to achieve an overall balance. Administrative agencies within the US system, according to the explanation, effectively constitute a fourth branch of government, whose claim to legitimacy lies not in their democratic legitimacy but in their supposed expertise, who themselves exercise forms of power recognisable within each of the three traditional branches, and who are kept in check by a combination of each of the three traditional branches of government.

Potentially of wider and more enduring significance than any of the explanations that are given is the framework for comparative analysis on which it is based. Inspired in part by the description given by Richard Neustadt in *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* (1990) of the constitutional system of the US as that of "separated institutions sharing powers", the framework draws a basic distinction between two methods of distributing public power within a system of government and correspondingly distinguishes between two methods of controlling the public power that is distributed. One method of distribution, epitomised by the US system, involves the diffusion of power by dividing it between institutions in a manner which requires some measure of cooperation between them in order for the power to be exercised. The corresponding method of controlling the power so distributed is described as one of checks and balances. The other method of distributing public power, epitomised by the UK to which the Australian system is in this respect more closely aligned, involves the concentration of power by dividing power between institutions in a manner which permits each institution to exercise the power vested in it unilaterally. The corresponding method of control is appropriately described as one of accountability.

Propounded as having the potential to provide a partial explanation for the observable similarities and differences in the methods of controlling administrative power across the three systems, the framework is shown by the analysis also to provide a partial explanation for the observable similarities and differences in more general perceptions of the role of courts within each system.

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Rechtserkentnis durch Richtermehrheiten: "Group choice" in europäischen Justiztraditionen. By Wolfgang Ernst [Tübingen: Mohr Siebeck Verlag, 2016. xx + 362 pp. Hardback €109. ISBN 978-3-16-154361-6.]

Friedrichs v California Teachers Association, 136 S.Ct. 2545 (2016), was a recent decision in which the decision of the lower court stood in the face of a tied Supreme Court of the United States. The problem in reaching that decision is very ancient. Professor Ernst in his prize-winning book *Rechtserkentnis durch Richtermehrheiten* charts the juristic debate over the last two millennia on the question of what to do when judges within a single court disagree. It is a very careful work covering Roman law, canon law, French law, German law and English law.

The structure of the work is to present the approaches of the different legal systems to the issue of divided courts. The predominant approach in each chapter is chronological. This allows the course of debates among jurists over time to appear. The presentation of the views of each author is given through a succinct narrative supplemented by quotations (often left in the original language). The emphasis is on letting the original sources speak for themselves.

Therefore the work is not primarily thematic. It does not bring out trends in the solution to the problem of when judges disagree. For the most part, the questions are set in the Roman period, which is why the author uses much space on that period in his first chapter. We are presented with the issues and the classical solutions of Julian and Pliny, which tend to recur in some form or another in the subsequent centuries.

The basic problem of the book is set out on pp. 9ff. If individual judges disagree, then should they call in a third judge to decide, or should the decision be based on a synthesis of their individual views? Julian (Digest 4,8,27,3) gives the example of three solutions to a single debt claim: 15, 10 and 5. His solution is to award 5, because that is the amount on which all the judges agree (see pp. 15ff). The significance of this example for the rest of the book is that it raises the question of whether judges need to agree just on the result or on the reasons for the result. If (as appears later in the book in relation to modern Germany) the emphasis is on reaching a result, rather than agreement on the reasons, then the Julian outcome is sufficient (see p. 58).

Pliny gives the problem of a Senate hearing in which three different punishments are proposed: death, exile and acquittal. If acquittal is only a minority view, should that decision prevail simply because of the failure to agree on anything else? Those who voted for the death penalty would also have concurred in exile. The case raises two questions: should the decision be approved by the absolute majority (*maior pars*) of the Senate or by a relative majority; and how is this decision-making process to be handled procedurally? In what order should the alternative sentences be put to the vote? Ernst presents us with the broad issue, but he spends significant time presenting the context in which Pliny was writing and the purposes for which he wrote (as far as these are ascertainable). So, on the one hand we have a general issue (the criminal penalty to be imposed by a divided court) and also a study in Roman law (whether Pliny was presenting a problem of justice or a problem of how to organise the procedure in the Senate so as to come to a decision which reflected the views of the majority) (see especially pp. 54–55 which suggest that the latter is the interest of the discussion).

A third recurrent solution is the *calculus Minervae*, which is drawn from the Greek heritage, but which became important in Roman debates and has retained its currency. In essence, it requires that the majority for a penalty is more than a single vote (pp. 32–34).

In considering these different solutions, Ernst considers that the procedural context of Roman law is significant. Each judge has his own vote and responsibility. If a third judge is called in to break the tie, then each individual judge has to sign up to the solution adopted by the third. There is no question of a majority vote (unlike in Pliny's Senate voting example). The idea that "the court" makes the decision is a much later concept.

