

## THE ORIGINALIST CASE AGAINST CONGRESSIONAL SUPERMAJORITY VOTING RULES

*Dan T. Coenen*

**ABSTRACT**—Controversy over the Senate’s filibuster practice dominates modern discussion of American legislative government. With increasing frequency, commentators have urged that the upper chamber’s requirement of sixty votes to close debate on pending matters violates a majority-rule-based norm of constitutional law. Proponents of this view, however, tend to gloss over a more basic question: Does the Constitution’s Rules of Proceedings Clause permit the houses of Congress to adopt internal parliamentary requirements under which a bill is deemed “passed” only if it receives supermajority support? This question is important. Indeed, the House already has such a rule in place, and any challenge to the Senate cloture rule is doomed from the start if that body may self-impose supermajority voting thresholds even for the actual enactment of laws. Existing scholarly work in this area, however, is incomplete. The most elaborate treatments invoke originalist principles to claim that the chambers of Congress may freely adopt supermajority (as well as submajority) bill-voting requirements. These treatments have spawned critical responses, but none of them focuses in full-blown fashion on the words and deeds of the Framers themselves. This Article fills the resulting gap by offering a wide-ranging argument against supermajority voting rules based on constitutional text, constitutional structure, and background understandings that pervaded the framing period. Taken as a whole, these controlling indicators of original meaning establish that a bill is passed if and only if it receives a majority vote.

**AUTHOR**—Associate Dean for Faculty Development, University Professor, and Harmon W. Caldwell Chair of Constitutional Law, University of Georgia School of Law. The author thanks Diane Amann, Erica Hashimoto, Michael Coenen, and Ed Larson, as well as participants in the 2011 Georgia Law/Emory Law Summer Research Workshop, for helpful comments on earlier drafts of the article. He also thanks three former students—Andrew Pinson, Charles Mathes, and Sara Fish—for outstanding assistance with regard to research, cite checking, and the like.

INTRODUCTION.....	1092
I. SUPERMAJORITY VOTING RULES AND CONSTITUTIONAL TEXT .....	1096
A. <i>The Presentment Clause</i> .....	1101
B. <i>The Vice President Voting Clause</i> .....	1103
C. <i>The Enumeration of Supermajority Voting Rules</i> .....	1105
II. SUPERMAJORITY VOTING, CONSTITUTIONAL STRUCTURE, AND RULES OF PROCEEDINGS.....	1109
III. SUPERMAJORITY VOTING RULES AND CONSTITUTIONAL HISTORY .....	1118
A. <i>Background Norms of Parliamentary Practice</i> .....	1118
B. <i>Republicanism</i> .....	1132
C. <i>Experience-Based Repudiation of Supermajority Voting Rules</i> .....	1139
D. <i>The Politics of the Framing and Supermajority Voting Rules</i> .....	1144
CONCLUSION.....	1152

INTRODUCTION

In July of 2011, a bipartisan group of Senators known as the “Gang of Six” put forward a far-reaching plan to deal with the then-looming federal debt-ceiling crisis.<sup>1</sup> One feature of their proposal called for establishment of annual spending caps, while another authorized departure from those caps only if the Senate approved that action by a vote of at least sixty-seven members.

The idea of imposing congressional supermajority voting rules, without amending the Constitution, was not new. In 1994, pursuant to a so-called “Contract with America,” Republican House candidates throughout the nation pledged that they would, if elected, install a 60%-vote requirement to pass any law that increased any income tax rate.<sup>2</sup> In fact, a Republican majority was swept into office, and it promptly made good on its promise by adopting House Rule XXI(5)(c).<sup>3</sup> The rule specified that “[n]o bill or joint resolution, amendment, or conference report carrying a Federal income tax rate increase shall be considered as passed or agreed to unless so determined by a vote of not less than three-fifths of the Members voting.”<sup>4</sup>

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<sup>1</sup> See Press Release, Senator Saxby Chambliss, A Bi-Partisan Plan to Reduce Our Nation’s Debt and Deficit (July 27, 2011), available at <http://chambliss.senate.gov/public/index.cfm/pressreleases?ID=ec2df064-c619-4330-97a6-4f67233dd184>.

