it should be remembered that some scarcity problems can be solved by producing more of the resource. Finally, there are well-known benefits to delay. Indecision creates an opportunity to collect more information and respond to unforeseen circumstances. The obvious conclusion is that

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61 See, for example, Immanuel Kant, *The Metaphysics of Morals* pt 2, §§ 37–39 at 209 (Cambridge 1996) (Mary Gregor, trans and ed) (positing a duty to respect others and a correlative claim to respect); Universal Declaration of Human Rights Art 1, 22, UN General Assembly Res No 217A(III) (1948), UN Doc A/810 (declaring that "[a]ll human beings are born free and equal in dignity and rights" and are "entitled to . . . rights indispensable for [their] dignity"). See also Mill, *Utilitarianism* at 93 (cited in note 43) (formulating Jeremy Bentham's view as "everybody to count for one, and nobody for more than one").

62 See *Best Colleges 2010*, US News & World Rep, online at http://colleges.usnews.rankingsandreviews.com/best-colleges/national-universities-rankings (visited Apr 24, 2010) (ranking the California Institute of Technology, MIT, Stanford, and the University of Pennsylvania fourth).

63 I mean either literal or practical indivisibility. See Adam M. Samaha, *Randomization in Adjudication*, 51 Wm & Mary L Rev 1, 20 (2009).

64 On a related note, the Order of the Coif used to allow its chapters to deny membership to law students who tied for the last of a limited number of places. See *Constitution of the Order of the Coif* § 4.2(b)(2) (1998).

there is no need to rank options when sustained equality is permitted, useful, or required.

That said, ties certainly can be troublesome or even catastrophic. The risks of ties prompt warnings of stalemate, standoff, impasse, or deadlock. People will differ over which ties are disastrous and which are endurable, but there is no question that individuals and societies are at least occasionally justified in making extraordinary efforts to rank options. The inability to select one home, one job, one patient, one President, one plan of attack, or even one driver with the right of way can be more than a nuisance. It can be the difference between systems seizing up and rumbling forward. Indeed, ties might be terrible even when unlikely. If the potential injury from stalemate is sufficiently catastrophic, even minuscule chances of a tie might be addressed with extremely costly precautions.

As one remarkable illustration of the felt importance of breaking ties, consider legislative redistricting in Illinois. The one-person, one-vote principle triggers redistricting obligations every ten years when new census figures arrive. But in the early 1960s, Illinois politicians deadlocked over a new redistricting plan for the state house. As a consequence, 236 candidates for 177 seats ended up all running together in a single at-large race.[65] The ballots were enormously long. Subsequently, a new multi-tier tiebreaking system was established for redistricting purposes.[66] If the state legislature fails to complete a redistricting plan by a certain deadline, a bipartisan eight-member commission inherits the obligation. If this commission deadlocks as well—which is not unlikely given its composition[67]—then lots are drawn to determine whether a Republican or Democrat is added to the commission.[68] The

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65 See James H. Andrews, *Illinois' At-Large Vote*, 55 Natl Civic Rev 253, 253–54 (1966) (explaining that an at-large election was prescribed by a 1954 state constitutional amendment).

66 See Ill Const Art 4, § 3(b).

67 See John S. Jackson and Lourenke Prozesky, *Redistricting in Illinois* 9–11 (Paul Simon Public Policy Institute, Apr 2005), online at http://opensiuc.lib.siu.edu/cgi/viewcontent.cgi?article=1013&context=ppi_papers (visited Apr 24, 2010) (noting deadlocks in each of the last three redistricting cycles).

68 See *Winters v Illinois State Board of Elections*, 197 F Supp 2d 1110, 1115 (ND Ill 2001) (three judge panel) (upholding the tiebreaker against due process and equal protection challenges), affd without opinion, 535 US 967 (2002). Proponents of this tiebreaking system might have thought that the prospect of a lottery would frighten legislatures into reaching agreement. This amounts to a "penalty default" tiebreaker, see Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87, 91–94 (1989), which is intended to encourage constructive behavior during the prior stage of decisionmaking. The attempt has not been successful in Illinois redistricting, but the strategy may be viable elsewhere. Difficulties include finding a tiebreaker that is sufficiently unpleasant to affect behavior, yet not so awful that the threatened tiebreaker could not credibly be threatened. In any event, seeing decisionmakers resort to tiebreakers informs the rest of us that prior decision rules are

redistricting issue illustrates how the prospect of deadlock may instigate repeated efforts to guarantee resolution and to improve the quality of the tiebreaking device.

B. When Ties Are Intolerable

Suppose, then, that a tie is costly or problematic. What is the best response in terms of decision rules and decision structures? This Part first highlights design choices that can minimize ties without generating tiebreaking decision structures, then explains the advantages and disadvantages associated with using tiebreakers, strictly defined.

1. Preventing ties.

If a persistent tie would be harmful, there are strategies for responding to the risk aside from the creation of tiebreakers. The basic lesson here is that the risk of a tie is a function of the decision rule operating in a given context, and that there are several ways in which decision procedures can be adjusted to prevent ties.

One possibility was mentioned above in a discussion of voting rules: manipulating a unitary decision rule by raising the bar for one outcome over another.[69] That is, the preferred outcome can be predetermined for numerical ties according to some value choice. As I have explained, this move will not eliminate indeterminacy regarding whether the new bar has been satisfied, but it can eliminate one form of tie.

Another possibility is to make a unitary decision rule more sensitive. Greater effort to detect differences or better evaluative technology can reduce the number of perceived ties. Hence a decisionmaker might spend more time on the problem to gather information and to reconsider carefully the options, or invest in better tools for processing relevant information in ways that allow clearer distinctions between options. These efforts can reveal more gradations within relevant metrics and can yield greater confidence in these perceptions. This should reduce the probability of a tie. Thus radar guns supply a more accurate measure of motorist speeds than unassisted human sensory perception; and we hope that recounting ballots in candidate elections has a similar upside.

A related strategy is to make the decision rule more complex. If it has not already been done, the scales for relevant variables could be increased or new variables could be added. Assuming that every gradation in the scale is equally likely to be perceived, and that variables can

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failing to resolve issues. This might be good reason to stop and reexamine the design of those prior rules.

[69] See Part I.B.1.

be measured with adequate confidence, the chance of a tie plummets when we move from a variable with a few gradations to hundreds or thousands of gradations. Adding new variables has a similar effect. It tends to reduce the chance of a tie, all else equal.[70] Moreover, adding variables might be justified regardless of how threatening a tie would be. Every new variable that is relevant to a sound decision should increase the likelihood of a correct decision, taking into account the possibility that complex decision procedures tend to induce mistakes.[71]

The reduction in ties from additional variables can be estimated. Suppose you face two options: reading the rest of this Article (action *A*) or writing an article of your own (action *B*). Suppose further that you use two variables to resolve this type of decision problem: entertainment value (variable *a*) and educational value (variable *b*). Each variable is equally important to you and can take one of two values: favor action *A* (represented by the value -1) or favor action *B* (represented by the value +1).[72] Assume that each value is equally likely for each variable in such decisions before you begin thinking about your options.[73] Finally, variables *a* and *b* are commensurable; you will simply add them together to make the decision. On these assumptions, the probability of a tie is 50 percent. There are four permutations and two of them add up to zero, as shown in Table 1. A zero sum amounts to a tie between *A* and *B*.

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70 One factor that must remain unaffected is the distribution of hard cases. If for some reason the addition of another variable leads people to litigate hard cases more often, for example, then the percent chance of a tie might actually increase. Having no strong intuition about the effect on contested cases, I will assume no net effect.

71 See, for example, Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stan L Rev 211, 214 (1995).

72 These relative values make it easy to see the direction in which each variable points in two-option cases. A more common scoring method assigns a zero or positive value $\{0, 1, 2, \ldots n\}$ to each variable for each option (for example, $A_a = 1$, $A_b = 2$, $B_a = 3$, $B_b = 2$, $C_a = 2$, $C_b = 0$), and then compares the total scores for each option (for example, $A = 3$, $B = 5$, $C = 2$).

73 The convention in decision theory differs. Ordinarily, decision theorists construct their decision tables to show that the expected utility of different options depends partly on the state of the world after a decision is made, and that the possible states are beyond the decisionmaker's control. Hence, decision tables chart the consequences of a set of actions across a set of states, which may or may not be subject to reliable prediction. See, for example, French, *Decision Theory* at 33 (cited in note 9). In my simplified discussion, the exact consequences of action *A* and action *B* are known to the decisionmaker once values are assigned to the variables, and it is known that each variable is equally likely to take the value -1 or +1.

TABLE 1. PERMUTATIONS FOR 2 VARIABLES WITH 2 VALUES {-1, +1}

a	*b*	*a* + *b*	choice
-1	-1	-2	*A*
+1	-1	0	tie
-1	+1	0	tie
+1	+1	+2	*B*

Now suppose that you are willing to add a third variable to the mix, such as reputation (variable *c*). If *c* has the same characteristics as *a* and *b*, then the possibility of a tie is totally eliminated. All three variables can never add up to zero, given the restrictions on their values. The eight permutations are shown in Table 2.

TABLE 2. PERMUTATIONS FOR 3 VARIABLES WITH 2 VALUES {-1, +1}

a	*b*	*c*	*a* + *b* + *c*	choice
-1	-1	-1	-3	*A*
+1	-1	-1	-1	*A*
-1	+1	-1	-1	*A*
+1	+1	-1	+1	*B*
-1	-1	+1	-1	*A*
+1	-1	+1	+1	*B*
-1	+1	+1	+1	*B*
+1	+1	+1	+3	*B*

These two-value cases do not reflect most real-life decision problems. Many variables are much less rigid. One variable might be more important than others, or might clearly favor one action over another rather than simply point in one direction. As a corrective, one or more variables can be loosened to take values higher than +1 or lower than -1. It is also possible for a variable to be indeterminate. A decision-maker might be unable to distinguish two actions with respect to educational value, or entertainment value, or some other relevant feature. This possibility suggests that at least some variables should be adjusted so that they may take the value 0.

The two-value variable cases lack these nuances. Because of this, an odd pattern emerges for the chance of a tie when new variables are added (Figure 1). The chance of a tie is always nil with an odd number of variables taking the values {-1, +1}. In contrast, an even number of

such variables results in a diminishing number of ties, with the percent chance topping out at 50 percent in the two-variable case.

FIGURE 1. TIES WITH 2-VALUE VARIABLES {-1, +1}

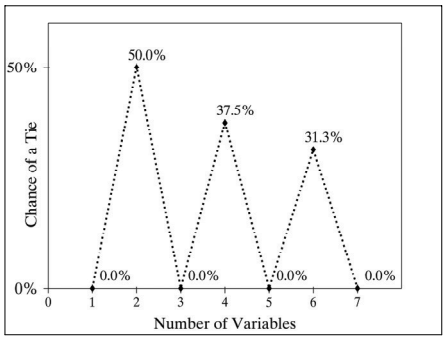


FIGURE 2. TIES WITH 3-VALUE VARIABLES {-1, 0, +1}

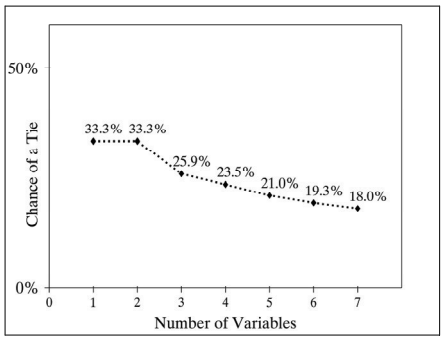
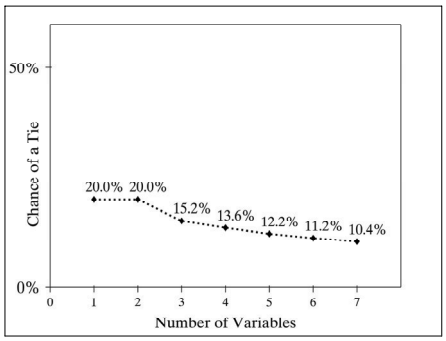


FIGURE 3. TIES WITH 5-VALUE VARIABLES {-2, -1, 0, +1, +2}



The second pattern is the one worth stressing: the percentage of ties tends to decrease as the number of variables increases. It holds for more nuanced variables. For variables taking the values {-1, 0, +1}, the chance of a tie stays at 33 percent for one or two variables and then drops to about 26 percent for three variables and 18 percent for seven

variables (Figure 2). The pattern is similar for variables taking the values {-2, -1, 0, +1, +2}. The major difference is that the chance of a tie is uniformly lower, starting at 20 percent and falling to about 10 percent with seven variables in play (Figure 3).[74]

2. Breaking ties.

The results above reflect a general principle that additional gradations or variables tend to reduce the risk of a tie. If a tie would be problematic, the best response might be a unitary decision rule that incorporates every conceivably relevant variable and a decision procedure that measures each variable with precision. But there are limits to the foregoing strategy. Decision costs likely will rise as the decision rule encompasses more variables and the process becomes more sensitive to nuance. In addition, the number of variables truly relevant to a sound decision has a ceiling. At some point, rational decisionmakers will run out of them. Moreover, the ceiling on useful variables might be lower if we account for the limited cognitive capacity of human beings. Complex formulas will be beyond the ability of many people to operate, at least without making frequent and serious errors. And, in at least some situations, a tie will remain possible even if all relevant variables are measured without error.

For these reasons, it will sometimes make sense to create a tiebreaking decision structure to break intolerable ties. So, assuming that this structure can be implemented such that decisionmakers will abide by it, what makes a good tiebreaker? Three candidates are assessed below: random, relevant, and double-counted variables.

a) Randomization. Aside from morally inferior variables, and as a purely theoretical matter, there is an especially attractive type of tiebreaker: randomization. A great virtue of randomization is that it facilitates decisive resolution while accepting that reason can run out.[75] Randomization allows a decisionmaker to embrace any form of indeterminacy without suffering a destructive stalemate and without ignoring or distorting the value of any variable relevant to the merits. Decisions do not tend to improve when a random variable is thrown into the mix of relevant variables, and so a decisionmaker is probably not missing anything when she first tries to solve a problem on the merits

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74 In the case of seven five-value variables, there are 78,125 permutations (5^7). I thank Daniel Roberts for his help in constructing these tables of permutations. The relevant spreadsheets are available from the author upon request.

75 See Elster, *Solomonic Judgements* at 38, 54, 73, 75, 107–09 (cited in note 9); Samaha, 51 Wm & Mary L Rev at 21–22 (cited in note 63). See also Peter Stone, *The Luck of the Draw* *123 (Oxford forthcoming 2010) (on file with author) ("[W]hen claims are equally strong, no relevant distinctions exist, and so an appeal to reason would accomplish nothing.").

without randomization. A random variable located in the tiebreaker position, however, can resolve major headaches.

Hence, if two actions are mutually exclusive yet equally preferable, the decisionmaker can give each action equal chances. In doing so, she avoids distorting her evaluation of the situation to meet the imperative of judgment, the infiltration of improper grounds for decision, and the unrealistic belief that reason can rank everything.[76] Randomization suppresses no ties, yet it resolves them. Turning to a statistically equiprobable randomization device is not the only rational response to indeterminacy; the decisionmaker could use any method that is arbitrary for picking one action over another,[77] in the sense of operating on a principle orthogonal to the merits. But whether the randomizing device is statistical or orthogonal,[78] it nonetheless provides a useful and rational response to indeterminacy.

As a matter of practical reality, however, randomization often will be unavailable. Occasionally the hindrance will be sadly pedestrian. Consider the yield-right rule. It obviously works much better than drivers flipping coins, which would entail delay and coordination problems. Probably more often, the hindrance will be cultural or political. This resistance seems strongest with respect to adjudication on the merits, where judges face not only reversal but also professional discipline if they flip coins to decide cases.[79] Of course, randomization is accepted practice elsewhere, including case assignment lotteries within judiciaries.[80] But lotteries can be a politically explosive decision rule. Officials who resort to them risk "the reproach of frivolity or cynicism."[81]

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76 See Otto Neurath, *The Lost Wanderers of Descartes and the Auxiliary Motive*, in Otto Neurath, *Philosophical Papers: 1913–1946* 1, 8 (D. Reidel 1983) (Robert S. Cohen and Marie Neurath, eds and trans) ("Rationalism sees its chief triumph in the clear recognition of the limits of actual insight.").

77 See Edna Ullmann-Margalit and Sidney Morgenbesser, *Picking and Choosing*, 44 Soc Rsrch 757, 758–65, 773–74 (1977) (distinguishing "picking" from "choosing" based on preferences and reasons).