Ernst gives a lot of space to the Roman law and its debates (pp. 9–59) because this really sets up the issues and the typical solutions. The author gives the impression that subsequent debates are, for the most part, going back over the same issues and solutions because, in the end, none is fully satisfactory. The author then gives significant space in ch. 2 to the distinctive features of the medieval learned law (pp. 61–113). It is here that occurs the move from the questions of disagreements among single judges to the decision-making of a collegial body, though he makes it clear that this is a very gradual process that, in many ways, is not complete until the nineteenth century. The processes of drafting opinions and deliberating on them inside the collegial body become important if there is to be one single judgment of "the court". The role of the reporter judge (*Berichtserstatter*) who collates

the evidence and formulates the decision of the court becomes significant. Equally significant is the process of reaching a decision: who speaks first and whether the presiding judge has a casting vote. Finally, there is the question of which issues need to be reserved to a higher formation of the court (what the English called the court en banc). The importance of this chapter is not just to see the emergence of the collegial court, but also the variety of such institutions. The Roman Rota shows the combination of the single judge with the consultation of experts and many German courts referred issues to *Spruchkollegien* in the universities. So the rules of procedure within these advisory bodies became important as part of the judicial decision-making process. The issue arose of whether the views of each individual consulted were to be given equal weight or whether the *maior et sanior pars* was to be adopted (see p. 84). Ernst's picture of the medieval debates demonstrates the variety of institutional settings, as well as the variety of opinions that were held. It confirms his view that the question of the right solution to judicial disagreement cannot be isolated from the institutional setting in which the solution has to be applied. His conclusion is that the heritage this provided to the era of codification was simply a diversity of solutions without a strong direction of what was a consistent and widely acceptable solution.

Chapter 3 is a shorter presentation of the writers from the Enlightenment who tried to draw on more scientific arguments (often based on mathematics). Much of the discussion presented involved requiring larger majorities in favour of a solution and looking at the sequence of questions put to a body such as a jury. As judges became more professionalised, so the question of the rationality of the jury came into focus. It is noted that much of the debate here was in relation to the criminal decision.

The short ch. 4 on France (pp. 147–65) shows the path from sixteenth century rules to the procedural Codes of 1806–08 with then a big jump to the way the current *Cour de cassation* works. Ernst notes the importance of the *juge départiteur* as a procedural device since the fifteenth century. By bringing in a judge to resolve a tie (often between lay judges), a rational solution can be reached. But then the question arises of whether this judge can add new grounds for a decision or must simply rely on those on which the other judges were relying. The French system thus adds to the mix.

Chapter 5 deals with German solutions in more depth. There is particular attention given to the Empire's criminal procedural code of 1878. The earlier debate had been about whether there had to be agreement on the reasons for the decision or on the result alone. Whereas von Savigny considered that there should be agreement on the reasons given by the court, the debates leading up to the 1878 Code favour simply an agreement on the outcome. The question of majorities in collegial courts remained unresolved and the solutions varied from one period to the next. Unlike the earlier chapters, neither the French nor the German chapters end with a conclusion. This makes it more difficult for the reader to draw conclusions about what the debates show about these legal systems as they evolved into unitary systems. The divergences between civil and criminal law are not the only ones. In particular, French labour law courts use the *juge départiteur* system, and many German and French courts have the issue of how to blend professional and lay judges.

The "English Legal Development" (ch. 6) is very different. (The publisher's title relates to "England" in the German sense of Great Britain and Ireland, with the occasional reference to the US.) Unlike other chapters, this is not predominantly historical. Instead, it describes the contemporary judicial organisation, mainly of the superior courts. Of particular interest to the author is how the idea of a precedent as a rule justifying a decision can be extracted from multiple individual judgments.

Unlike earlier chapters, there is not much discussion of the jury and its decision-making procedures.

The concluding chapter begins by giving an account of two processes in recent German history. The role of the government assistant to the judge in the Nazi courts to ensure that the "*Führerprinzip*" was respected in all decisions. The second is the decision-making of a more conventional kind in the *Bundesverfassungsgericht* (German Constitutional Court), where minority opinions are permitted. A short section on the Roman Rota after the Code of Canon Law of 1917 is followed by a short presentation on the practice of collegial arbitration panels.

The author concludes with three pages on the way in which contemporary principles of open justice require the views of individual judges to be transparent and not secret and that the individual responsibility of the judge should lead to a willingness to permit dissenting opinions. Methods of decision-making would then be more open to discussion and processes of "layered decision-making" could be carefully installed to ensure rational and consistent justice.

The choice of a country-based presentation over a thematic presentation has disadvantages. It is clear from the different chapters that ideas on these topics were not considered in linguistically sealed groupings. Scholars of one tradition were well aware of the solutions adopted in other countries. This is not surprising since, before 1790, France was legally disunited and Germany even more so. There were relatively few scholars in the different countries and it is not surprising that they read each other's work. Roman law was a common point of reference and part of legal education, including in the common law world. Whilst it is true that today the different jurisdictions are held together by countries and different academic communities, this has not always been the case. A thematic approach might have focused on the special concerns in criminal law, especially the view that there should be a higher majority required to convict someone of an offence, compared with the civil law. On the other hand, the problems of differences of view over the criminal penalty are more straightforward than differences of view about the remedy in commercial transactions. A grouping around problems rather than countries would have been more useful. This is even more so because the long chapters on opinions in the different countries do not lead, in the end, to conclusions about the legal community in question. We learn that there were divergences and lack of certainty, but we do not learn insights into the nature of the legal community which led it to its own particular solution.

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The Duty to Account: Development and Principles. By J.A. WATSON [Sydney: Federation Press, 2016. 240 pp. Hardback A$90.00. ISBN 978-1-76-002066-8.]

At its very outset, *The Duty to Account* claims that its purpose "is to invite a larger consideration of the doctrine of account, including having regard to its long history and modern utility, as the premises and foundation of many and varied relationships recognised in law and equity today". It lives up to this promise: the book is a long overdue consideration of the nature and history of account. Modern treatments of the topic – those best known are the writings of Steven Elliott – do not explore the evolution of accounting, whilst David Ibbetson's seminal *Historical Introduction to the Law of Obligations* (1999) is organised according to tort, contract and unjust