<sup>2</sup> CONTRACT WITH AMERICA 8 (Ed Gillespie & Bob Schellhas eds., 1994) (setting forth a commitment to “require a three-fifths majority vote to pass a tax increase”).

<sup>3</sup> See Susan Low Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Rules*, 14 CONST. COMMENT. 1, 1–2 (1997).

<sup>4</sup> The original House rule was set forth at H.R. Res. 6, 104th Cong. § 106(a) (1995), reprinted in H.R. DOC. NO. 103-342, at 658 (1995).

The House has since tweaked the text of this rule, but its basic requirement of a 60%-vote threshold remains on the books today.<sup>5</sup>

Rule XXI(5)(c) sparked a firestorm of constitutional debate.<sup>6</sup> Its defenders insisted that nothing in the Constitution blocked adoption of supermajority voting requirements.<sup>7</sup> Instead, they found support for these requirements in Article I's stipulation that "[e]ach House may determine the Rules of its Proceedings."<sup>8</sup> Critics shot back that Rule XXI(5)(c) offended the Framers' presupposition that any bill would be deemed "passed" under Article I, Section 7, so long as a majority voted in its favor.<sup>9</sup> They also emphasized that the new rule was "unprecedented" in imposing a supermajority voting requirement for the enactment of ordinary federal legislation.<sup>10</sup>

This debate was noteworthy in part because of the prominence of key participants. Defending the rule, based on what I call the "Any-Voting-Number Theory," were the nation's most prolific analysts of legislative supermajoritarianism, Professors John McGinnis and Michael Rappaport.<sup>11</sup>

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<sup>5</sup> The current tax-related rule, which continues to embody a supermajority-vote requirement, appears in clause (5)(b) of Rule XXI. H.R. DOC. NO. 111-157, at 889-90 (2011). For simplicity's sake, this Article will refer only to the original provision, Rule XXI(5)(c). H.R. DOC. NO. 103-342, at 658.

<sup>6</sup> See, e.g., Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1995) [hereinafter *Open Letter*]; Brett W. King, *Deconstructing Gordon and Contingent Legislative Authority: The Constitutionality of Supermajority Rules*, 6 U. CHI. ROUNDTABLE 133 (1999) [hereinafter King, *Deconstructing Gordon*]; Brett W. King, *The Use of Supermajority Provisions in the Constitution: The Framers, The Federalist Papers and the Reinforcement of a Fundamental Principle*, 8 SETON HALL CONST. L.J. 363 (1998) [hereinafter King, *Use of Supermajority*]; John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995) [hereinafter McGinnis & Rappaport I]; John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327 (1997) [hereinafter McGinnis & Rappaport II]; Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996).

<sup>7</sup> See, e.g., McGinnis & Rappaport I, *supra* note 6, at 484.

<sup>8</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>9</sup> See *Open Letter*, *supra* note 6, at 1540 (citing THE FEDERALIST NO. 58, at 397 (James Madison) (Jacob E. Cooke ed., 1961)).

<sup>10</sup> *Id.* at 1539; accord King, *Deconstructing Gordon*, *supra* note 6, at 135 (observing, following the adoption of Rule XXI(5)(c), that "[f]or the first time in history, more than a simple majority of members is now required to vote in the affirmative before certain bills are considered as 'passed' by a house of Congress"); see also Max Minzner, *Entrenching Interests: State Supermajority Requirements to Raise Taxes*, 14 AKRON TAX J. 43, 43 (1999) ("At the opening of the 104th Congress, the new Republican majority imposed the first supermajority requirement 'limited to particular cases' in the history of Congress." (quoting THE FEDERALIST No. 58, *supra* note 9, at 397 (James Madison)). *But cf.* *Open Letter*, *supra* note 6, at 1543 (noting that the only prior deviation involved "recent innovations" initiated in 1985 dealing with the specialized "budget reconciliation process" in the Senate).