78 See Samaha, 51 Wm & Mary L Rev at 10–14 (cited in note 63) (distinguishing these concepts).

79 See, for example, *In re Brown*, 662 NW2d 733, 738 (Mich 2003) (censuring a judge who used a coin flip to determine a custody dispute); New York State Commission on Judicial Conduct, *Annual Report* 84, 88 (1984) (disciplining a judge who used a coin toss to determine the length of a defendant's jail sentence); *In re Friess*, 91 AD2d 554, 554–56 (NY App 1982) (denying the judge's request to restrain the Commission from proceeding against him because of the coin-toss procedure).

80 See Neil Duxbury, *Random Justice: On Lotteries and Legal Decision-Making* 43–84 (Oxford 1999) (collecting examples of lotteries in social decisions); Samaha, 51 Wm & Mary L Rev at 29–53 (cited in note 63) (contrasting attitudes toward randomization in case assignment and merits judgments).

81 Neurath, *The Lost Wanderers of Descartes* at 8–9 (cited in note 76). See also Elster, *Solomonic Judgements* at 37 (cited in note 9) ("Rather than accept the limits of reason, we prefer the rituals of reason."); John E. Coons, *Consistency*, 75 Cal L Rev 59, 110 (1987) (similar); Judith

A recent illustration comes from Connecticut election law. That state's statutes used to provide that tied primary elections would be resolved by lot.[82] For at least fifty years preceding the 2006 election cycle, there had been no ties in any Connecticut election and so the provision rested in quiet obscurity. In that year, an incumbent state legislator attracted a primary challenger, and the ballot-counting procedure ended with each candidate receiving 457 votes. The incumbent prevailed on a coin toss. When she returned to the legislature, she and the secretary of the state joined forces to amend the statute. "No candidate should have to worry that a tie would mean a coin-flip," the secretary later declared, "and more importantly no voter should fear being disenfranchised."[83] However weak this logic might be, Connecticut law now mandates special elections instead of lotteries to resolve ties in primary elections.[84] The financial cost of a special election is a rough indication of the political difficulty with randomization in this particular context.

b) Relevant variables. If randomization is unavailable, an alternative is to place a relevant variable in the tiebreaker position. Often this will be regrettable. To the extent that a variable relevant to the merits of a decision is isolated from consideration unless and until the other relevant variables cancel out, the decisionmaker is throwing out potentially valuable information. Not every feasible system is first-best, however, and informational sacrifices might have to be made. The discussion here offers a way to think about the tradeoffs.

Begin by noticing an obscure benefit from using a relevant variable as a tiebreaker instead of adding it to the mix of other variables. As shown in Part II.B.1, adding a variable to a decision rule tends to drive down the chance of a tie—but placing that same variable in a lexically inferior position tends to drive down the chance of a tie *even faster*. The same variable will usually do more good against ties as a tiebreaker than it will when treated like any other relevant variable.

Resnik, *Precluding Appeals*, 70 Cornell L Rev 603, 611 (1985) ("[T]he community wishes judicial rulings to appear to be the product of contemplative, deliberative, cognitive processes.").

82 See An Act Concerning the Integrity and Security of the Voting Process § 46, Conn Pub Act No 07-194 (2007), codified at Conn Gen Stat § 9-446 (showing and amending the previous version of the statute).

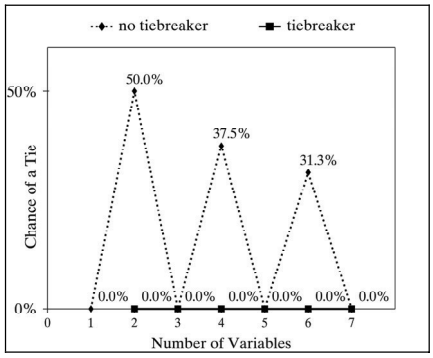
83 Connecticut Secretary of the State, *Tie Elections Can No Longer Be Decided by a Coin Flip* 2 (July 9, 2007), online at http://www.ct.gov/sots/LIB/sots/Releases/2007/07_09_07 NoMoreTies.pdf (visited Apr 24, 2010). See also Susan Bysiewicz, *Toss Out Coin-Flip When Vote Is Tied*, New Lond Day (Mar 31, 2007) ("Since the coin-flip, I have spoken with many voters who express frustration and disbelief with the way the election was ultimately decided."). A third candidate finished close behind the other two, making salient the thought that voters' opinions had been disregarded.

84 See Conn Gen Stat § 9-446(a)–(b). Randomization is not gone from the system. If the special primary election ends in another tie, lots are drawn. See Conn Gen Stat § 9-446(a)–(b).

Although I am not aware of a mathematical proof for this proposition, it holds for many situations.

Figures 4 through 7 display some results.[85] In each figure, one line charts the drop in ties when a variable is added to the mix of other variables, while a second line charts the drop when a variable is instead made the tiebreaker for the remaining variables. Figure 4 shows results for binary variables that can only take the values {-1, +1}. Here the chance of a tie is always zero when one of these variables is a tiebreaker. The dramatic quality of this effect is moderated, however, because the chance of a tie is also zero in half the cases when such binary variables are all mixed together. Depending on the number of binary variables, a tiebreaker may not be necessary.

FIGURE 4. TIES WITH 2-VALUE VARIABLES {-1, +1}



[85] Calculating the chance of a tie with only one tiebreaker variable is simple, once the permutations are set out for the other variables. The formula is the chance of a tie with the tiebreaker variable *alone* (for example, 0.2 for a variable with equal chances of taking one of the five values {-2, -1, 0, +1, +2}) multiplied by the chance of a tie with the *other* variables and *no* tiebreaker.

As in Part II.B.1, I am making the important assumption that the probability of each variable taking the value zero is just as likely as that variable taking any other value in the set of permissible values. In the real world, these probabilities might be very different and sometimes will not be known. The examples discussed in the text are instructive illustrations rather than close approximations of real-life decisionmaking.

FIGURE 5. TIES WITH 3-VALUE VARIABLES {-1, 0, +1}

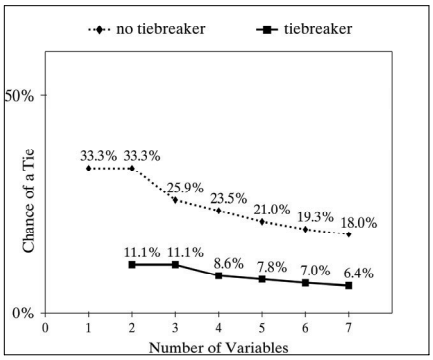


FIGURE 6. TIES WITH 5-VALUE VARIABLES {-2, -1, 0, +1, +2}

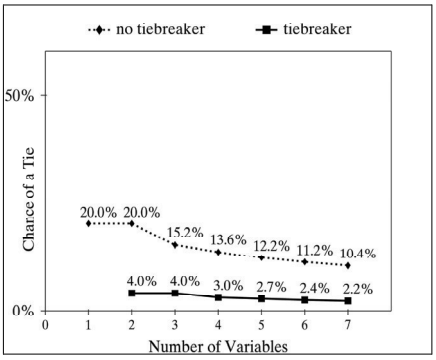
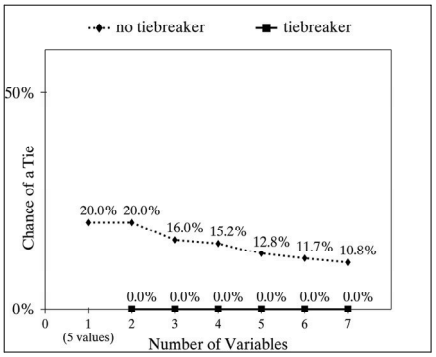


FIGURE 7. TIES WITH 5-VALUE VARIABLES {-2, -1, 0, +1, +2} AND A DUMMY {-1, +1}



The results are more consistent for other types of variables. Figure 5 uses variables that may point in one of two directions but also may themselves be indeterminate—that is, they take the values {-1, 0, +1}. Here the chance of a tie is never eliminated, but it is systematically lower when one of these variables is saved for the tiebreaking role.

For example, if two such variables are relevant to the merits, the chance of a tie is about 33 percent when the variables are added together but only about 11 percent when one variable is reserved as a tiebreaker. With seven such variables, the difference is 18 percent compared to under 7 percent. Figure 6 shows the five-value variable cases, where each variable may point strongly or weakly in one of two directions and may also be indeterminate. The results are similar, although the chance of a tie is lower across the board.

Not all variables have the same character within the same decision situation. Figure 7 illustrates one version of variable diversity. It combines some number of variables taking the values {-2, -1, 0, +1, +2} with one dummy variable taking the value {-1, +1}. Reserving this dummy variable for tiebreaking purposes eliminates all ties. This variable can point only in one direction or another, making it decisive in all cases where it is the only consideration. The figure confirms that adding more five-value variables to the mix also reduces the chance of a tie, albeit more slowly. Mixing seven of these variables still leaves the chance of a tie at nearly 11 percent. Hence this combination of variable types follows the general pattern established above, with more extreme benefits from the tiebreaker.

There is a downside, of course. Each of these decision structures entails a decisionmaker ignoring information by secluding relevant variables into tiebreaker positions. Segregating relevant information is not risk-free. If a relevant variable is used as a tiebreaker, the decision will be clearly free of error only when (1) the tiebreaker variable is itself indeterminate, in which case it is unhelpful to the decisionmaker regardless of the decision structure, or (2) the non-tiebreaker variables yield indeterminacy, in which case the tiebreaker will be considered and no relevant information will be discarded. In all other cases, there will be something wrong with the result.

A serious concern is the risk of a *missed reversal*. In a number of instances, the tiebreaking variable would have pointed strongly enough in one direction to overcome a weak preference for another direction based on the other variables. This risk can be calculated. With respect to variables with an equal likelihood of taking one of the five values {-2, -1, 0, +1, +2}, the risk of missing a reversal by using a tiebreaker ranges from 8 percent for two such variables to a little over 4 percent for seven such variables.[86] The need for a tiebreaker of this

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[86] To reiterate, this calculation does not include cases where the non-tiebreaker variables total up to zero; in those cases, the tiebreaker variable would have been considered anyway. Instead, the missed reversal rate was calculated by counting the number of times the tiebreaker variable took the value -2 or +2 when the non-tiebreaker variables added up to +1 or -1 (respectively), then dividing by the total number of permutations with all variables taken together.

kind should exceed the costs associated with choices that are outright incorrect on occasion.

A second concern is the risk of *missed ties*. Even if adding a tiebreaker variable into the mix would not have shifted the decisionmaker's choice from one action to another, this variable might have generated a tie had it been mixed up front. Again taking the five-value variable cases as illustrative, the isolation of one variable in the tiebreaker position misses a tie in 16 percent of the permutations for two such variables and a bit over 8 percent of the permutations for seven such variables. Of course, this risk is also a benefit insofar as ties are problems; the tiebreaking structure is avoiding stalemate in a fraction of all cases.[87] Nevertheless, the best answer based on all relevant information can be indeterminate. Saving a relevant variable for tiebreaking purposes will artificially suppress a number of true ties.

A third cost involves *incorrect magnitudes*. Sometimes it is valuable to know not only which action is superior but also the degree to which that action is better than others. Placing a relevant variable in a tiebreaker position can interfere with such judgments of magnitude, even if that variable would have neither reversed the decision nor generated a tie. The tiebreaker variable might have nudged the decisionmaker even further toward one action, or back toward some other action. Returning to the five-value variable cases, a tiebreaking decision structure usually results in an inaccurate magnitude assessment. For two or three such variables, there would have been a magnitude change 64 percent of the time by including the tiebreaker variable with the non-tiebreaker variables; this number increases to 71 percent for seven such variables.[88]

Given the restrictions on the variables, this calculation covers every case in which the tiebreaker variable is strong enough to reverse a decision.

87 Recall, however, that throwing another relevant variable into the mix also reduces the chance of a tie, so using a tiebreaker has mixed effects on the number of ties.

88 I again exclude cases where the non-tiebreaker variables add up to zero.

FIGURE 8. ERRORS WITH 5-VALUE VARIABLES PLUS A 5-VALUE TIEBREAKER

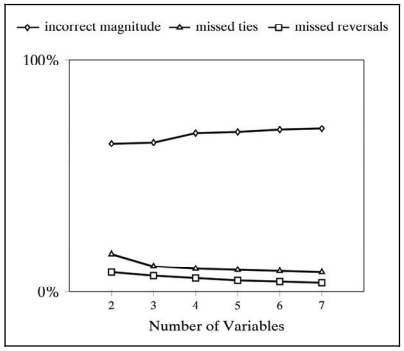

FIGURE 9. ERRORS WITH 5-VALUE VARIABLES PLUS A DUMMY TIEBREAKER

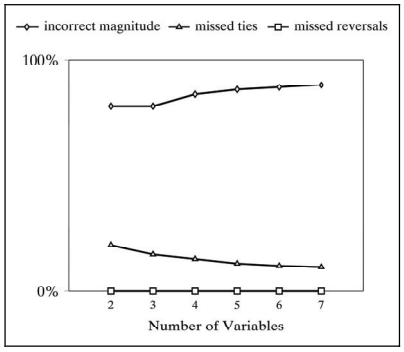

Figure 8 charts these three kinds of errors for the five-value variable cases. Figure 9 does so for five-value variables combined with one dummy variable taking the value {-1, +1}. Notice that in this last set of cases, the missed reversal rate falls to 0 percent. This is the consequence of using such a weak dummy variable as a tiebreaker instead of a variable with greater nuance. When a variable only and always points toward one action or another, and when that variable can only weakly favor one action over another, it can only alter magnitudes or create ties when mixed with the five-value variables—given their character. And, of course, a dummy variable will break ties resulting from the other variables 100 percent of the time.

c) Double counting. Because using a relevant variable as a tiebreaker is a double-edged sword, there should be a desire for less tragic alternatives. If randomization is still unavailable, might there be a way to use relevant variables without throwing out useful information? Double counting seems to be the answer.

The discussion above assumed that a relevant variable could be placed either in a lexically superior decision rule or in a lexically inferior decision rule, not both. But a variable can be made part of both stages. Decisionmakers could consider variables *a*, *b*, and *c* during their first cut at a decision problem, then break any resulting ties by considering variable *a* once again. No valuable information is lost at stage one. In this respect, double counting a relevant variable to break ties is like using a random variable: neither requires the decisionmaker to ignore any relevant consideration at the first stage of the decision procedure. Meanwhile, reintroducing a concededly relevant variable to resolve close calls might avoid the stigma sometimes associated with randomization.

Double counting comes with a potential drawback, however, that is not present with random tiebreakers. Including a variable in both decision rules might make that consideration unduly important to interested parties. It might create incentives to excel on that dimension—or to select into an applicant pool—that are too strong from a given normative baseline. Thus, if an author knows that readers evaluating her article will use variable *a* as part of a first-stage judgment that might be decisive and also to resolve any lingering doubts about its ranking, she might put more effort into writing an amusing article than decisionmakers would otherwise prefer. Random tiebreakers do not have this influence on behavior.[89]

Problematic incentive effects from double counting can be addressed by reducing the weight of variable *a*, but this will come with error costs. If variable *a* receives less weight within the lexically superior decision rule to compensate for its reappearance in the tiebreaker position, then presumably some first-stage decisions will be skewed. There can be missed reversals, missed ties, and incorrect magnitude estimates because the weight of variable *a* has been depressed. Similar remarks apply even when variable *a* ought to be more influential than other considerations, as an independent normative matter. It is true that reintroducing variable *a* as the tiebreaker is one way to increase its influence. But this reintroduction will not affect decisions that never reach the tiebreaking stage. To influence those decisions, variable *a* must also receive greater weight within the lexically superior decision rule—and this reintroduces the incentives problem with which we began.[90]

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[89] Random variables might have other problematic behavioral consequences, depending on how people react to unpredictability associated with randomization.

[90] As Lee Fennell has suggested to me, decisionmakers could break ties by randomizing across the relevant variables in the lexically superior decision rule. If this lottery of relevant variables is weighted in accord with the relative importance of each variable within the lexically superior decision rule, then it should avoid the error costs and could avoid the incentive problems

Nevertheless, double counting will at least occasionally be the best available tiebreaker. Its desirability depends on a comparison of the error costs and incentive effects within a particular context. Under certain conditions, a variable relevant to a decision on the merits will have little effect on behavior. One such variable is chronological age, which is an attribute that people cannot change. Although double counting an immutable and easily verified characteristic will sometimes change the mix of applicants for a benefit, it will break ties, it will not increase errors at the decisionmaking stage, and it will minimize potentially troublesome incentive effects.

Examples of double counting to break ties do exist. In the 1990s, the United States Air Force evaluated new weapons systems with a procedure that included double counting. Officials first screened defense contractor proposals for effectiveness, then evaluated the remaining alternatives based on a more detailed investigation of both effectiveness and cost.[91] In 2006, the University of California, Berkeley announced an admissions policy with an analogous structure. According to the policy, all applications would be scored for strength, and some applicants would be awarded admission at this stage. But for an anticipated "tie-break pool," experienced evaluators would reread those applications according to "the same array of criteria" used in the first stage plus additional considerations, such as whether the applicant attended a low-performing public school.[92] In both examples, variables appear and reappear.

Because these examples involve screening, however, they are not within my core concern. At the end of the decision process, several variables are in play to resolve a predictably high number of ties. Moreover, the first stage of evaluation might represent priorities that are not so much double counted as they are minimum standards. But other instances of double counting for tiebreaking purposes surely exist—or they ought to.[93]

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that I have raised. Such lotteries can be useful, but they conflict with an assumption of the discussion above—namely, that randomization is not feasible. Whether weighted or unweighted, lotteries often face practical implementation problems. See text accompanying notes 78–81.

91 See Zachary F. Lansdowne, *Ordinal Ranking Methods for Multicriterion Decision Making*, 43 Naval Rsrch Logistics 613, 613–14 (1996).

92 Admissions, Enrollment, and Preparatory Education Committee, University of California, Berkeley, *Tie-Breaking Procedures: Freshman Selection Fall 2009 and Spring 2010* (Oct 10, 2008), online at http://academic-senate.berkeley.edu/sites/default/files/committees/aepe/tie_break__09.pdf (visited Sept 30, 2010).

93 Part III.B.2 considers whether various presumptions in law sometimes operate as double-counted variables even if they are not formally designed as tiebreakers at all.

The foregoing analysis indicates features that a desirable tiebreaker should have. The best tiebreakers will minimize errors while providing a decisive resolution when other considerations end in stalemate. Obviously the optimal tiebreaker for a given decision situation will vary according to one's preferred goals and values, including the relative importance of different kinds of errors. But we have learned enough to outline the profile of an attractive tiebreaker, even when randomization is foreclosed.

First, if a relevant variable must be sacrificed to the tiebreaker position, it should be a relatively *unimportant* consideration. Categorical moral inferiority is obviously one form of relative unimportance. But this feature was also suggested above by variables that could not take values less than -1 or greater than +1. The conclusion is an extension of the case for lotteries as tiebreakers. Choosing a relatively less important variable reduces the number of missed reversals, missed ties, and inaccurate magnitude estimations. At the extreme limit, with a random variable or truly orthogonal consideration, decisionmakers will not lose any relevant information, and they are unlikely to skew behavioral incentives in undesired directions. There may well be political hindrances to using nearly frivolous considerations to resolve stalemate, as there sometimes are with lotteries. People might be disturbed when the decisive consideration in an important matter is so trivial. But, if decisionmakers can get away with it, frivolousness is a virtue for tiebreakers in the context of episodic stalemate.

Second, an especially good tiebreaker will be *decisive*. The discussion above presupposes that ties are problematic, so the best tiebreakers have the best chance of breaking all ties. A variable that will always and clearly identify one and only one action should be preferred, all else equal. This feature was signified above by variables that could not take the value zero. Although affected parties can alter their behavior in light of a predictably unidirectional tiebreaker, sometimes these incentives will be not terribly problematic and, in any event, unimportant compared to the value of nearly automatic resolution of socially destructive stalemates.

Third, variables that are controversial or otherwise *costly* to assess might be good candidates for tiebreakers. This observation is partly in tension with the value of decisive tiebreakers, but in some circumstances it will be best to confine a difficult consideration to a tiebreaker position. Tiebreaker variables will not be considered very often if ties are rare. Decisionmakers can then take advantage of a bifurcated decision structure to minimize evaluation of the most taxing variables. Of course, if such variables are so difficult to assess that the decisionmaker risks falling into another tie, there will be a sacrifice in decisiveness. And if such variables are also relatively important to a

sound judgment, restricting them to a tiebreaker position can result in high error costs—partly because valuable information is often lost, partly because practice might make perfect in a decisionmaker's ability to assess these variables. Theoretically, however, costly variables can be too difficult to handle on a consistent basis and hence can be potentially good tiebreakers.[94]

Fourth and finally, a relevant variable need not always be sacrificed to the tiebreaker position alone. Sometimes it will be appropriate to *double count* a variable that was included in the lexically superior decision rule. Such double counting comes with the risk of undesirable incentive effects or, in the alternative, error costs. But double counting may outperform the isolation of a relevant variable into a tiebreaker position.

III. APPLICATIONS

With the forgoing lessons in mind, we are in a better position to evaluate design choices related to tiebreakers. In some cases, the task of evaluation is fairly simple. Consider the yield-right rule. Assuming it qualifies as a tiebreaker, it seems like a good one. First, it uses a variable with admirable unimportance. Nobody believes that yielding right or left at an intersection has moral significance.[95] Moreover, nothing important is lost in traffic law by imposing a yield-right rule only when motorists are effectively tied with respect to the time at which they reach an intersection. Further extending a preference for traffic coming from any motorist's right would delay many vehicles for no good

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94 In fact, if errors are not distributed in a troublesome way, then especially difficult variables might be rough substitutes for random tiebreakers.

95 Perhaps an explanation for our yield-right preference is the longstanding rule for ships at sea. See Convention on the International Regulations for Preventing Collisions at Sea, Rule 15, 1977 28 UST 3459, TIAS No 8587 (1972) ("When two power-driven vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way and shall, if the circumstances of the case admit, avoid crossing ahead of the other vessel."); *The Chesapeake*, 5 F Cases 560, 560 (CC EDNY 1867) (describing this as "a simple and plain rule"). Captains' quarters were ordinarily built on the starboard side, meaning that a captain in his quarters with a window would ordinarily be able to see a ship coming from his ship's "right." But in the United States, automobile drivers are situated on the left side of their vehicles. On the other hand, there are less arbitrary explanations for the yield-right rule for ground traffic. Where traffic must stay on the right side of the road, the vehicle to the right will more quickly pass the line of crossing if both vehicles enter the intersection at the same time and travel at the same speed. See *Salmon v Wilson*, 227 Ill App 286, 288 (1923). So perhaps yield right is a logical extension of a first-in-time principle.

reason.[96] Equally notable, the variable is remarkably easy for drivers to ascertain and it is cleanly decisive.[97]

In this Part, three more important subjects are investigated in greater depth. These applications illustrate themes from the discussion above. The first application highlights the difficulties of lexical ordering. It assesses affirmative action programs, which are occasionally designed as tiebreakers even though this decision structure might not make sense as a matter of first principle. The second application shows the legal system responding to intolerable ties. It examines tiebreakers within interpretive method, which judges use to avoid indeterminacy in legal texts. The third application picks up on the possibility of effectively randomizing or double counting relevant variables. It involves all of adjudication, maybe all of law. The question here is whether adjudication writ large might be usefully analogized to a tiebreaker for a set of disputes left unresolved in the rest of social life and, if it can be, how we might judge the character of that institution.

A. Affirmative Action

Affirmative action can serve more than one goal and it can take more than one form. Even so, a significant strand of the affirmative action idea involves conscious efforts to increase the representation or enhance the status of people who share some characteristic, such as a particular race or sex.[98] The straightforward way to accomplish these goals is conscious consideration of the characteristic of interest by decisionmakers who have power to change the situation of concern. Characteristics such as race or sex (or income or legacy status or whatever) can be incorporated into decision procedures as relevant variables. Although many people totally oppose the consideration of such factors in some subset of decisions, my concern here is the best

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96 See *Partridge v Enterprise Transfer Co*, 30 NE2d 947, 952 (Ill App 1940).

97 There are exceptions. When four motorists traveling from different directions reach a four-way intersection at approximately the same time, the yield-right rule itself breaks down and someone needs to barge ahead or be waved through.

98 See, for example, Cecil J. Hunt, II, *The Color of Perspective: Affirmative Action and the Constitutional Rhetoric of White Innocence*, 11 Mich J Race & L 477, 517 (2006) (relating several definitions of affirmative action to "an explicit consciousness of race and some degree of preference based on perceived racial identity"); James P. Sterba, *A Definition of Affirmative Action*, in Carl Cohen and James P. Sterba, *Affirmative Action and Racial Preference: A Debate* 199, 200 (Oxford 2003) (defining affirmative action policies partly in terms of "favoring qualified women and minority candidates over qualified men or nonminority candidates"); Roberta Ann Johnson, *Affirmative Action Policy in the United States: Its Impact on Women*, 18 Polit & Pol 77, 77 (1990) (defining affirmative action to include programs that "take some kind of initiative . . . to increase, maintain or rearrange the number or status of certain group members usually defined by race or gender, within a larger group").

design for affirmative action programs where the characteristic in question might lawfully be taken into account.

1. Options.

Among the significant design choices for such programs is whether to use a tiebreaking decision structure. Two recent Supreme Court decisions illustrate quite different designs.

Grutter v Bollinger[99] reviewed an affirmative action program for admissions that lacked a tiebreaker. University of Michigan Law School officials used race as one factor among many in evaluating prospective students.[100] That an applicant's race was mixed together with a range of other considerations became a theme in the Court's rationale for upholding the program against an equal protection challenge. The majority was satisfied with this kind of all-things-considered individualized assessment for an institution of higher education that wanted to remain academically excellent and, at the same time, at least somewhat racially diverse.[101]

In contrast, *Parents Involved in Community Schools v Seattle School District No 1*[102] reviewed a race conscious program with a tiebreaker. One of the programs in question assigned students to Seattle's public high schools. School officials collected parental preferences for the placement of incoming ninth graders. For oversubscribed schools, the program allowed siblings to stay together, then considered the racial composition of the school's entire student body, and then considered geographic proximity of the school to the applicant's home.[103] In the rare case that geography did not assign all remaining applicants, a lottery was used.[104] This time, the Court invalidated the program against an equal protection challenge, at one point emphasizing the program's limited effects on school racial composition.[105]

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99 539 US 306 (2003).

100 See id at 315–16.

101 See id at 334–44. But consider *Gratz v Bollinger*, 539 US 244, 270 (2003) (invalidating a university admissions program that gave a set number of points to racial minority applicants).

102 551 US 701 (2007).

103 See id at 711–13; id at 813 (Breyer dissenting) (noting that the plan did not apply to transfer students). Seattle's assignment plan did not mandate a particular racial composition for each school, but it did define relatively homogeneous compositions judged by white versus nonwhite populations and then attempted to moderate those extremes. See id at 712 (majority). Whether such programs count as "affirmative action" is debatable. I use them to illustrate a decision structure.

104 See *Parents Involved in Community Schools v Seattle School District No 1*, 426 F3d 1162, 1171 (9th Cir 2005) (en banc) (noting that the lottery is "virtually never used"), revd, 551 US 701 (2007).

105 See *Parents Involved*, 551 US at 733 (concluding that the program was not narrowly tailored). See also *Taxman v Board of Education*, 91 F3d 1547, 1551, 1558 (3d Cir 1996) (invalidating a

In neither case did the justices make much of the distinction between a tiebreaking decision structure and other designs, but this choice did surface in *Parents Involved*. The majority distinguished Seattle's tiebreaking program from the program upheld in *Grutter* partly because "*when* race comes into play" in the Seattle program, "it is decisive by itself" and "is not simply one factor weighed with others in reaching a decision."[106] This logic is difficult to take seriously, however, except as an arbitrary basis for preserving some piece of *Grutter*. The *Parents Involved* majority indicated its concern about the influence of race, but the decision structure is hardly a proxy for that. A tiebreaking decision structure might mean that race is almost never considered, while an all-things-considered judgment might mean that race is always considered and habitually decisive. It all depends on the variables in play and the applicant pool, not the decision structure standing alone. A critic might nonetheless believe that this school district used race too often, but that is a different complaint. More telling is Chief Justice John Roberts's less qualified statement that the district should "stop assigning students on a racial basis."[107] This is consistent with opposition to any consideration of race regardless of the decision structure, without the logically awkward suggestion that racial tiebreakers are especially troublesome.

Conceivably, the best elaboration of constitutional doctrine would make tiebreakers inapposite. Perhaps the importance of the goal and the propriety of the means are unaffected by the choice to place variables such as race or sex or income in a tiebreaker position. At the same time, we should understand that tiebreaking and nontiebreaking decision structures are functionally different. These differences should affect nonconstitutional policy assessments, if not equal protection doctrine.

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race-based tiebreaker used to decide which of two government employees would be laid off); *Tevlin v Metropolitan Water Reclamation District of Greater Chicago*, 237 F Supp 2d 895, 899 (ND Ill 2002) (describing a program under which race was used to choose among roughly equally qualified candidates for promotion); Portland State University, Office of Affirmative Action and Equal Opportunity, *Employment Affirmative Action* (2009), online at http://www.afm.pdx.edu/WHATSAFM.html (visited Apr 8, 2010) (describing an affirmative action program as including a racial tiebreaker for qualified applicants); Henry Ramsey, Jr, *Affirmative Action at American Bar Association Approved Law Schools: 1979–1980*, 30 J Legal Educ 377, 380–81 (1980) (describing a typical process of summarily rejecting and summarily admitting applicants who appeared to be easy cases, then considering additional variables for the remaining pool).

106 *Parents Involved*, 551 US at 723 (emphasis added).

107 Id at 748 (Roberts) (plurality).

2. Evaluation.

It would be odd if those who oppose affirmative action are more strongly against programs with tiebreakers, all else equal. Relegating variables such as race or sex to a tiebreaker position tends to reduce their importance in decisionmaking. Seattle could have designed its program to look more like the University of Michigan's, stirring race together with other variables for every student applicant. But the influence of race and outcomes might well be greater with that design. Again, there is no way to tell without knowing the constellation of variables, their relative weights, and the attributes of the applicant pool. Insofar as affirmative action skeptics prefer that race be less, rather than more, influential in decisionmaking, they should be at least indifferent to tiebreaking decision structures when compared to all-things-considered judgments.

The more interesting question is whether proponents of affirmative action should ever support a tiebreaking decision structure. One hitch for them is feasibility. If proponents want to ensure that a critical mass of some group is represented, and if they are also committed to a relatively selective test for admissions and jobs and so on, then there may not be enough potential affirmative action beneficiaries to achieve both goals with a tiebreaking structure. When a variable such as race or sex cannot be considered until lexically prior variables cancel out, and when there are only a small number of potential affirmative action beneficiaries who satisfy those lexically prior demands, there may not be any benefits left over for the tiebreaker to award. Program designers could make the lexically prior demands less selective, in order to reach the tiebreaking stage more often. And they could reduce the number of gradations in the lexically superior variables, which would tend to lump more applicants together and increase the chance of ties. But under the conditions just noted, selectivity would be sacrificed in favor of diversity—for all applicants.

Even if a tiebreaking structure is feasible given the goals of decisionmakers, affirmative action proponents have reason to choose another design. The core question is why a variable such as race ought to be relevant, yet only relevant when every other consideration washes out.[108] It is perfectly sensible for supporters to want such variables available for use in every case. We might say that if the variable is a plus factor for one applicant it should be a plus factor for every applicant with the same attribute. This seems true regardless of the rationale for the relevance of an attribute such as race, sex, income, or whatever—

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[108] See Part II.A.

whether the program is aimed at capturing the advantages of diversity, or remedying past discrimination, or accomplishing some other goal. Affirmative action considerations can simply take their place alongside other variables deemed relevant to good judgment. I am not aware of contemporary proponents who contend that race or sex is a lexically inferior consideration, as a moral matter, compared to factors such as seniority or past performance or test scores or legacy status.[109]

Surely proponents have room to disagree over the appropriate weight of affirmative action considerations; but these differences do not indicate that those sympathetic to the goals of affirmative action believe that, say, race is never significant enough to outweigh even the slightest meaningful difference in, say, test scores. A tiebreaking decision structure represents this kind of categorical ordering. Seattle's school assignment plan is, at most, a weak example to the contrary. After parental preferences were gathered, only sibling status was prioritized over racial composition; and limiting extremes in racial composition was always more important than geographic proximity.[110]

Now, it is quite possible that affirmative action proponents can be pushed into tiebreaking decision structures as a matter of politics. Between the ardent supporters of critical mass and the hard-line opponents of affirmative action might lie a compromise in which race or sex may be considered only occasionally and only in otherwise close cases. This might not be a bad description of some affirmative action moderates, and a potential second-best result for proponents.[111]

But this possibility does not tell us how a principled position in favor of affirmative action can deny the relevance of race or gender for all applicants, except those who happen to be tied with another

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[109] Proponents of affirmative action can hold that a minimum level of competence is a prerequisite to additional evaluation without believing that affirmative action considerations should be the only tiebreakers for choosing among minimally competent candidates. One might reasonably conclude that the ability to graduate from a university is a necessary attribute for admission, regardless of the applicant's contribution to a valued form of diversity. The less intuitive proposition for affirmative action proponents is that race- or sex-related considerations bear a similarly inferior relationship to many other factors taken into account after a minimum level of competence is established.