<sup>11</sup> Their writings on this subject include: John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999); John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003); see also *supra* note 6 (noting other works of Professors McGinnis

Arrayed against these advocates was a small army of no less prominent academics, including Professor Jed Rubenfeld, who authored the group's most elaborate critique of Rule XXI(5)(c).<sup>12</sup>

Also striking were the contending styles of argument put forward by these analysts. Professors McGinnis and Rappaport focused on originalist reasoning, emphasizing text-based inferences and background understandings they saw as prevailing at the time of the framing.<sup>13</sup> Professor Rubenfeld also advanced textual and historical arguments,<sup>14</sup> but his point of emphasis lay elsewhere.<sup>15</sup> Decisive to him were the intolerable practical implications of the McGinnis-Rappaport approach. Among other things, according to Professor Rubenfeld, no sensible view of the Constitution could tolerate an outcome that would permit either chamber of Congress to identify any percentage of votes (be it 1%, 40%, 60%, or 100%) as determinative with regard to the passage of any or all bills.<sup>16</sup> That, however, was just the outcome that the Any-Voting-Number Theory endorsed.

Obscured by the nature of the Rubenfeld critique was an important point—namely, that the originalist argument of Professors McGinnis and Rappaport itself is open to a powerful originalist attack. In taking on Rule XXI(5)(c), Professor Rubenfeld chose to focus his considerable talents in large measure on other matters,<sup>17</sup> and latter-day fellow travelers have tended to follow his lead.<sup>18</sup> As a result, I go in this Article where no one has gone

and Rappaport). In more recent works that examine Senate filibuster rules, Professors Fisk, Chemerinsky, and Roberts have signaled substantial agreement with Professors McGinnis and Rappaport. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 242 (1997); John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 530 (2004).

<sup>12</sup> See Rubenfeld, *supra* note 6. Other signatories of the “Open Letter,” which set the stage for Professor Rubenfeld’s piece, were Professors Ackerman, Amar, Balkin, Bloch, Bobbitt, Fallon, Kahn, Kurland, Laycock, Levinson, Michelman, Perry, Post, Strauss, Sunstein, and Wellington. See *Open Letter*, *supra* note 6, at 1544.

<sup>13</sup> See McGinnis & Rappaport II, *supra* note 6, at 330–31 (focusing on “the legal and linguistic context of the framing,” while faulting Rubenfeld because he “appears to eschew inferences from history, structure, and purpose”).

<sup>14</sup> See, e.g., Rubenfeld, *supra* note 6, at 76.

<sup>15</sup> See McGinnis & Rappaport II, *supra* note 6, at 346–47 (describing Rubenfeld’s analysis as “originalist or textualist” in only a “limited sense”).

<sup>16</sup> See Rubenfeld, *supra* note 6, at 80–83.

<sup>17</sup> See McGinnis & Rappaport II, *supra* note 6, at 329 (noting that Rubenfeld’s argument focuses on “a variety of hypotheticals” and the “absurd consequences” of a legislative supermajority rule).

<sup>18</sup> See, e.g., Bloch, *supra* note 3, at 4 (emphasizing the “distorting impact adding supermajority requirements can have on the other branches”); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1006, 1012–14 (2011) (attacking the constitutionality of the supermajority filibuster rule because it might lead to recognition of legislative power to entrench incumbent Senators); Josh Chafetz & Michael Gerhardt, Debate, *Is the Filibuster Constitutional?*, 158 U. PA. L. REV. PENNUMBRA 245, 246 (2010), <http://www.pennumbra.com/debates/pdfs/Filibuster.pdf> (Chafetz, Opening Statement) (“Our Constitution . . . cannot countenance this sort of self-entrenchment by incumbents.”); King, *Deconstructing Gordon*, *supra* note 6, at 175–76, 181 (reasoning that arguments

before, by advancing a comprehensive originalist argument that the Constitution embodies an unyielding principle of legislative majoritarianism in enacting ordinary laws, which Rule XXI(5)(c) and other rules of its kind offend.<sup>19</sup>