[110] See *Parents Involved*, 426 F3d at 1169, 1171 (noting that the sibling tiebreaker accounted for 15 to 20 percent of the admissions to the ninth grade class in an oversubscribed school, and that distance accounted for 70 to 75 percent of such admissions).

[111] Some justifications for opposing affirmative action might leave space for such programs when applicants appear equally well qualified. Thus, those who believe that market competition generally drives out inefficient racial stereotypes in employment decisions might nevertheless believe that such stereotypes can persist with respect to job applicants who appear tied. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv L Rev 1003, 1073 (1995). In this domain, affirmative action proposals might suffer less resistance, even if affirmative action proponents have no principled reason to stop there.

applicant on every other relevant measure. Nor does it tell us why race or gender should never be used to produce ties or reverse outcomes. As long as one believes that the consideration of these variables makes the decision procedure better rather than worse, then placing them in a tiebreaker position will increase errors.[112] If a tie would be intolerable, then a more arbitrary variable might be used,[113] or affirmative action considerations could be double counted to break ties.[114] If a tie would be acceptable, as when evenly matched applicants can be both accepted or both rejected, then no tiebreaker is necessary at all.

In addition, proponents have alternatives to tiebreakers, at least theoretically.[115] One option is to evaluate different groups separately to ensure that a quota or goal is achieved. Instead of creating a tiebreaker, a quota system creates two distinct decision procedures. Hence proponents need not worry that an affirmative action tiebreaker will be triggered too infrequently, or that other important indicators of merit will be weakened too broadly. Quotas or numerical goals are relatively simple extensions of a commitment to affirmative action, but of course they are often either prohibited by law or unsustainable in politics.

More realistically, affirmative action proponents can turn to all-things-considered judgments. These judgments may include race or sex as relevant variables with adequate weight to achieve whatever goal proponents have in mind. They are also the kind of judgments that are (or were) acceptable to the Supreme Court. It is not clear that a tiebreaking decision structure will be viewed any more favorably by the justices. Such structures could make controversial tiebreaking variables more psychologically salient to judges and to critics of affirmative action, even if those variables are equally or less likely to be decisive. If nothing else, a multifactor analysis of applicants can make the impact of race, sex, and other variables more obscure.[116] There is no indication of

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112 See Part II.B.2.b.

113 See Part II.B.2.a.

114 See Part II.B.2.c. Recall that a potential downside of double counting involves problematic incentives for those subject to the decision rule. But not all variable values are subject to the control of interested parties. Depending on which affirmative action considerations are used, applicants might have great difficulty entering and exiting the relevant categories. Incentive effects might be minimal, and an increase in applications from the targeted group might be helpful.

115 On race-conscious but facially race-neutral alternatives, see, for example, *Parents Involved*, 551 US at 788–89 (Kennedy concurring) (mentioning "strategic site selection of new schools" and "recruiting students and faculty in a targeted fashion," among other methods); James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 Harv L Rev 131, 135–36 (2007).

116 Commentators have long pointed to the potential significance of appearances with respect to race-conscious decisionmaking. See, for example, Kenneth L. Karst and Harold W. Horowitz, *The* Bakke *Opinions and Equal Protection Doctrine*, 14 Harv CR–CL L Rev 7, 14, 28–29 (1979) (discussing Justice Powell's opinion in *Bakke* as allowing affirmative action programs to survive,

leniency toward tiebreakers in *Parents Involved*, anyway. So all-things-considered judgments ought to attract support from affirmative action proponents as a matter of principle, and perhaps strategic necessity.

Although the argument for designing affirmative action programs as tiebreakers in a strict sense is relatively weak, it might be worth pausing to consider whether the characteristics often singled out by affirmative action programs might be good tiebreakers as a general matter. The above discussion concentrated on moral reasoning, but intolerable ties may also justify a tiebreaking decision structure. Is an attribute like race or sex a promising candidate for tiebreaker status when other considerations end in stalemate? One might believe that these characteristics are basically "arbitrary" grounds for making judgments about people.[117] Although contemporary observers have shown that categories such as race and sex are not as easy to apply as casual conversation tends to suggest,[118] with additional specification they are variables that are relatively easy to evaluate. They are probably easier to assess than variables such as future effort or intelligence. One could also conclude that the use of race or sex to decide merits questions is sufficiently controversial, or so difficult to appropriately weight, that these factors should be considered, if at all, at a tiebreaking stage.

But of course variables like race or sex are special today, in a way that makes utterly implausible their use as instruments of rationally arbitrary decisionmaking. They are not like coin flips or phone numbers or even phrenology. However defined, the categories of race and sex have a unique history and political charge, and they correlate with differences in life chances that many find unacceptable. If one of these variables were consistently used as a tiebreaker within some domain, we would be right to ask about the resulting patterns. If already disadvantaged classes would end up worse off, the tiebreaker would cause gratuitous harm. If disadvantaged classes would end up better off, we would return to the controversial normative questions surrounding affirmative action. The objectives of affirmative action, it seems, are usually too important to be implemented through tiebreakers in a

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perhaps via disguise); John Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 Nw U L Rev 363, 388, 407–10 (1966).

117 See *Meritor Savings Bank v Vinson*, 477 US 57, 66–67 (1986). Critics of affirmative action sometimes recommend lotteries in favor of racial tiebreakers, see Pauline T. Kim, *The Colorblind Lottery*, 72 Fordham L Rev 9, 12–17 (2003) (collecting such arguments), but the discussion in the text is suggesting that random and racial tiebreakers might have something in common.

118 See, for example, Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 NYU L Rev 1134, 1145–71 (2004) (distinguishing racial discrimination from ethnic discrimination); Donald Braman, *Of Race and Immutability*, 46 UCLA L Rev 1375, 1427–32 (1999) (collecting human biodiversity studies).

strict sense, while the variables relevant to affirmative action are insufficiently arbitrary to be attractive tiebreakers in general.

B. Interpretive Method

While the foregoing concentrated on the moral ranking of relevant variables, tiebreakers in interpretive method can be motivated by the conclusion that ties are intolerable. Across the history of modern adjudication, apparently no judge has answered the questions, "What does this statute mean?" or "What does this constitutional provision mean?" with the answer, "I don't know" and left it at that.[119] When litigants will not settle, judges decide controversies one way or another. They must have tools to resolve every close call. Interpretive method is one place where this commitment manifests itself in a tiebreaking decision structure.

1. Illustrations.

In describing how legal interpretation is supposed to work, one set of sources or techniques is often characterized as lexically prior to another. Hence a statute's plain meaning (somehow ascertained) is said to trump any other consideration that might be relevant to interpretation, such as the lessons of legislative history.[120] Consistent with a lexically inferior ranking, legislative history is not available to create ambiguity in statutory text—only to resolve it.[121] Likewise, some canons of construction are supposed to be consulted only when other tools of interpretation yield doubt. Among the most famous is the rule of lenity for criminal statutes, which is reserved for the closest cases. "The rule of lenity . . . applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute."[122] A related practice is judges deferring to reasonable

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119 See, for example, *Watts v Indiana*, 338 US 49, 62 (1949) (Jackson concurring in part and dissenting in part) ("I do not know the ultimate answer to these questions [about due process, Court authority, and custodial interrogation]; but, for the present, I should not increase the handicap on society."); *United States v Robinson*, 324 US 282, 286 (1945) (Rutledge dissenting) (stating "I do not know what Congress meant" by a statutory exemption from the death penalty and concluding that the death penalty should not be imposed due to vagueness). Compare id at 286 (Black) ("We do not know what provision of law . . . gives us power wholly to nullify the clearly expressed purpose of Congress to authorize the death penalty because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise.").

120 See *Boyle v United States*, 129 S Ct 2237, 2246 (2009) (stating that arguments regarding statutory purpose, legislative history, and the rule of lenity were irrelevant because the RICO statute was clear). See also *Caminetti v United States*, 242 US 470, 485 (1917) (denying that interpretation is taking place when statutory meaning is plain).

121 See *United States v Shreveport Grain & Elevator Co*, 287 US 77, 83 (1932).

122 *United States v Hayes*, 129 S Ct 1079, 1088–89 (2009), quoting *United States v Shabani*, 513 US 10, 17 (1994). See also *Hayes*, 129 S Ct at 1093 (Roberts dissenting) ("Taking a fair view,

interpretations of ambiguous federal statutes by federal agencies. If the statute is clear (somehow tested), then judicial deference to the agency is inappropriate.[123]

As a formal matter, tiebreaking canons can now be distinguished from more flexible interpretive presumptions.[124] These presumptions include judicial disfavor of retroactivity,[125] preemption,[126] extraterritorial application,[127] and invalidity.[128] Such leanings do not seem reserved for the purpose of breaking ties, although they might be lexically inferior to plain meaning. Insofar as they interact with other variables indicating statutory meaning, they cannot be tiebreakers in a strict sense. And as a matter of sheer logic, interpretive presumptions cannot eliminate the chance of a tie. In fact, it is theoretically possible for an interpretive presumption to generate a tie when added to other relevant variables.

In addition to doctrinal formulations, academic theorists have observed or recommended lexical ordering for interpretive problems. Ronald Dworkin famously characterized legal interpretation as a process that combines fit with justification.[129] The former may dominate the latter. Thus Dworkin has indicated that the best philosophical reading of equal citizenship includes welfare rights, but that this outcome is currently foreclosed to courts by considerations of fit.[130] Although he is at odds with Dworkin on many issues, Michael McConnell's approach to

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the text . . . is ambiguous, the structure leans in the defendant's favor, the purpose leans in the Government's favor, and the legislative history does not amount to much. This is a textbook case for application of the rule of lenity."); *United States v Santos*, 553 US 507, 514 (2008) (plurality) ("Under a long line of our decisions, the tie must go to the defendant."); Healy, 43 Wm & Mary L Rev at 570–74 (cited in note 10) (discussing canons of statutory interpretation as tiebreakers in cases of ambiguity).

123 See *Chevron U.S.A. Inc v NRDC*, 467 US 837, 842–44 (1984) (stating the test in two steps, the first asking whether the intent of Congress is clear and the second whether the agency's interpretation is permissible or reasonable). This formulation resembles a tiebreaker, strictly defined, regardless of recent debates over when *Chevron* applies, see Thomas W. Merrill and Kristin E. Hickman, Chevron*'s Domain*, 89 Georgetown L J 833, 873–89 (2001), whether *Chevron* is a good representation of legislative will, see Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L J 64, 74–75 (2008), and whether judges should do a lot or a little thinking at step one. The tiebreaker characterization is trickier, however, if *Chevron* is reconceptualized as having only one step. See Matthew C. Stephenson and Adrian Vermeule, Chevron *Has Only One Step*, 95 Va L Rev 597, 604 (2009).

124 See Cass R. Sunstein, *Legal Reasoning and Political Conflict* 189 (Oxford 1996) (noting a difference between tiebreakers for equipoise and interpretive presumptions).

125 See *Landgraf v USI Film Products*, 511 US 244, 272–73 (1994).

126 See *Medtronic, Inc v Lohr*, 518 US 470, 485 (1996).

127 See *Microsoft Corp v AT&T Corp*, 550 US 437, 454–56 (2007).

128 See *Edward J. DeBartolo Corp v Florida Gulf Coast Building and Construction Trades Council*, 485 US 568, 575 (1988). We might add the norm of constitutional avoidance as well. See *Ashwander v Tennessee Valley Authority*, 297 US 288, 347 (1936) (Brandeis concurring).

129 See Ronald Dworkin, *Law's Empire* 65–68 (Harvard 1986).

130 See Ronald Dworkin, *Justice in Robes* 122–23 (Harvard 2006).

constitutional adjudication has an analogous structure. He contends that the only judicial consideration should be fit—but because some cases cannot be resolved on that basis, McConnell must have a supplemental rule of decision. He then recommends judicial nonintervention to foster ordinary politics.[131] Another variation on the same structure is Randy Barnett's version of constitutional construction. When the original public meaning of the Constitution yields indeterminacy, Barnett wants judges to impose a presumption favoring libertarian results in order to bolster the moral legitimacy of the document.[132]

These views are contested, of course. But it is conventional wisdom to believe that many interpretive issues are resolved by conventional legal argument while a more difficult set of controversies—perhaps made unavoidable by selection effects in litigation—are influenced by judicial discretion or ideology. Extreme versions of the attitudinal model of judicial behavior[133] are giving way to more nuanced views that both ideology and preexisting legal sources influence outcomes.[134] And some observers seem content with an adjudicative system that allows something like ideology to determine case outcomes after conventional legal argument runs out. As Benjamin Cardozo explained it, judges have "an outlook on life, a conception of social needs, a sense . . . of 'the total push and pressure of the cosmos,' which, when reasons are nicely balanced, must determine where choice shall fall."[135]

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131 See Michael W. McConnell, *The Importance of Humility in Judicial Review*, 65 Fordham L Rev 1269, 1273 (1997) ("When the dictates of 'fit' are satisfied, the judge's role is at an end."). See also J. Harvie Wilkinson, III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 Va L Rev 253, 267 (2009) ("When a constitutional question is so close, . . . the tie for many reasons should go to the side of deference to democratic processes.").

132 See Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 49–52, 118–30, 268–69 (Princeton 2004).

133 See Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 81, 111–12, 310–11 (Cambridge 2002) (claiming that Supreme Court justices "freely implement their personal policy preferences").

134 See, for example, Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* 11–227 (Stanford 2007) (exploring various factors including standards of review); Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 BC L Rev 685, 688 (2009) (recognizing that the key issue is how much, not whether, judicial ideology matters).

135 Benjamin N. Cardozo, *The Nature of the Judicial Process* 12 (Yale 1921). See also H.L.A. Hart, *The Concept of Law* 135–36 (Clarendon 2d ed 1994) (discussing a rule-generating function of judges, at least at the margins of statutes and precedents); Frederick Schauer, *Judging in a Corner of the Law*, 61 S Cal L Rev 1717, 1729–32 (1988) (connecting positivists, realists, and Ronald Dworkin in their treatment of hard cases at the appellate level and suggesting that most appellate cases might be "essentially non-legal enterprises"); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J Pub L 279, 280 (1957) (describing Supreme Court justices as making policy choices "from time to time . . . where legal criteria are not in any realistic sense adequate to the task").

2. Evaluation.

Understanding interpretive method (or its exhaustion) as generating a tiebreaking decision structure prompts a series of questions that should now be familiar. They begin with the question whether a "tie" regarding legal meaning would be intolerable in the context of adjudication. Is it unacceptable for a judge to confess uncertainty and proceed no further? This question is deep, and probably too deep. It calls for the defense of a tradition of certitude and decisiveness within adjudication that is longstanding if not unbroken—a practice that might include enough motivated reasoning so that judges are rarely capable of experiencing uncertainty. Confessing uncertainty requires the decisionmaker to feel it first.[136] Either way, a full defense is too difficult in this space. Instead, I can offer two thoughts that make a defense plausible.

First, adjudicative institutions should be assessed in light of other available dispute resolution mechanisms. Relatively few disagreements will involve lawyers or courts, let alone final resolution by judges,[137] and the type of disputes that are adjudicated might have been resolved by another method such as negotiated settlement or arbitration. These alternative methods can be equally decisive without the commitment to determinate resolution of legal meaning. It seems easier to defend the presence of one institution that guarantees a final answer regarding legal meaning to all disputants who demand it when a variety of other institutions provide no such guarantee. In this way, courts can help end contests among parties who cannot find other ways to stop the fighting, while also offering public information about law's content and thereby preventing some number of future disputes, all without dominating the socially necessary activity of dispute resolution.

Second, courts often will be acceptable locations for eliminating legal uncertainty. Many details of statutory and constitutional law have low stakes for society at large, or lack demonstrably high stakes.[138] This can be true even when such details are extremely important to the relatively few litigants who find themselves in court. Telling litigants that the applicable law is irreducibly unclear effectively removes

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136 See Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U Chi L Rev 511, 513 (2004) ("[T]he mind shuns cognitively complex and difficult decision tasks by reconstructing them into easy ones, yielding strong, confident conclusions.").

137 See Richard E. Miller and Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 L & Socy Rev 525, 536–43 (1981) (showing a winnowing process from grievance, to claim, to disputed claim, to the use of lawyers and courts). See also Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 123, 251 (Chicago 1994) (noting that courts can address only a small fraction of significant policy disputes).

138 See, for example, Adam M. Samaha, *Undue Process*, 59 Stan L Rev 601, 624–29 (2006) (reviewing empirical studies).

adjudication from the list of reliable dispute resolution mechanisms and shifts some of that burden to other institutions. Whatever arguments can be made for some manner of legislative remand,[139] it is not sensible for a judiciary to refer every close call, no matter how socially insignificant, to other lawmaking systems with responsibilities of their own.[140] To be sure, these observations tell us nothing about how judges should identify and resolve legal uncertainty, nor do they justify a judicial commitment to determinate legal meaning in all cases. Perhaps our system overestimates the cost of legal uncertainty. But it would not be surprising if a large fraction of truly hard questions regarding law's content are best answered, somehow, by judges.

Before moving forward, it is worth noting a view on which "ties" in legal meaning are impossible. The degree to which legal meaning is indeterminate is partly a function of the operative method of interpretation. With a flexible understanding of "interpretation,"[141] the operative method might confidently answer all questions of meaning. This point is an extension of Dworkin's "one right answer" thesis, although Dworkin himself indicates that the uniquely best answer can be a tie.[142] In any event, the idea is that different methods of interpretation will have different chances of producing indeterminacy.[143] At the end of the day, we observe zero legal-meaning ties in adjudication with respect to any issue of consequence to the outcome. One might then say that the interpretive method used by judges is free of ties.

This does not, however, obviate further evaluation of law's tiebreakers. Most important, there are lexical priorities within official judicial statements on interpretive method that mandate a tiebreaking decision structure. The absence of ties does not show the absence of tiebreakers; the former can be a sign of a tiebreaker's effectiveness. There is a fair question regarding the *motivation* for lexical ordering within interpretive method. Perhaps this prioritization is the result of moral reasoning rather than, or in addition to, a particular problem

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139 See, for example, Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action* 175, 188–89 (Knopf 1971); Lani Guinier, *The Supreme Court, 2007 Term—Foreword: Demosprudence through Dissent*, 122 Harv L Rev 4, 40–41 (2008).

140 I have ignored arguments that courts are systematically better policymakers for a class of issues. To the extent that this is true, courts should be authorized to generate law whether or not "interpretation" yields uncertainty.

141 See, for example, Kent Greenawalt, *Constitutional and Statutory Interpretation*, in Jules Coleman and Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law* 268, 268–70 (Oxford 2002) (including text, original meaning, underlying rationale or basic values, application to particular cases, and stare decisis).

142 See Ronald Dworkin, *Taking Rights Seriously* 279–90 (Harvard 1977) (arguing that there is a single correct answer, even in hard cases, for each decisionmaker, but counting a conclusion that a case is "tied" as a single correct answer).

143 See Part II.B.1.

with ties in this setting. Perhaps the rule of lenity helps produce good judicial decisions and yet is somehow so unimportant that it should not influence any decisions in the absence of indeterminacy. In my view, it is implausible that aversion to ties plays no role in the development of a decisive interpretive method in court. Yet some lexically inferior considerations within interpretive method could be morally and categorically inferior to others. A critical evaluation of interpretive tiebreakers is therefore appropriate.

How good, then, are the existing tiebreakers? Because interpretive method is a work in progress within judiciaries, and because the actual determinants of judicial behavior are subjects of ongoing debate, a simple conclusion is elusive. But a few things are clear. First of all, judges never overtly use randomization as an interpretive tiebreaker.[144] Although this might be a mistake as a matter of ideal theory, practical reasons do exist for a merits-randomization ban in adjudicative systems.[145] Judges face a serious public relations problem when they use lotteries and when their effort on a case cannot be verified by a relatively uninformed citizenry. And if there were no such public skepticism, we might fear overuse of randomization as a docket-clearing device. Assuming that the number of appropriate occasions for merits lotteries is small, merits randomization does not seem worth the complications. At the same time, courts forfeit the ability to break ties on matters of legal interpretation with the irrelevant, decisive, and low-cost device of the lottery.

It might seem strange, but one hope for current practice is that it relies on nearly arbitrary factors to resolve difficult interpretive questions. Perhaps judges characterize these considerations in high-minded fashion, as theoretically justified structural considerations or laudable traditions,[146] but they turn out to be variables on the verge of irrelevance. This could be something to celebrate. Unless lexically inferior considerations are at most tangentially relevant to a sound conclusion on legal meaning, they are strong candidates for presumptions and other types of variables ordinarily used to answer these questions. Again, a relatively unimportant variable can be given lesser weight without demoting it to a tiebreaker position. The more arbitrary the inferior variable, the more comfortable we should be.

The only way definitively to evaluate existing tiebreakers in interpretive method is to settle on a normative framework. The moral commitments animating these frameworks speak to what counts as a good

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144 See text accompanying notes 79–81.

145 See Samaha, 51 Wm & Mary L Rev at 67–70 (cited in note 63).

146 See, for example, *United States v R.L.C.*, 503 US 291, 305 (1992) (plurality) (referring to the "venerable rule of lenity").

judgment regarding legal meaning, and thus what counts as a legitimate source of law and legal interpretation. These are famously contested matters. Some commentators are happy to have judges consider a wide range of sources and use a wide range of techniques, while others are stricter. Where one stands on these controversial issues will influence whether one believes that, for example, consulting legislative history is categorically inferior to leaning against extraterritoriality.

Useful observations nevertheless can be made. We should be able to agree that interpretive method for criminal statutes has developed a powerful tiebreaker: the rule of lenity. The rule is extraordinarily simple, making it cheap to operate and unambiguously decisive in every applicable situation. Criminal defendants are easy to identify, so the rule is effectively a single-value variable always pointing in the same direction. Of course, judges disagree over precisely when the rule ought to be invoked,[147] and they may not (be able to) follow the tiebreaking decision structure of which it is a part. This structure requires mental compartmentalization of different variables along with a willingness to accept indeterminacy absent the tiebreaking rule, and judges will sometimes struggle with these requirements. Furthermore, knowing that a narrower interpretation is better than a broad interpretation does not settle the precise meaning of a statute. Nevertheless, a judge's chance of resolving an interpretive issue arising from a criminal statute well enough to decide case outcomes is effectively 100 percent once the rule of lenity is operational.

A serious question is whether lenity is so unimportant that it ought to be cabined in a tiebreaker position. As with affirmative action, we do not see proponents of this variable denigrating its normative significance.[148] And there may be good reasons to prefer a rule of lenity to a rule of severity, such as distrust of government and a preference for private ordering. Too good, in fact: the stronger those reasons, the more difficult it becomes to understand why lenity is not one factor among many. If instead lenity is a poor value to use for interpretive decisions, then it should not be considered at any stage of the decision procedure. And if avoiding ties is an independent priority for decisionmakers, lenity can be double counted. Lenity could be one variable of some strength at the front end of interpretation, and a decisive variable is cases of indeterminacy. There seems to be no simple and persuasive rebuttal to this critique.

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147 For the view that judicial enforcement of the rule "is notoriously sporadic and unpredictable," see Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 S Ct Rev 345, 346.

148 Unless "venerable," *R.L.C.*, 503 US at 305, is a misnomer for "old or inexplicable."

The situation on the civil side is messier. Civil statutory interpretation lacks a universal tiebreaker that can assure decisive outcomes. Some considerations that may be lexically inferior to plain text readings—such as legislative history—are unlikely to resolve decisively every close call if honestly used. Other lexically inferior considerations—such as *Chevron* deference—are decisive but do not reach every issue of civil statutory interpretation. When no agency offers an interpretation, there is no agency interpretation eligible for tiebreaking deference. Although some lexically inferior considerations in civil statutory interpretation may be fairly demeaned as relatively frivolous, it is hard to belittle all of them.[149] It is especially tricky to belittle them without proving their illegitimacy. This is the case with legislative history. Justices who are skeptical of legislative history have good arguments for ignoring it completely,[150] while those attracted to legislative history seem unlikely to confine it to a last-ditch tiebreaker position.[151]

What is most interesting is that, even on the civil side, where there is no universal interpretive tiebreaker, no judge stops in frustration. Every judge reaches a decisive conclusion on every interpretive question she faces. Even the most enthusiastic proponents of using legislative history to inform statutory meaning have never ended in equipoise. Yet by collapsing many sources into a single stage of decision, one would expect indeterminacy to result every so often. It does not. This suggests a broader insight: any judge's formal description of interpretive method probably will not capture the actual mechanics of decision. Of course, there is nothing surprising about a gap between official formulations of interpretive method and judicial behavior. It is often only *after* a detailed discussion of case facts and procedural history that the Supreme Court will declare something like, "We start [sic], as always [sic], with the language of the statute."[152] And judicial precedent seems to act as a trump over other legal texts, at least when judges are adequately comfortable with the merits of the precedent.

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149 The importance of a tiebreaker variable depends on how often it will be used. If judges regularly must resort to a lexically inferior consideration because the lexically superior considerations often yield indeterminacy, then the inferior consideration is not so inferior. To the extent that lexically inferior considerations in statutory interpretation are frequently the outcome-determinative basis for decision, there is less need to belittle them.

150 See Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of the United States Federal Courts in Interpreting the Constitution and Laws*, in Amy Gutmann, ed, *A Matter of Interpretation* 3, 17 (Princeton 1997) (rejecting the use of subjective and unexpressed legislative intent as "incompatible with democratic government").

151 See Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 85–88, 98–101 (Knopf 2005) (arguing that "overemphasis on text can lead courts astray, divorcing law from life" and suggesting a mix of sources for statutory interpretation, perhaps especially in hard cases).

152 See, for example, *Williams v Taylor*, 529 US 420, 431 (2000).

But I mean something more than the mundane observation that judges imperfectly describe their actual rules of decision.

Combining a commitment to providing determinate legal meaning with the reality of countless difficult interpretive questions makes a tiebreaking decision structure extremely useful, or even essential. When we observe unswerving determinacy from judges who do not specify a tiebreaker, judicial practices probably are departing from judicial prescriptions for interpretation in a particular way. Judges may be psychologically unfit to experience such ties and skewing relevant considerations to manufacture certainty, but they also could be finding ways to break ties that are even better than canons such as the rule of lenity. More specifically, we might hope that judges are engaged in undeclared double counting.

Consider the use of interpretive presumptions. As a formal matter they are not reserved for use as tiebreakers, so they should produce ties in some number of cases. Every so often, the presumption against preemption should just counterbalance every other relevant variable in civil statutory interpretation. We know that interpretive presumptions are never used this way, and yet we observe no recognized ties. This is true even if no tiebreaking canon of construction appears. Interpretive presumptions might, therefore, occasionally operate as tiebreakers regardless of how they are officially characterized. This could happen in two ways.

One possibility is that a judge will shelve an interpretive presumption unless and until other considerations leave her uncertain as to the statute's meaning. An interpretive presumption can be stressed at the end of an opinion and portrayed as the decisive consideration. The presumption is the kicker for the court. We cannot be sure that the presumption played no role until uncertainty was confronted, but we cannot rule out the possibility either. In this scenario, the so-called presumption may have been misdescribed. If so, it is a tiebreaker and it is subject to the commendations and concerns raised above.

A second possibility is potentially more optimistic. Judges may sometimes double count an interpretive presumption for tiebreaking purposes. In other words, a judge might consider a presumption such as aversion to preemption up front, along with other indications of legal meaning, and then, if indeterminacy becomes a threat, return to the presumption as a way to avoid stalemate. If so, the judge avoids the sacrifice of presumably relevant information during the lexically superior decision stage while also avoiding the problems of uncertainty in legal meaning. As I have explained, double counting comes with

incentive problems, but it can reduce errors in adjudicating cases.[153] There is value, therefore, in judges departing from the apparent design of interpretive presumptions when no other tiebreaker is available.[154] And there is a sound argument for making the rule of lenity a universal presumption in criminal statutory interpretation, if it is to be considered at all, and for reintroducing that factor or another relevant variable when tiebreaking is necessary.

C. Law as Life's Tiebreaker

In a very loose sense, every law is a tiebreaker. By providing rules to facilitate coordination, cooperation, zero-sum dispute resolution, and order in general, laws help people resolve doubt and disagreement that would otherwise interfere with a well-running society. One might therefore say that law breaks ties even as it serves a variety of social functions.[155] As explained above, however, this understanding of tiebreaking is wildly inclusive.[156] It extends to all decision rules. The better question is whether law can be usefully viewed as a tiebreaker in a more strict sense—as a set of decision rules and associated institutions that are more-or-less lexically inferior to another set of rules operated by a different set of institutions. Below I suggest that the answer is yes. But I recognize that the fit is imperfect. Unlike the examples above, hard-line lexical inferiority is often less apparent and it is not universal across all legal institutions. In addition, the tiebreaker analogy works best for judiciaries, and these institutions interact with others in ways that many tiebreakers do not. Indeed, this interaction opens possibilities for the constructive double counting of variables relevant to both law and the rest of social life.

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153 See Part II.B.2.c.

154 This is also possible for other kinds of presumptions. See, for example, *Clark v Arizona*, 548 US 735, 766–77 (2006) (discussing presumptions of innocence and sanity); *Maine v Adams*, 672 SE2d 862, 867 (Va 2009) (discussing a presumption of ownership based on possession). Unfortunately, the manner in which such presumptions actually operate is at least as difficult to ascertain as it is for interpretive presumptions.

155 Perhaps an expressive function of, or constraint on, law fits less well with a tiebreaking characterization. See, for example, Elizabeth S. Anderson and Richard M. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U Pa L Rev 1503, 1511–14 (2000) (defining an expressive moral theory in terms of constraints on the public meaning associated with actions). But some versions of expressivism present legal institutions as only one mechanism for expressing group values. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U Pa L Rev 2021, 2025–33 (1996) (investigating law as one method of expression for the purpose of changing problematic social norms in order to, for example, solve collective action problems). The more that expressive theories can be reduced or connected to other theories, such as coordination theories of law, the better the tiebreaker analogy will be.

156 See Part I.A.

1. Characterizations.

Several struts support the tiebreaker analogy for legal institutions and, more particularly, for courts. The first is the manner in which ordinary people view and treat them. Whether or not people generally prefer private ordering to other types of politics, our courts are far from the first place that ordinary people turn to resolve their grievances. Many people have reported that calling a lawyer should be the last resort for solving problems,[157] and parts of the country have a stated social norm against some kinds of litigation.[158] Litigation is not a good reputation-builder, while criticism for failing to seek legal redress seems rare. Abraham Lincoln once wrote—and, more to the point, people still point out that Abraham Lincoln once wrote—"Discourage litigation. Persuade your neighbors to compromise whenever you can."[159]

In addition to indications of litigation's backseat status in popular opinion is evidence that people actually steer their claims away from courts. Available studies indicate that less formal dispute resolution mechanisms settle the bulk of all grievances before they reach a lawyer, let alone a courtroom. A classic survey by Richard Miller and Austin Sarat reported that approximately 10 percent of perceived grievances made their way to a lawyer and only 5 percent to a court.[160] Neighbors often talk out their differences, employers and employees often accommodate each other, and injured parties often lump it—

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157 See Barbara A. Curran, *The Legal Needs of the Public: A Final Report of a National Survey* 235 table 6.8, 240–41 figure 6.1 (ABA 1977) (showing survey responses ranging from over one-third to over half, depending on the cohort). I have found no more recent poll.

158 See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County*, 38 Stan L Rev 623, 681–85 (1986) (finding a social norm against formal trespass claims for damages among rural neighbors).

159 Lincoln, *Fragment: Notes for a Law Lecture* at 19 (cited in note 1), quoted in, for example, Warren E. Burger, *Isn't There a Better Way?*, 68 ABA J 274, 275 (1982); Shawn J. Bayern, Comment, *Explaining the American Norm against Litigation*, 93 Cal L Rev 1697, 1699 (2005).

160 See Miller and Sarat, 15 L & Socy Rev at 536–44 (cited in note 137). See also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society*, 31 UCLA L Rev 4, 20–21 (1983) (discussing survey results regarding consumers). Other studies use expert evaluation in an attempt to isolate only legally cognizable claims for the denominator. See Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: A Survey of Americans—Major Findings from the Comprehensive Legal Needs Study* 7–8, 17–19 (ABA 1994), online at http://www.abanet.org/legalservices/downloads/sclaid/legalneedstudy.pdf (visited Apr 24, 2010) (reporting that low- and middle-income people with "legal needs" either do nothing or use nonjudicial mechanisms more often than they resort to the civil justice system but showing that use of the civil justice system is common for family matters); Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System—And Why Not?*, 140 U Pa L Rev 1147, 1183–90 (1992) (reviewing medical malpractice studies and concluding that victims rarely complain, perhaps because of perceived litigation costs, including stigma, although noting that severe injuries and automobile accidents seem to prompt higher litigation rates).

letting their losses lie long before any judge tells them that they must. Much of this pattern of behavior is consistent with simple models of settlement when parties roughly agree on the expected outcome in court.[161] If nothing else, preventable litigation costs encourage otherwise disputatious parties to split their differences.[162] Even if the United States is more litigious than many other comparable nations, which is an assertion subject to doubt, our courts are simply not in the forefront of dispute resolution writ large.[163]

Infrequency and unpopularity do not establish that litigation is lexically inferior to any other system, but additional features of modern adjudication pull it toward the tail end of dispute resolution sequences. These features are part of the official design of our judiciaries. Most importantly, judges respect and encourage negotiated settlements.