This conclusion finds support in the text, structure, and history of the Constitution. As to text (which is the subject of Part I) and structure (which is the subject of Part II), close study shows that a premise of unbridgeable congressional majority voting runs through much of the original Constitution and is compromised in no way by the Rules of Proceedings Clause. A look at the history of the founding period (which is the subject of Part III) confirms that the Framers embraced a strict norm of legislative majoritarianism. Indeed, the Any-Voting-Number Theory stands at odds with four separate elements of our constitutional history: (1) the pervasive acceptance in Anglo-American parliamentary practice of majority rule at the time of the framing, (2) then-ascendant philosophical views about the essential role of majority-based decisionmaking within republican systems, (3) the shared practical goal of ridding the new government of supermajority voting rules because rules of that very kind had immobilized the federal legislature under the Articles of Confederation, and (4) the Framers' forging of key political compromises built on a binding norm of

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from “democracy, history, and tradition” render the McGinnis-Rappaport position “highly suspect” but focusing on “the practical and potential consequences of [their] position”).

<sup>19</sup> I pause to note four overarching points. First, modern commentators have sought to tease out distinctions among various theories of originalism, with particular attention being paid in recent years to the ratifying-community-centered concept of “original meaning.” See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997). The analysis presented here is fully consonant with that approach, and the references it makes to historical sources (such as the Philadelphia Convention debates, dictionaries, background theoretical writings, and *THE FEDERALIST PAPERS*) are common fare in any form of originalist exegesis.

Second, few will be surprised to learn that justiciability doctrines may complicate judicial review of self-imposed congressional rules. Compare *Skaggs v. Carle*, 110 F.3d 831, 837 (D.C. Cir. 1997) (finding challenges to Rule XXI(5)(c) nonjusticiable), with *id.* at 837–41 (Edwards, C.J., dissenting) (finding no obstacle to judicial review). Jurisdictional complexities, however, in no way diminish the significance of the analysis offered here. Members of Congress, no less than Justices, take oaths “to support this Constitution” and thus not to support rules that offend its commands. U.S. CONST. art. VI, cl. 3. The foundational constitutional issues considered here are of enduring and recurring importance, and thus the duty of our legislative representatives—as well as that of our courts—to honor the Constitution in addressing them is of enduring and recurring importance, too.

Third, much of this Article challenges the writings of Professors McGinnis and Rappaport. But make no mistake about the seriousness of their work: It sets forth a detailed line of argument, which is couched in temperate tones. Indeed, the value of the McGinnis and Rappaport articles, as a starting point for analysis, is (I hope) brought into focus by this piece.

Finally, while the work of Professor Rubinfeld and others does not focus to the extent this Article does on originalist reasoning, it contains much material that reinforces the argument made here. Concerns about absurd results, for example, have a role to play in any originalist inquiry. See *infra* note 196 and accompanying text. There can be no doubt, then, that this Article builds in important respects on the earlier work of Professor Rubinfeld and the other critics of the McGinnis-Rappaport approach.

congressional majoritarianism, including the Great Compromise on large-state and small-state power.

The analysis offered here is important in and of itself. It is all the more important, however, because it bears on related issues, including the constitutionality of the Senate's long-disputed treatment of filibusters. According to that body's cloture rule, the agreement of sixty senators is required to end debate on most pending matters.<sup>20</sup> Critics of this rule have challenged its constitutionality on the ground that it is functionally indistinguishable from a supermajority voting rule.<sup>21</sup> This argument, in turn, has stirred forceful rebuttals, including in Senate hearings conducted in 2010,<sup>22</sup> as well as in a recent scholarly exchange between Professors Chafetz and Gerhardt.<sup>23</sup>

This Article is linked to the escalating controversy over the filibuster in two ways. The first linkage arises because no argument against the sixty-vote cloture rule based on the norm of legislative majoritarianism can succeed if no such norm exists. Establishing the existence of this principle is therefore an indispensable precondition to launching a constitutional attack on the Senate's cloture practice. The second linkage is more subtle but no less important. In the end, the success of any challenge to the Senate filibuster system will hinge not only on the existence of a fixed norm of legislative majoritarianism, but also on that norm's robustness. This Article seeks to show that the case for recognizing this mandate is so strong that there remains little, if anything, left to be said for the Any-Voting-Number Theory. A constitutional principle of this vigor clearly undoes Rule XXI(5)(c). And, precisely because of its potency, this same principle casts an ominous shadow over analogues of that rule, including the Senate's supermajority-based filibuster regime.

## I. SUPERMAJORITY VOTING RULES AND CONSTITUTIONAL TEXT

Article I, Section 7 of the Constitution specifies that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall . . . be presented to the President."<sup>24</sup> If a bill receives a majority vote within a chamber, has it "passed" for purposes of this clause? The argument for the Any-Voting-Number Theory begins with the thought that the Constitution does not address this question in pointedly express terms, and in particular does not specify that the House and Senate may not impose on themselves nonmajority voting rules under the Rules of Proceedings

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<sup>20</sup> U.S. SENATE COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 112-1, at 21 (2011) (Rule XXII(2)).

<sup>21</sup> See Chafetz & Gerhardt, *supra* note 18, at 247–48.

<sup>22</sup> *Examining the Filibuster: Hearings Before the S. Comm. on Rules & Admin.*, 111th Cong. (2010).

<sup>23</sup> See Chafetz & Gerhardt, *supra* note 18.

<sup>24</sup> U.S. CONST. art I, § 7, cl. 2.

Clause.<sup>25</sup> This would-be argument is, however, unpersuasive because many requirements that our Constitution imposes are not set forth in pointedly express terms. The Fifth Amendment, for example, nowhere specifies that regulatory interferences with property may qualify as takings under a multifactor balancing test,<sup>26</sup> and the First Amendment does not on its face speak of special rules that target “public fora”<sup>27</sup> or “prior restraints.”<sup>28</sup> In these and many other instances, however, the Supreme Court has recognized constitutional “sub-rules” that constrain government action in light of the history and purpose of the relevant clause.<sup>29</sup> Not surprisingly, proponents of the Any-Voting-Number Theory acknowledge the existence of many rules of this kind. Citing background understandings that prevailed in 1788, for example, they argue that Article I’s grant of “legislative power” bars entrenchment of laws over time, even when Congress acts pursuant to one of its enumerated powers.<sup>30</sup> By symmetry of logic, if governing interpretative principles indicate that “passed” when standing alone means “voted for by a majority,” these interpretive principles must be honored so as to trump any otherwise operative authority granted by the Rules of Proceedings Clause.<sup>31</sup>

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<sup>25</sup> See McGinnis & Rappaport I, *supra* note 6, at 484 (“The *Open Letter* fails to identify a constitutional clause that prohibits the three-fifths rule.”).

<sup>26</sup> See, e.g., *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124–25 (1978) (identifying several factors for determining whether a regulation constitutes a taking under the Fifth Amendment).

<sup>27</sup> See *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (noting the “stringent standards [the Court has] established for restrictions on speech in traditional public fora”).

<sup>28</sup> See *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 556 (1976) (noting that the Court has interpreted the First Amendment to afford “special protection” to orders that impose a “‘prior’ restraint” on speech).

<sup>29</sup> See Dan T. Coenen, *The Pros and Cons of Politically Reversible “Semisubstantive” Constitutional Rules*, 77 *FORDHAM L. REV.* 2835, 2855–56 (2009).