The mundane yet fundamental truth is that a valid settlement trumps preexisting rights to litigate the covered claims. Judicial support for settlement comes in the form of an expressed preference for it in civil cases, backed by usual willingness to respect these agreements despite ex post complaints of irregularity or injustice.[164] Whatever the limits on contracting away litigation rights, there is no general fairness check on negotiated settlements.[165] In a similar spirit, the federal policy supporting many commercial arbitration agreements indicates that traditional courts have moved toward a tiebreaking role even for garden-

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161 See George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1, 4–5 (1984). For more on the model, see text accompanying notes 227–30.

162 Consider Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter* (Nov 17, 1921), in Association of the Bar of the City of New York, 3 *Lectures on Legal Topics* 87, 105 (Macmillan 1926) ("[A]s a litigant I should dread a lawsuit beyond almost anything else short of sickness and death."). Having even *prevailing* parties bear most of their litigation costs can be seen as a feature that pushes courts toward tiebreaker status. For a leading exception, see 42 USC § 1988(b).

163 For a review of the limited comparative data, see generally Gillian K. Hadfield, *Higher Demand, Lower Supply? A Comparative Assessment of the Legal Resource Landscape for Ordinary Americans*, 37 Fordham Urban L J 129 (2010) (concluding that individuals in the United States seem to rely on legal institutions less often and that the country seems to devote fewer social resources per filed case, but that Americans seem to face more legal problems per capita).

164 See, for example, *Williams v First National Bank*, 216 US 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); *In re Tamoxifen Citrate Antitrust Litigation*, 466 F3d 187, 202–03 (2d Cir 2006) (similar); *D.H. Overmyer Co v Loflin*, 440 F2d 1213, 1215 (5th Cir 1971) ("Settlement agreements are highly favored in the law and will be upheld whenever possible because they are a means of amicably resolving doubts and uncertainties and preventing lawsuits."). See also *Shedden v Wal-Mart Stores*, 196 FRD 484, 486 (ED Mich 2000) (citing "scarce judicial resources"). Another rationale is confidence in private bargaining. See *Hennessy v Bacon*, 137 US 78, 85 (1890).

165 Compare class action settlements, and their agency problems, as an exceptional circumstance. See FRCP 23(e) (requiring court approval). See also 15 USC § 16(e) (regarding antitrust consent decrees proposed by the federal government); FRCP 23.1(c) (regarding proposed settlements in derivative actions); FRCP 66 (requiring a court order before dismissal of actions involving a receiver).

variety legal disputes.[166] Although judicial practice is not so explicitly promotional when it comes to plea bargains,[167] such negotiated resolutions tend to stick. Indeed, our judiciaries are not designed to handle many more criminal trials without seriously cheapening the procedure that they now offer. By the early 1970s, the Supreme Court called plea bargaining "an essential component of the administration of justice. Properly administered, it is to be encouraged."[168]

Of course, settlement negotiations take place in law's shadow,[169] and in this respect settlement cannot be insulated from adjudication. At least as a matter of strategy, settlement and adjudication are related. But this does not undermine the analogy between adjudication and tiebreaking. A lexically inferior stage of a decision procedure may influence the behavior of players at an earlier stage without forfeiting tiebreaker status. That a soccer team strives to prevent (or reach) a penalty shootout does not affect the characterization of the shootout as a tiebreaker.

Were respect for settlement the judiciary's entire settlement policy, however, the tiebreaker analogy might seem inapt. Judges can respect the settlements they come across without telling parties to negotiate before they litigate. An apparently high settlement rate[170] cannot prove that there is a judicial commitment to prioritizing settlement efforts. Settlement rates are driven, among other factors, by the amount of litigation costs that can be avoided, by the predictability of trial outcomes, and by relatively low stakes for the parties. None of

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166 See Federal Arbitration Act, 9 USC § 2 (authorizing courts to enforce private agreements to arbitrate); *Southland Corp v Keating*, 465 US 1, 10 (1984) (recognizing "a national policy favoring arbitration"); Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 NYU L Rev 1420, 1426–33 (2008) (tracking an increasingly pro-arbitration interpretation of the statute in the Supreme Court).

167 See, for example, FRCrP 11(c)(1), (c)(5) (stating that district judges must not participate in discussions regarding plea agreements and authorizing district judges to reject them). But see *People v Signo Trading International*, 476 NYS2d 239, 241 (NY City Ct 1984) (recognizing that New York trial judges may participate in plea negotiations). A guilty plea might be deemed involuntary if the trial judge improperly encourages a deal. See *McMahon v Hodges*, 382 F3d 284, 289 n 5 (2d Cir 2004).

168 *Santobello v New York*, 404 US 257, 260 (1971). See also Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L J 1909, 1909–12, 1916 (1992) (asserting participant comfort with the practice and defending a reformed structure).

169 See Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L J 950, 997 (1979).

170 See Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J Empirical Legal Stud 705, 730 table 7 (2004) (calculating that settlements were approximately 60 percent of all final dispositions in federal district courts in 2000); Kevin M. Clermont, *Litigation Realities Redux*, 84 Notre Dame L Rev 1919, 1955 (2009) (calculating a postcommencement settlement rate of nearly 68 percent).

these factors shows that judiciaries are designed to provide a lexically inferior second-stage dispute resolution mechanism.

But settlement gets more than respect. If courts ever were indifferent to settlement efforts, they are not now. Over the last several decades, as caseloads and skepticism about the virtues of litigation seemed to increase, judges around the country developed techniques for encouraging parties to settle claims.[171] Alongside the emergence of an alternative dispute resolution (ADR) movement outside the courts, the judiciary's own efforts to manage and settle litigation were among the major developments in twentieth-century dispute resolution.[172] Turning points were marked, for example, when the Federal Rules of Civil Procedure were amended in 1983 to authorize explicitly the use of pretrial conferences to facilitate settlement,[173] when parties became obligated to discuss settlement possibilities at their initial planning conference,[174] and when the Alternative Dispute Resolution Act of 1998 instructed district courts to adopt local rules requiring "that litigants in all civil cases consider the use of an alternative dispute resolution process at an appropriate stage in the litigation."[175]

Trial judges possess a number of methods by which to make settlement more attractive and litigation less so.[176] For instance, federal district courts can require parties and attorneys to spend time and other resources on settlement conferences,[177] they can demand that parties

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171 See Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 Cornell L Rev 918, 939 (1995) (citing docket overload and litigation disillusionment as motivators).

172 See Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 15 Rev Litig 503, 503–06 (1996) (discussing the development of court-annexed alternative dispute resolution into the 1990s).

173 See FRCP 16(a)(5) (including settlement promotion as a goal).

174 See FRCP 26(f)(2).

175 28 USC § 652(a). District courts may, however, exempt cases from this requirement after consulting with lawyers about how to define the exemptions. See 28 USC § 652(b).

176 See generally *Manual for Complex Litigation* § 13 at 167–74 (Federal Judicial Center 4th ed 2004) (discussing specific techniques); Robert J. Niemic, Donna Stienstra, and Randall E. Ravitz, *Guide to Judicial Management of Cases in ADR* 1–10, 38–47, 128–35 (Federal Judicial Center 2001) (discussing federal court-annexed ADR options); Jona Goldschmidt and Lisa Milord, *Judicial Settlement Ethics: Judges' Guide* 70–73 (American Judicature Society 1996) (listing settlement-promotion techniques). For court-annexed efforts in the federal courts in the years before the Alternative Dispute Resolution Act of 1998, see Elizabeth Plapinger and Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 3–6, 60–69 (Federal Judicial Center 1996) (noting the popularity of mediation programs).

177 See FRCP 16(c)(1), (c)(2)(I) (authorizing district courts to compel availability to consider possible settlement and to use "special procedures" to facilitate settlement). See also *G. Heileman Brewing Co v Joseph Oat Corp*, 871 F2d 648, 652–53 (7th Cir 1989) (en banc) (relying on inherent judicial authority to penalize the failure to send a corporate representative with settlement authority); *Shedden*, 196 FRD at 486 (ordering corporate officer presence at trial in response to a no-settlement policy); Kent D. Syverud, *The Duty to Settle*, 76 Va L Rev 1117, 1126–62 (1990) (discussing a duty to settle imposed by courts on insurers of defendants).

explore mediation,[178] they can have parties listen to the impressions of a third-party expert through early neutral-evaluation programs,[179] and they can set an early trial date to jumpstart negotiations.[180] Many courts also increase litigation costs for a party who rejects a settlement offer that ends up being more favorable than the result at trial.[181] All of this makes negotiated settlement not just respected but also, in significant ways, encouraged as a prior step in dispute resolution.

Settlement-promotion policies are not the only way in which law molds courts into tiebreakers. Consider the rise of administrative agencies and the judicial response. The modern administrative state now conducts an enormous amount of adjudication that might have been lodged in traditional courts alone.[182] Over time, judges accommodated this overlap in jurisdiction by accepting, or perhaps demanding, judicial review of agency outcomes.[183] More than this, judges developed a doctrine of exhaustion that required aggrieved parties to seek administrative remedies before turning to the courts. The Supreme Court now relies on both the Administrative Procedure Act[184] and a freestanding doctrine of exhaustion to constrain the timing of judicial intervention when federal agency action is under challenge.[185] While a § 1983 suit against a state or local official ordinarily overcomes any obligation to exhaust state administrative remedies,[186] there is a notable exception for prisoner plaintiffs,[187] and the Court's requirement for maturation of takings claims

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178 See 28 USC § 652(a)–(b). See also *In re Atlantic Pipe Corp*, 304 F3d 135, 143–45 (1st Cir 2002) (recognizing inherent authority to require mediation efforts, with parties sharing costs).

179 See 28 USC § 652(a)–(b).

180 See Richard L. Marcus, *Slouching toward Discretion*, 78 Notre Dame L Rev 1561, 1592 (2003).

181 See FRCP 68 (regarding formal offers from defendants); Cal Code Civ Pro § 998 (applying to both plaintiff and defendant offers); Tex R Civ Pro 167.4 (same). See also *Delta Airlines v August*, 450 US 346, 352 (1981) (characterizing the purpose of FRCP 68 as settlement promotion).

182 See Richard E. Levy and Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U Kan L Rev 473, 473–77 (2003).

183 See, for example, *Bowen v Michigan Academy of Family Physicians*, 476 US 667, 670 (1985) ("We begin with the strong presumption that Congress intends judicial review of administrative action."); *Crowell v Benson*, 285 US 22, 51–61 (1932) (permitting agency adjudication of fact questions relevant to a "private right" but with judicial review); Laurence H. Tribe, *American Constitutional Law* 285–98 (West 3d ed 2000) (tracing the wax and wane of the "private rights" distinction); Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv L Rev 915, 946–48 (1988) (recommending appellate review as the Article III–preserving check on agency adjudication).

184 See 5 USC § 704 (limiting judicial review to "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in court").

185 See *Darby v Cisneros*, 509 US 137, 153–54 (1993) (explaining that the Administrative Procedure Act governs exhaustion requirements for certain claims, while "the exhaustion doctrine continues to apply as a matter of judicial discretion" in other cases).

186 See *Patsy v Board of Regents*, 457 US 496, 502–11 (1982).

187 See 42 USC § 1997e(a).

has a similar effect.[188] None of this pushes all legal institutions into a lexically inferior status, but it does make traditional litigation look more like a tiebreaker than step one in dispute resolution.

This brings us to a smattering of jurisdictional and justiciability doctrines under which courts stay their hands without tying them forever. Setting aside doctrines that demarcate separate spheres of authority for nonjudicial institutions,[189] some of Alexander Bickel's "passive virtues" for the federal courts can be recharacterized as building blocks for a tiebreaking decision structure.[190] Consider judicial demands that controversies ripen before adjudication is appropriate[191] and that advisory opinions not issue in advance of concrete and pressing conflict.[192] Certain federalism-related constraints on federal jurisdiction have a similar character, although they divide one set of courts from another. Recall that federal courts should neither interfere with pending criminal prosecutions[193] nor reach federal constitutional questions when a state court interpreting state law might make an answer unnecessary.[194] Each of these doctrines permits courts to maintain overlapping authority while moving judicial involvement toward later stages of a dispute. In the federal system, at least, a tradition has developed in which the judiciary receives and maintains relatively broad

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188 See *Williamson County Regional Planning Commission v Hamilton Bank of Johnson City*, 473 US 172, 186–99 (1985) (faulting a § 1983 takings plaintiff for not first seeking relief via zoning variances and an inverse condemnation action). If a state court actually reaches the merits of a federal takings claim while the claimant seeks state relief, a subsequent federal court judgment might be precluded. See *San Remo Hotel v City and County of San Francisco*, 545 US 323, 345–46 (2005).

189 The political question doctrine, for instance, does not make courts into last-ditch dispute resolution mechanisms; its aspiration is to shut the courthouse door against a category of disputes that judges want resolved elsewhere. See *Baker v Carr*, 369 US 186, 217 (1962); Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 Duke L J 1457, 1461–62 (2005) (discussing the scope of the doctrine); Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 Colum L Rev 237, 300–36 (2002) (describing the doctrine's weakening).

190 See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 111–98 (Bobbs-Merrill 2d ed 1986).

191 See, for example, *Texas v United States*, 523 US 296, 300–02 (1998) (denying ripeness where the state procedure to be protected had not been and might not be used); *Abbott Laboratories v Gardner*, 387 US 136, 148–49 (1967) (looking for hardship in the absence of immediate adjudication plus present fitness for judicial resolution).

192 See *United States v Freuhauf*, 365 US 146, 157 (1961) (expressing concern over issues that lack focus when not preceded by proper adversarial contestation); Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv L Rev 1002, 1005 (1924) ("[T]he legislature must be given ample scope for putting its prophecies to the test of proof.").

193 See, for example, *Younger v Harris*, 401 US 37, 43–44 (1971). Parties inhibited by *Younger* abstention may end up litigating federal claims in the Supreme Court on direct review or in a lower federal court on habeas.

194 See, for example, *Railroad Commission of Texas v Pullman Co*, 312 US 496, 499–502 (1941). Federal litigation detoured by *Pullman* abstention may return to the abstaining court.

subject matter jurisdiction and, at the same time, tends to manage its operations so that other institutions move first, if not last.[195] It is part of an old, albeit contested, idea that "federal courts may exercise power only in the last resort, and as a necessity."[196]

As many of the preceding examples indicate, federal courts in particular emphasize their place at the back of the dispute resolution line. To be blunt, federal judges are last-word freaks. The most famous illustration is the Supreme Court's interpretation of the Constitution, which, in the Court's view, is final and supreme.[197] But the desire to give the final word runs deeper than that. Federal judges have long indicated that they would rather say nothing than submit to direct review by other officials. The prospect of nonjudicial review prompts federal judges to refuse to offer a judgment in the first place.[198] Otherwise they would lose their place in line (last, that is). A statutory mandate that federal courts reopen their own final judgments prompted a related constitutional protest in *Plaut v Spendthrift Farm, Inc*.[199] Rejecting this effort, the Court found within Article III a "fundamental principle" that protects the federal judiciary's "power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy."[200] Perhaps every decision leaves opportunities for a workaround, even if it is as inconvenient as Article V or the appointment of new judges. But federal judges plainly want their solutions for individual cases to appear last in time and to be respected thereafter.

A final component of the tiebreaker analogy is more subtle. It is a message suggested by several decision rules designed for hard questions—rules that share a preference for the status quo or for nonintervention. Some qualify as tiebreakers themselves. One example is the preponderance of the evidence rule in civil litigation: the defendant

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195 On the expansion of federal jurisdiction, see, for example, Samuel Issacharoff and Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L Rev 1353, 1365–1414 (2006). For the latest major struggle to retain judicial oversight, see *Boumediene v Bush*, 553 US 723, 769–71 (2008) (preserving habeas jurisdiction over Guantanamo Bay detainees). On the differences with respect to state courts, see generally Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv L Rev 1833 (2001).

196 *Allen v Wright*, 468 US 737, 752 (1984) (quotation marks omitted), quoting *Chicago and Grand Trunk Railway Co v Wellman*, 143 US 339, 345 (1892).

197 See *United States v Morrison*, 529 US 598, 616 n 7 (2000); *Cooper v Aaron*, 358 US 1, 18 (1958). That is, until new law is made via Article V or by the Court itself.

198 See *Chicago & Southern Air Lines v Waterman SS Corp*, 333 US 103, 113 (1948) ("[I]f the President may completely disregard the judgment of the court, it would be only because it is one the courts were not authorized to render.").

199 514 US 211 (1995).