<sup>30</sup> Indeed, Professors McGinnis and Rappaport advocate recognition of similarly extrapolated rules that are said to constrain the chambers’ power to determine how bills are passed under the Rules of Proceedings Clause. They would not uphold House rules, for example, that give a veto to a nonmember, McGinnis & Rappaport II, *supra* note 6, at 332–35, that preclude certain members from voting on certain bills (except apparently where the veto is on a matter as to “which [the member] is immediately and particularly interested”), *id.* at 332 n.27 (internal quotation mark omitted), that condition one chamber’s enactment of a bill on enactment by the other chamber, *id.* at 338–40, or that “confer[] one vote on some Members while providing more than one vote to other Members,” *id.* at 333 n.28. None of these limits is, however, expressly stated in the Constitution.

<sup>31</sup> See *United States v. Ballin*, 144 U.S. 1, 5 (1892) (holding that, in promulgating rules, Congress “may not . . . ignore constitutional restraints”). Indeed, not infrequently, the Court has imposed limits on Congress based on the Constitution’s “essential postulate[s],” *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934), rather than its explicit terms. See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 47, 54, 72 (1996) (endorsing a nontextual limit on congressional power to expose states to suit in federal court); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (extending this principle to state court actions). In such cases, the Court has looked beyond particular textual passages to “historical understanding and practice” and “the structure of the Constitution.” *Printz v. United States*, 521 U.S. 898, 898, 905 (1997). Of particular importance with respect to the norm of majority voting, the Court has rooted some constitutional restrictions of this kind in controlling background assumptions about republican self-government. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 819 (1995) (applying an

In fact, even when read in isolation, the “passed” language of Article I points toward a mandate of majority voting for at least three reasons. First, well-settled practice in the framing period—and thus the common understanding of the time—equated the passing of laws with a majority vote, unless a Constitution or Constitution-like text provided to the contrary.<sup>32</sup> Second, even the most ardent proponents of the Any-Voting-Number Theory acknowledge that the word “passed” carries with it a default rule of legislative majoritarianism.<sup>33</sup> But if the term “passed” denotes “voted for by a majority” in the absence of a contrary rule, it seems entirely reasonable to say it denotes “voted for by a majority” without more. Third, at least two early dictionaries include definitions that associate the word “pass” with receipt of a majority vote.<sup>34</sup> Of particular significance, a portion of the law-related definition of “pass” provided by Noah Webster in 1828 was “to receive the sanction of a legislative house or body by a majority of votes.”<sup>35</sup> To be sure, Professors McGinnis and Rappaport point to other dictionary entries that do not mention a majority vote, including Samuel Johnson’s definition of “pass” as meaning only “[t]o be enacted.”<sup>36</sup> A definition that equates “passed” with “enacted,” however, is not at all inconsistent with a principle of majority voting, particularly in light of other

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“egalitarian theme” and a “critical foundation for the constitutional structure” to void state-created candidate qualifications); *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (rejecting congressional power to exclude elected members who meet constitutionally stipulated qualifications based on a “fundamental principle of our representative democracy . . . ‘that the people should choose whom they please to govern them’” (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 257 (Jonathan Elliot ed., Washington 1836) [hereinafter ELLIOT’S DEBATES] (statement of Alexander Hamilton))); *Burroughs v. United States*, 290 U.S. 534, 545 (1934) (drawing on the holding of *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) (stating that democratic elections must allow “the free and uncorrupted choice of those who have the right to take part in that choice” in recognizing an implied federal power to regulate presidential elections)); *see also* *McCulloch v. Maryland*, 17 U.S. 316, 428–29 (1819) (recognizing nontextual immunity of federal instrumentalities from state taxation in large part because the federal citizenry is not fairly represented in any single state’s legislature); *cf.* *Roberts*, *supra* note 11, at 540–41 (noting that although the “anti-entrenchment principle does not appear as such in the Constitution,” it is rightly implied because it comports with “common understanding” and “lies at the heart of our representative democracy”). The bottom line is apparent: If there exists a “fundamental principle of our representative democracy” that endorses legislative majority rule, *Powell*, 395 U.S. at 547, that principle—even if nontextual in nature—must operate to delimit congressional authority, including under the Rules of Proceedings Clause.

<sup>32</sup> *See infra* Part III.A.1.

<sup>33</sup> *See infra* note 91 and accompanying text.

<sup>34</sup> *See* Rubinfeld, *supra* note 6, at 77 (“When a legislative bill is finally assented to by a majority vote of the body . . . , it is said to be ‘passed’ by such body . . . .” (omissions in original) (quoting 2 STEWART RAPALJE & ROBERT L. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 935 § 4 (Jersey City, Frederick D. Dinn & Co. 1883)) (internal quotation marks omitted)); *infra* note 35 and accompanying text.

<sup>35</sup> 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 31 (New York, S. Converse 1828); *see also* McGinnis & Rappaport II, *supra* note 6, at 343 n.72 (noting this text).

<sup>36</sup> McGinnis & Rappaport II, *supra* note 6, at 342 (alteration in original).



early dictionary definitions that tellingly associate the word “majority” with the enactment of laws.<sup>37</sup> At the least, then, the word “passed” may be read as an originalist matter to carry with it the idea of approval by majority vote. And the large body of evidence set forth below signals that that definition is significantly more plausible than reading the word to mean something like “approved by whatever number of members the chamber designates for itself by rule either for all bills or any particular groups of bills at any given time.”

This large body of evidence supports a wide-ranging argument for rejecting the Any-Voting-Number Theory. That argument begins with the constitutional text itself, in keeping with the settled proposition that the document’s terms must always be read in light of the company they keep.<sup>38</sup> The Constitution, for example, nowhere states that federal courts may nullify acts of Congress. In *Marbury v. Madison*,<sup>39</sup> however, the Court extrapolated this authority from the collaborative operation of three interlocking pieces of the Framers’ handiwork: (1) the grant of federal jurisdiction over cases “arising under the constitution,” (2) the identification of the Constitution as “the supreme law of the land,” and (3) the vesting in the federal courts of “judicial power.”<sup>40</sup> Here, in like fashion, the “passed” language of Article I does not stand alone. Indeed, the fixed norm of legislative majoritarianism that this language reifies is so deeply woven through the fabric of the Constitution that it finds support in no fewer than seven separate clauses.<sup>41</sup> We turn now to the most informative of those

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<sup>37</sup> See, e.g., 2 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (London, His Majesty’s Law Printers 1771) (defining “majority” as including the following: “The only method of determining the acts of many is by a majority; the major part of members of parliament enact laws . . .”); GILES JACOB, THE NEW LAW DICTIONARY 354 (London, Henry Lintot 1743) (including in the definition of “majority” that “it is the *Majority* of Members of Parliament, which enact our Laws”).

<sup>38</sup> See McGinnis & Rappaport II, *supra* note 6, at 347 (emphasizing that “whenever a provision is ambiguous, we properly read it in light of the rest of the document” and that “[s]ometimes other specific provisions shed light on a dispute over the meaning of a particular clause”).

<sup>39</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>40</sup> *Id.* at 173, 178–80 (emphasis omitted).