200 Id at 218–19, quoting Frank H. Easterbrook, *Presidential Review*, 40 Case W Res L Rev 905, 926 (1990) ("[A] 'judicial Power' is one to render dispositive judgments.").

prevails if the evidence of liability is equally strong on both sides.[201] The entirety of civil adjudication is to that extent biased toward prior outcomes in other arenas of social life. On the criminal law side, we might view the rule of lenity, as well as the demand for proof beyond a reasonable doubt, as serving a similar value of nonintervention.[202] When we turn to appeals, the message is much the same. Trial court judgments are affirmed, not reversed, when the appellate panel is equally divided.[203] A final pro–status quo decision rule for close calls applies in legislatures, although it may be less decisive if the agenda remains flexible. Like the rule for equally divided judges, an equally divided legislative vote normally means that the relevant proposition fails.[204] Note, too, that these background values, which I have labeled nonintervention or status quo bias, can still yield cleanly decisive judgments on the merits. All of the above rules accomplish this, especially those used in court. We cannot say that the application of these rules removes courts from the decision structure altogether. Instead, they help courts reach decisions in favor of other dispute resolution mechanisms.

There are counterexamples, of course. Consider the ability of states to mandate the death penalty when a jury concludes that aggravating and mitigating circumstances are in equipoise,[205] along with the vice president's tiebreaking vote in the Senate.[206] Status quo bias is hardly the rationale for these rules. In addition, the status quo can be

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201 See *Pennsylvania Railroad Co v Chamberlain*, 288 US 333, 339 (1933) (explaining the adverse consequence of bearing the burden of persuasion "where proven facts give equal support to each of two inconsistent inferences"). The preponderance rule is a tiebreaker in the loose sense. It is more like a unitary majority vote requirement than a lexically inferior rule. See Part I. Illinois courts used to allow a separate jury instruction to the effect that "if the evidence is evenly balanced, then the jury shall find for the defendant," *Alexander v Sullivan*, 78 NE2d 333, 336 (Ill App 1948), but contemporary thinking is that this instruction, however technically accurate, is "slanted" and unhelpful, see Illinois Pattern Jury Instructions: Civil § 4.15 (West). But see New Jersey Model Jury Charges (Civil) § 1:12I (West) (including such an instruction).

202 See text accompanying note 122. Whether or not proof beyond a reasonable doubt is a tiebreaker loosely defined, it supports the general point being made in the text.

203 See *Warner-Lambert Co v Kent*, 552 US 440, 441 (2008) (per curiam). See also 28 USC § 2109 (reaching a similar result in the absence of a quorum in the Supreme Court, except in cases of direct appeal from district courts); *Morrison Knudsen Corp v Fireman's Fund Insurance Co*, 175 F3d 1221, 1237–39 (10th Cir 1999) (holding that the appellant loses when the appendix is incomplete and prevents review). Alternatively, this rule could be justified on grounds of clarity: "reversal" might leave more confusion than outright affirmance.

204 See Tarr and O'Connor, *Congress A to Z* at 472 (cited in note 8); Robert, et al, *Robert's Rules* at 392 (cited in note 4). An additional justification involves stability: approving motions on tie votes might leave those measures open to wasteful reconsideration, assuming no agenda restrictions, while defeating them avoids this oscillation. In any event, the current rule does not stop advocates of change from tinkering with their proposal and bringing the revised version to a new vote.

205 See *Kansas v Marsh*, 548 US 163, 181 (2006).

206 See note 8 and accompanying text.

difficult to identify, as when a candidate election is tied, two cars reach an intersection at the same time, an agency's statutory interpretation is defended under *Chevron*,[207] or a judge on habeas review cannot tell whether a trial error was harmless.[208] But the counterexamples will not eliminate a modest theme of nonintervention in law's tiebreakers—a value that nevertheless produces merits judgments for particular disputes. And that theme softly reinforces the notion that legal institutions are not designed to be society's first resort for dispute resolution.

The tiebreaker analogy is admittedly imperfect. Legal institutions do not generally demand an exhaustive effort at reconciliation within other systems first. Some people are willing and able to seek relief in politics or adjudication rather quickly. Nor do courts always cower in a small corner of social life. Judges can be more forward than that.[209] Moreover, litigation is in one sense subsidized: filing fees are well below the actual cost of running the court system. Plus judges disavow "coercion" of parties into settlement, leaving their power to avoid merits adjudication weaker than it might be.[210] Equally important, judicial settlement efforts are often annexed to the litigation process instead of segregated from it. This makes settlement less like a separate stage of dispute resolution. Finally, significant issues are not resolved "finally" by legal institutions or anyone else. Individual parties might accept the fate assigned to them by court judgments, and so their particular dispute might end, but broader normative and empirical questions can be given only provisional answers in these settings.[211] As to those questions, court decisions are episodes in a cycle of debate and less like end-of-the-line tiebreakers.

A useful analogy between adjudication and tiebreakers nonetheless survives these qualifications. The resemblance is clear enough once we combine mainstream attitudes and practices regarding resort

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207 See note 123.

208 See *O'Neal v McAninch*, 513 US 432, 435 (1995). The same rule applies on direct review, id at 437–38, but the application to habeas is less explicable as status quo bias. See id at 442–43 (stressing the danger of custody infected by constitutional error).

209 To take one example, the Supreme Court invalidated government sex discrimination while the Equal Rights Amendment was being debated in state legislatures. See *Frontiero v Richardson*, 411 US 677, 687–88 (1973) (plurality) (using congressional approval for the amendment as support for applying strict scrutiny); id at 692 (Powell concurring) (objecting to strict scrutiny given the ongoing ratification debate, although not to judicial invalidation of the sex classification at issue).

210 See *In re NLO, Inc*, 5 F3d 154, 157–58 (6th Cir 1993) (holding that district courts may not order parties to participate in summary jury trials); *Kothe v Smith*, 771 F2d 667, 669–70 (2d Cir 1985) (holding that a district judge improperly sanctioned one party to a dispute for failing to settle before trial). Actually, the anticoercion principle partly supports the analogy: if judges always mandate settlement, adjudication would have no ties to break.

211 See, for example, Barry Friedman, *Dialogue and Judicial Review*, 91 Mich L Rev 577, 653 (1993) (describing judicial review as part of "an elaborate discussion" with the public).

to legal institutions, the respect for and promotion of negotiated settlement by our judiciaries, the jumble of legal norms that channel disputes toward administrative agencies and other forums before adjudication, the ways in which legal norms often skew toward nonintervention in hard cases, and the judicial commitment to giving only final answers in particular disputes.

In fact, we can examine the most assertive-seeming instances of judicial adjudication and find a prior stage of roughly the same dispute to which the judges were responding. *Bush v Gore*,[212] for example, came only after it appeared that Bush and Gore were nearly tied at the ballot box.[213] Many believe that the Court should not have intervened at any stage of the dispute given the alternative mechanisms for resolution, such as the pathways marked by the Electoral Count Act.[214] There is good reason to criticize the Court majority on this score, although the election might well have been contested longer and without a different outcome had the Court not intervened. But can we imagine the Court announcing the victor before Election Day? Before any machine or manual recount was conducted?[215] In the case that was actually decided, respect for the Court's judgment ended a recount—not every count. And the judgment was the product of a practice called judicial "review."[216]

2. Evaluation.

As a matter of fact and by design, judiciaries tend to be late-stage decisionmakers. From this tiebreaking angle, there are at least three plausible normative reactions to the health of our legal system. Each of them reflects an important theory of what law is and ought to be about. The first reaction is dismay. Perhaps courts supply rational deliberation on core public values, and perhaps they should not take a backseat to inferior institutions. The second reaction emphasizes effective dispute resolution rather than rational norm generation. It involves acceptance of, or even hope for, randomness in adjudication. The third reaction suggests a somewhat more optimistic conclusion. It is that legal

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212 531 US 98 (2000).

213 See id at 100–03 (describing counts, recounts, litigation, remand, and more).

214 See Electoral Count Act of 1887, 24 Stat 373, codified at 3 USC §§ 5–7, 15–18; *Bush v Gore*, 531 US at 153 (Breyer dissenting); Samuel Issacharoff, *Political Judgments*, 68 U Chi L Rev 637, 639, 651–53, 656 (2001) (suggesting that the Court had "a warrant to enter the political fray" only "when no other institutional actor could repair the damage").

215 Consider *Bush v Palm Beach County Canvassing Board*, 531 US 70, 78 (2000) (per curiam) (remanding for clarification of a decision that required inclusion of some manual recounts).

216 See Adam M. Samaha, *Originalism's Expiration Date*, 30 Cardozo L Rev 1295, 1312 (2008) ("In our system, nonjudicial actors bear initial responsibility for understanding the Constitution's meaning.").

institutions are inescapably and appropriately double counting social values as they end disputes that are not resolved elsewhere.

a) Life as law's tiebreaker? For some observers, judiciaries fail to perform their unique role when they leave center stage on issues of public importance. Judges have a particular way of evaluating problems and explaining their conclusions, and a particular set of information on which they act. In their best light, courts open a forum for rational deliberation about the appropriate content of law using valuable data about the real world that is generated by disputing parties. This heroic vision of judicial behavior is suggested by Bickel's wish that judges would follow "the ways of the scholar,"[217] and Ronald Dworkin's perception that courts are a "forum of principle" often absent from the machinations of other institutions.[218] On this view, neither private ordering nor ordinary politics can deliver satisfying answers to the deep questions of law's proper character; and pushing courts into a tiebreaking role would be senseless.

Owen Fiss advanced a similar perspective even as court dockets grew, the ADR movement surged, and judges ramped up efforts to manage and settle cases. In an iconic article, *Against Settlement*, Fiss characterized the mission of judicial adjudication as the development of public values in a forum less affected by power inequalities. "Like plea bargaining," he wrote, "settlement is a capitulation to the conditions of mass society .... Someone has to confront the betrayal of our deepest ideals and be prepared to turn the world upside down to bring those ideals to fruition."[219] Although Fiss had little interest in devoting public resources to solely private disputes,[220] he wanted judges to forge ahead in cases involving public values, or cases in which society's weaker members claim that law mandates disruption of private ordering or politics as usual.[221] Judges should not be seen as regretful tiebreakers of any kind, then, but as public officials authorized "to enforce and create society-wide norms, and perhaps even to restructure institutions."[222] At

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217 Bickel, *The Least Dangerous Branch* at 25 (cited in note 190) ("Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar.").

218 Ronald Dworkin, *The Forum of Principle*, 56 NYU L Rev 469, 518 (1981) (arguing that law provides a space for contestation backed by matters of principle distinct from "the battlefield of power politics").

219 Owen Fiss, *Against Settlement*, 93 Yale L J 1073, 1075, 1086–87 (1984).

220 See Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv L Rev 1, 30 (1979) (suggesting arbitration). Compare Fiss, 93 Yale L J at 1087–88 (cited in note 219) (doubting that judges could correctly assign cases to adjudication and settlement tracks).

221 See Fiss, 93 Yale L J at 1076–78, 1085–87 (cited in note 219).

222 Fiss, 91 Harv L Rev at 31 (cited in note 220). See id at 34 (asserting the special independence and dialogic abilities of courts). See also Judith Resnik, *Managerial Judges*, 96 Harv L Rev 374, 431 (1982) ("[T]he quintessential judicial obligations of conducting a reasoned inquiry,

the logical extreme, we might say that the crude bargaining of social life ought to be a lexically inferior tiebreaker for debates not reached by the more pristine rationality of the court system.

There is something magnificent about these claims, in my view, and not only because they are provocatively idealistic. They point to the right questions. Bickel, Dworkin, Fiss, and others dedicated to robust judicial authority attempted to identify valuable features embedded in the design of judiciaries that were not replicated in other institutions. One might disagree with their conclusions, or believe that their analysis was incomplete, while recognizing that these scholars made admirable attempts to draw institutional comparisons.[223] Courts are indeed special institutions with an ineradicable relationship to the elaboration of legal norms. Performing that function is, for them, unavoidable. Even the *Manual for Complex Litigation* concedes that "[s]ome cases involve important questions of law or public policy that are best resolved by public, official adjudication."[224]

Yet legitimate doubts about the claims of Fiss and others have, if anything, deepened over the years. One serious concern is feasibility. To the extent that anyone believed judges could take a leading role in a large fraction of important legal questions, experience has not treated that hope well. Courts have too few resources for that.[225] They could never fully stop settlement even if they stopped encouraging it, and they will never accept review of every significant legal question.

Even with unlimited resources, a heroic view of the typical judiciary—perhaps the extraordinary judiciary—is unrealistic. One part of the problem is motivation, another is systemic, and yet another involves normative disagreement. Whatever capacity judges have for high-quality rationality insulated from base politics, there is serious doubt that judges actually exercise this capacity in most hard cases.[226]

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articulating the reasons for decision, and subjecting those reasons to appellate review . . . have long defined judging and distinguished it from other tasks.").

223 See Ronald Dworkin, *Freedom's Law* 34–35 (Harvard 1996) (recognizing that the institutional questions reduce to practical considerations and results); Bickel, *The Least Dangerous Branch* at 24–26 (cited in note 190) (comparing courts and legislatures in addressing the so-called countermajoritarian difficulty); Fiss, 91 Harv L Rev at 1–2, 31–34 (cited in note 220) (comparing courts and agencies on several dimensions relevant to accomplishing institutional reform).

224 *Manual for Complex Litigation* § 13.11 at 167 (cited in note 176).

225 See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court's Agenda—And the Nation's*, 120 Harv L Rev 4, 9, 49 (2006) (arguing that most Supreme Court adjudication deals with non-salient, even if sometimes influential, policies); Komesar, *Imperfect Alternatives* at 123, 251 (cited in note 137) (noting that the "physical resources and personnel" of the judiciary are more modest than those of the political branches, "dictat[ing] a confined judicial role"). Compare David Luban, *Settlements and the Erosion of the Public Realm*, 83 Georgetown L J 2619, 2647 (1995) (suggesting that settlement is unavoidable and can be reformed).

226 See, for example, Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 L & Soc Inquiry 309, 329 (2002).

Judges must be appointed somehow, and the system for acquiring the office, if nothing else, connects them to ordinary politics. Although judges are not a representative sample of the population, they are not especially well chosen to share the normative goals of scholars like Fiss, either. Nor are judges likely to possess the expertise or dedication necessary to perform a justifiably leading role in norm creation. Courts are at most one institutional participant and, as we have seen, they are often committed to speaking last rather than first. Finally, the relevant norms are controverted. People disagree persistently about the proper goals for judiciaries in particular and government in general, just as they disagree about the proper mix of bargaining and principle, deliberation and decisiveness, politics and adjudication.

For the most part, courts cannot, will not, or should not take the lead in public law generation.

b) Courts as lotteries. Other evaluations of law as tiebreaker are cheerier, although one of them will seem awkward at first. Accepting the tiebreaking analogy, we can return to the bases for evaluating tiebreakers developed in Part II.B.2, which emphasized normative unimportance, clean decisiveness, potential costliness, and, on occasion, double counting. We might then conclude that adjudication performs its tiebreaking role well—if, oddly enough, judicial outcomes are partly arbitrary, and if, in addition, judiciaries effectively double count societal norms.

First of all, adjudication is ordinarily decisive with respect to individual disputes. This seems to be the minimum goal of judges, anyway, whether or not they can achieve the final word on broader questions of fact and value. These decisionmakers offer decisive judgments on each question that they choose to answer, and participants tend to respect those judgments. Moreover, adjudication might qualify as the kind of costly debate over controversial issues that is best left for last. A substantial price is entailed by any judicial process that aspires to rational debate based on reliable information about the realities of life. Adjudication is a unique venue for contestation, and no one doubts that litigation is costly.

The challenge in defending adjudication as one of life's crucial tiebreakers revolves around law's normative value. Remember that sound tiebreakers often rely on relatively unimportant variables to provide decisive answers. Hence, as legal norms better reflect fundamentally just norms of behavior, we may become less confident that adjudication is a socially beneficial form of tiebreaking. Now, the idea that the health of our legal system depends on its use of normatively trivial decision rules is something less than intuitive. No official within the system would associate with the notion that judicial adjudication is

a rough substitute for randomization. But there is logic behind the idea. It is built on a few simple observations.

The first phenomenon worth noting is a selection effect on adjudicated cases. With important caveats, it has long been suggested that relatively difficult cases tend to be litigated and that the most difficult of these tend to survive until trial and appeal. Other disputes can be settled rationally and much earlier, at least if we assume that the parties' expectations about a judgment on the merits are sufficiently similar, that the stakes for them are comparable, and that the avoided litigation costs are sufficiently high.[227] Thus cases adjudicated on the merits are probably not a random sample of all similar disputes, and the sample's peculiar character helps adjudication approach arbitrariness. Nearly intractable disputes are theoretically most likely to linger until judges and juries impose final judgment. These disputes, in turn, will be least likely to have unique solutions that are uncontroversially optimal. Uncertainty among parties translates into higher probability of litigation to the end and probably correlates with difficulty among judges in reaching consensus.[228] The outcome can be analogized to a coin flip, at least from the litigants' perspective.[229]

The point can be made, albeit less dramatically, for those not convinced of a strong selection effect. Whether or not the pools of settled and adjudicated cases are demonstrably different—and the selection hypothesis in strong form has suffered major challenges[230]—no one

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227 See, for example, Priest and Klein, 13 J Legal Stud at 4–5, 17 (cited in note 161); Schauer, 61 S Cal L Rev at 1722–23, 1726–27 (cited in note 135) (finding similar thoughts in Karl Llewellyn's work on appellate judging). For a discussion of the serious challenges for a model this simple, see generally Kevin M. Clermont and Theodore Eisenberg, *Litigation Realities*, 88 Cornell L Rev 119 (2002).

228 See Priest and Klein, 13 J Legal Stud at 16–17 (cited in note 161).

229 See Theodore Eisenberg, *Testing the Selection Effect: A New Theoretical Framework with Empirical Tests*, 19 J Legal Stud 337, 341 (1990) (noting that Priest and Klein's 50 percent hypothesis allows "one [to] model the outcome of litigated cases by analogy to flips of an unbiased coin"). In fact, at least one evolutionary model of legal development performs just fine when judges flip coins. See Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J Legal Stud 51, 53–55, 61 (1977) (relying on a selection effect in which parties who favor the more efficient rule are less likely to settle and stating that the model works if merits decisions are made "randomly").

230 For empirical challenges to the Priest-Klein prediction that the plaintiff win rate should be about 50 percent, given their assumptions, see, for example Clermont and Eisenberg, 88 Cornell L Rev at 150–52 (cited in note 227) (observing appellate affirmance rates on the order of 80 percent and suggesting relatively low litigation costs and perhaps indignation as factors explaining weak appeals); Eisenberg, 19 J Legal Stud at 338–39, 348 (cited in note 229); Linda R. Stanley and Don L. Coursey, *Empirical Evidence on the Selection Hypothesis and the Decision to Litigate or Settle*, 19 J Legal Stud 145, 149, 159–64 (1990) (reporting experimental data in which settled cases were not meaningfully different, discussing strategic behavior and homoscedastic error variance as explanations, yet finding that less information does reduce settlement chances). One simple explanation for unsettled cases despite a largely predictable result at trial is asymmetric stakes. See, for example, Priest and Klein, 13 J Legal Stud at 24–29 (cited in note 161) (recognizing that point); Rubin, 6 J

doubts that the pool of litigated cases includes extremely difficult issues. There are too many disputes, complexities, unknowns, and good-faith disagreements over means and ends for the truth to be otherwise. From the perspective of critical theorists and modern legal realists, the domain of hard cases is large when only conventional legal analysis is available; for others the domain is smaller but still present.[231] We should not anticipate clear answers, regardless of the test for clarity, in all or even most of the closely contested cases. In many cases, merits adjudication will be operating in the gray zone of reasonable debate.[232] Judges themselves cannot rightly believe otherwise, regardless of the certitude on display in published opinions.[233] Reconsider in this light Justice Robert Jackson's quip, "We are not final because we are infallible, but we are infallible only because we are final."[234]

Of course, judiciaries do not close their cases by overtly randomizing across the set of plausible outcomes.[235] Judges publish reasons, and juries are supposed to have them. Yet it turns out that merits judgments are tightly connected to randomization, at least in the more challenging cases.

Within the jurisdictional boundaries of each adjudicative institution, judges and juries are typically selected at random.[236] Some form of assignment lottery is now the norm. If all of these decisionmakers were the same, the case assignment method would be irrelevant to case outcomes.

Legal Stud at 53 (cited in note 229) (emphasizing incentive differences for one-shot and repeat players). But settlement in cases that many judges would experience as relatively easy may also be thwarted by strategic behavior during settlement negotiations, optimism bias in one or more parties, and a passion for public vindication, among other forces.

231 See, for example, Mark Tushnet, *Critical Legal Theory (without Modifiers) in the United States*, 13 J Polit Phil 99, 108 (2005) (noting the moderated claims of critical legal theorists). Actually, decision will sometimes be difficult, perhaps more difficult, when conventional legal analysis is disregarded. Converting every litigated question into a "policy" question does not necessarily simplify the matter. Consider Richard A. Posner, *How Judges Think* 230–31 (Harvard 2008) (acknowledging that both legal reasoning and pragmatism can run out); Jack M. Balkin, *Deconstruction's Legal Career*, 27 Cardozo L Rev 719, 734 (2005) (suggesting that "social construction . . . helped produce the internal sense in lawyers and judges that some arguments were better than others").

232 For characterizations of constitutional choices, see Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 Colum L Rev 606, 663–64 (2008) ("[A] host of constitutional design choices are subject to serious uncertainty regarding their influence on any number of outcomes."); Samaha, 59 Stan L Rev at 625–29 (cited in note 138) (reviewing empirical literature for the preceding proposition).

233 Such opinions are sometimes at odds. Compare *District of Columbia v Heller*, 128 S Ct 2783, 2799 (2008) (indicating "no doubt" that the Second Amendment confers an individual right unconnected with militia service) with id at 2826 (Stevens dissenting) (asserting that "the Framers' single-minded focus . . . was on military uses of firearms").

234 *Brown v Allen*, 344 US 443, 540 (1953) (Jackson concurring).

235 See note 79 and accompanying text.

236 See Samaha, 51 Wm & Mary L Rev at 5, 47–52 (cited in note 63) (discussing the extent of and limits on case assignment lotteries).

But neither sitting judges nor eligible jurors are fungible, and every practicing lawyer knows it. Because these potential decisionmakers differ in their competence and ideology, they would reach different conclusions in some subset of litigated cases. In fact, there is good reason to believe that the most difficult cases are the ones in which competence and ideology are likely to have the most influence.[237]

Moreover, because randomization's impact comes through the case assignment mechanism, no individual judge or jury must be irrational, nonrational, arbitrary, or even subjectively uncertain for the analogy to hold. Each decisionmaker can be as resolute as humanly possible. We need only debatable issues of fact or law plus a diverse set of decisionmakers. Case assignment lotteries do the rest. When we combine selection effects with a diverse set of decisionmakers assigned to cases by lot, we have a system that begins to approximate random selection.

This is only an approximation, of course. Among other differences with overt merits randomization, many litigated cases nonetheless have a fairly obvious solution given an appropriate amount of judicial effort. Plus the range of answers in hard cases that could be given by the mix of official decisionmakers is not necessarily the same as the plausible set of merits outcomes. Furthermore, the US Supreme Court sits at the apex of the system and it does not sit in randomly selected panels. This further constrains outcomes in other courts, even apart from the limited mix of views that survives the judicial appointments process.[238] Hence, the judicial lottery is weighted and bounded in many ways that distinguish it from a coin flip on every issue.

But the influence of assignment randomization on outcomes is not really debatable. And so the tiebreaker analogy for adjudication is a way to feel better about the influence of chance. John Coons told us that "[p]eople resist having their noses rubbed in the randomness of the system,"[239] but we have cause for qualified celebration of it.

c) Courts as reflections. If the foregoing portrait of law as lottery seems too sobering or too distant from ordinary perceptions, a third perspective supplements the lottery analogy and provides more hope for those concerned about arbitrariness. This additional perspective also helps account for the experience of relatively easy cases in adjudication.

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[237] See id at 53–57, 64 (exploring the relationships among judicial competence, ideology, and decisions).

[238] See id at 53–66 (vetting the connections and possible disconnects between case assignment lotteries and merits randomization and concluding that the former does not fully track the optimal domain for randomization suggested by ideal theory).

[239] Coons, 75 Cal L Rev at 110 (cited in note 81).

I refer to the thought that law's officials, including judges, often act in accord with mainstream or politically ascendant policy preferences, and that this consistency might be a form of beneficial double counting. To the extent that adjudication resolves the episodic stalemates of social life with faintly modified versions of the ordinary norms of social life, we could say that law has subtracted nothing from the lexically superior stages of dispute resolution while reinforcing those norms and performing the challenging task of breaking every tie that it faces. This characterization might be more comforting than randomization, and it too has substantial support in legal theory.

The law and society school of legal studies has been claiming for years that legal norms track forces external to legal institutions. General claims of this type can be found in the works of modern scholars including Lawrence Friedman, who sees law as essentially a mirror of society,[240] and these claims extend back through the nineteenth century writings of Friedrich Karl von Savigny on the relationship between the *volkgeist* and law.[241] These claims can be maddeningly abstract, with references to vague forces amounting to "the hidden voices of the zeitgeist."[242] But it is by now obvious that legal institutions are not fully autonomous.

In addition, somewhat more specific assertions have been made about the relationship between external and internal forces shaping law. We have the traditional connections made between custom and negligence,[243] trade usage and contract interpretation,[244] along with religious

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240 See Lawrence M. Friedman, *A History of American Law* ix (Simon & Schuster 3d ed 2005) ("Perhaps it is a distorted mirror. Perhaps in some regards society mirrors law. Surely law and society interact. The central point remains: Law is the product of social forces, working in society. If it has a life of its own, it is a narrow and restricted life."); Lawrence M. Friedman, *Law and Society: An Introduction* 107 (Prentice-Hall 1977) ("In the long run, society molds legal thought in its image.").

241 For a review of Savigny's theory, such as it is, see Anna di Robilant, *Genealogies of Soft Law*, 54 Am J Comp L 499, 527–32 (2006). For an excellent conceptual overview of internal and external theories of legal change, see generally William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 Am J Comp L 489 (1995).

242 Lawrence M. Friedman, *Law in America: A Short History* 42 (Modern Library 2002) (describing influences on nineteenth-century judges, which is particularly challenging).

243 See Kenneth S. Abraham, *Custom, Non-customary Practice, and Negligence*, 109 Colum L Rev 1784, 1786 (2009) (explaining that the newest draft of the Restatement of Torts allows parties to present custom evidence without it becoming dispositive); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 Va L Rev 1899, 1930–67 (2007) (collecting examples from intellectual property cases and criticizing the influence of custom therein). Rothman points out that custom can be driven by litigation-avoidance preferences, see id at 1951, and there are obvious problems if courts then import such play-it-safe practices back into the legal norm.

244 See UCC § 1-205 (covering the relevance of course of dealing and usage of trade evidence).

beliefs and the criminal law.[245] Some of these connections may have faded over time, but there is a vibrant line of scholarship that has softened the distinction between law, culture, and politics. This enormous literature includes the observations of political scientists that judges usually will not push beyond the boundaries of the political mainstream[246] and the sense of social-movement legal historians that public and political discourse is linked to doctrinal development, including constitutional doctrine.[247] Indeed, there is a logical affinity between these efforts and the selection effect studies: both identify chains of causation leading far beyond courthouse doors.

Although the connection between nonlegal forces and legal institutions can be much better understood, along with the foggy boundary between nonlegal and legal institutions, a relationship certainly exists. As legal institutions including courts adopt or adapt ideas from other locations, a kind of double counting takes place. At an earlier stage in a dispute, parties make claims relying in part on conventional morality and typical practice but find themselves unable to settle their disagreements. Occasionally these unresolved disputes find their way to a judge, perhaps after some other legal official has intervened, but without cutting loose the influence of nonlegal morality and what seems normal for the circumstances.

Courts are not simply reflecting external social or political norms. The relationship is plainly more nuanced than that. What seems right and ordinary outside of legal institutions is influenced by the policy of legal institutions. Furthermore, not every mainstream norm has a mirror image in the reasoning processes of judges and jurors; the conventions of legal argument surely affect the implementation of those norms. The resulting slippage between social norms and legal norms

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245 See, for example, Alan Watson, *Legal Transplants: An Approach to Comparative Law* 66–69 (Georgia 2d ed 1993) (investigating reliance on, and deviations from, biblical commands in the formal law of Massachusetts Bay Colony).

246 See, for example, Robert G. McCloskey, *The American Supreme Court* 225 (Chicago 1960); Dahl, 6 J Pub L at 281 (cited in note 135) (finding that Court policy ultimately converges with the positions of national governing coalitions). See also Dean Alfange, *The Supreme Court and the National Will* 220–21 (Doubleday 1937). For a recent study in the same spirit by a law professor, see Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* 367–76 (Farrar, Straus and Giroux 2009).

247 See, for example, William N. Eskridge, Jr, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 Mich L Rev 2062, 2064 (2002); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 Cal L Rev 1323, 1323 (2006) ("Social movement conflict, enabled and constrained by constitutional culture, can create new forms of constitutional understanding."); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 Harv L Rev 191, 201–36 (2008). See also Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 Const Comment 701, 724 (2007) ("[T]here is no view from nowhere in constitutional law, no place for a Justice to stand that is divorced from the culture and society in which the Court operates.").

should be appreciated. Otherwise there would be, if no other danger, a risk of legal institutions mindlessly reincorporating play-it-safe norms of behavior that the law helped prompt. That would create a destructive feedback loop. And if courts only mimicked external norms, it would be unclear how they could resolve all disputes that survive to litigation.

We can now view courts as tiebreakers and their tiebreakers as partly redundant—different enough from the norms of ordinary life to end residual disputes effectively, and yet similar enough to share whatever strengths and legitimacy they have. The subset of people who end up as judges will not share every value and perception of a more general public, to be sure. But these differences help resolve disputes that last until they reach a courtroom, and the commitments and worldviews of sitting judges usually will be in the vicinity of everyone else's. Judicial selection processes and other political and cultural forces assure it. Case assignment lotteries are still driving results in a number of cases, given diversity on the bench, yet the overall pattern of judgments will tend to remain within a mainstream boundary. This is not an unqualified endorsement of the system or mainstream norms. To the extent that the norms from which judges and jurors draw are imperfect, however, the target of concern must be far broader than our judiciaries.

A final thought in this path involves incentive effects. The major trouble with double counting a normatively relevant variable to break ties is the possibility that actors will be too powerfully incentivized to satisfy (or appear to satisfy) the double counted variable.[248] Knowing that a variable will be reintroduced at a tiebreaking stage with some probability makes the variable that much more significant to interested parties. Nor can there be an assurance that sociolegal norms will be impervious to manipulation, and we must admit the normative imperfection of at least some of these rules. Perhaps this problematic effect is simply a tolerable price to pay for a decisive dispute resolution system.

But also worth reemphasizing is the rarity of litigation and the likely lack of knowledge regarding the specifics of legal norms among many. That legal norms are often not shockingly different from social norms does not mean that ordinary people pay attention to the former in conducting their everyday lives. For individuals who end up in contact with the judicial system, often the prospect of litigation was dim and unimportant to their behavior. Insofar as litigation strikes like lightning, incentive effects from double counting will not be significant.

In the end, however, we should be willing to recognize that few tiebreakers for social decisions are associated with perfect worlds.

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[248] See Part II.B.2.c.

And, unlike game designers, we are not engaged in the entertainment business here. Both tiebreaking decision structures and the particular tiebreakers that they employ are typically considered the best available response to an environment falling short of ideal. Legal institutions are no different.

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No one of these three perspectives is the complete story, of course. Rationality, randomness, and reflection of social forces each characterize only one facet of our legal institutions, so none of them fully captures the role of law and adjudication in our society. Perhaps the combination of veritable randomization and double counting will overcome any misgivings associated with adjudication's demotion to late stages of dispute resolution. I find this conclusion attractive. But the analytic framework is more important than anyone's conclusion on this score. Likening legal institutions to tiebreakers should instigate a serious evaluation of these competing perspectives, and on the terms established in this Article for evaluating all kinds of tiebreakers. At its best, then, the tiebreaker analogy offers a fresh way to think about legal institutions and a sensible way to judge them.

CONCLUSION

A tiebreaker can usefully be defined as a type of lexically inferior decision rule that ranks options when a lexically superior rule breaks down. The tradeoffs involved in constructing such decision structures prompt the question whether a tie would be truly intolerable and, if so, whether ties can be prevented by adjustments to a unitary decision rule. If such adjustments are impossible or inadequate, then the consequences of various tiebreakers are now clearer: random variables with their political problems, relevant variables with their error costs, and double-counted variables with their potential incentive effects.

These insights are significant for a variety of legal questions. Tiebreakers are part of decisionmaking within legal institutions today, and legal institutions themselves can be evaluated as tiebreakers. Whatever conclusions one might reach on the particular applications explored above, this Article offers a way to identify and assess tiebreaking decision structures. And whatever nuances remain to be explored, the general analytic framework presented here is enough to bring a unique and theoretically neglected tool for decisionmaking into the fold of legal studies.