<sup>41</sup> The sentence in the text refers to no fewer than “seven separate clauses” because several provisions, in addition to the three clauses identified in the following sentence and discussed in detail in the remainder of this Part, work against the Any-Voting-Number Theory. Those clauses include the Quorum Clause, *see infra* note 45, the House and Senate Composition Clauses, *see infra* note 184, and the Appointment and Qualifications Clauses, *see infra* note 187 and accompanying text. The case for a fixed constitutional rule of legislative action may also gain ground by reading the term “passed” *in pari materia* with Article I, Section 1’s vesting in Congress of the “legislative power” in light of historical understandings that that power was to be wielded by majority vote. *See McGinnis & Rappaport II, supra* note 6, at 345 (relying on “fundamental” understandings and “writings at the time of the Framing” to root the anti-entrenchment principle in Article I’s grant of “legislative power”). Finally, as one commentator has argued at length, the case against the Any-Voting-Number Theory may find additional support in the words of Article I, Section 3, which specifies that “each Senator shall have one vote.” *See Michael J. Teter, Equality Among Equals: Is the Senate Cloture Rule Unconstitutional?*, 94 MARQ. L. REV. 547, 553–54 (2010). Because these other clauses offer less direct support for the norm of majority

clauses: (1) the term that establishes a two-thirds vote as determinative for purposes of overriding presidential vetoes,<sup>42</sup> (2) the clause that grants the Vice President a tiebreaking power when the Senate is “equally divided,”<sup>43</sup> and (3) the five specialized provisions in the original Constitution that impose supermajority voting requirements only in highly exceptional contexts.<sup>44</sup> These provisions, especially in their joint operation, cut sharply against the Any-Voting-Number Theory.<sup>45</sup>

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voting than the clauses identified in the next sentence, they are not given extensive attention in this Article. Even so, it merits emphasis that they reinforce the textual case against the Any-Voting-Number Theory.

<sup>42</sup> U.S. CONST. art I, § 7, cl. 2.

<sup>43</sup> *Id.* art. I, § 3, cl. 4.

<sup>44</sup> See *infra* notes 63–67 and accompanying text.

<sup>45</sup> Supporters of the Any-Voting-Number Theory also seek support in the constitutional text, but their arguments are not convincing. They point, in particular, to the clause that states that “a Majority of each [chamber] shall constitute a Quorum to do Business,” U.S. CONST. art I, § 5, cl. 1, claiming that the Framers’ express establishment of a fixed majority quorum rule establishes by negative implication the lack of a fixed majority voting rule for acting on bills because that subject received no similarly targeted treatment in the constitutional text. See McGinnis & Rappaport I, *supra* note 6, at 487. This argument misses the mark. As Professor Amar has explained, specification of a clarifying quorum rule made perfect sense because preexisting “state constitutions and British practice had varied widely on the quorum question.” AKHIL REED AMAR, DRAFT BOOK (forthcoming Sept. 2012) (manuscript at 438 n.34) (on file with author). In contrast, there already existed in 1787 a well-settled practice of majority-controlled legislative voting, absent constitutional specification to the contrary. Thus, constitutional clarification was necessary in the former context but needless in the latter. See King, *Deconstructing Gordon*, *supra* note 6, at 180–81. In fact, the Quorum Clause strongly supports a fixed norm of legislative majoritarianism. Why? Because its central purpose was to safeguard majority-based legislative decisionmaking by preempting the “baneful practice” under which minorities would block majority action by simply not showing up. See THE FEDERALIST NO. 58, *supra* note 9, at 397 (James Madison). For this reason, the Quorum Clause, as Joseph Story explained, helps undergird the principle of dominant significance here—namely, that “to give the rule to the minority, instead of the majority” is “to subvert the fundamental principle of a republican government.” 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 833, at 296 (Boston, Hilliard, Gray & Co. 1833) (making this point in analyzing the Quorum Clause); see also Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 487 (2011) (“Both Madison and the Supreme Court [in *Ballin*] saw the Quorum Clause as instantiating majority rule.”).

Along the same lines, the Electoral College Clause (which was altered by the Twelfth Amendment, but in no way that is significant here) spoke of the need in presidential voting to secure “a Majority of the whole Number of Electors” and, failing that, a “Majority of all the States” as represented in the House. U.S. CONST. art. II, § 1, cl. 3. These references to majority voting in no way tend to prove that majority voting is not required in passing bills. Again, as Professor Amar has explained, preconstitutional practice was far from well settled in this context, and those uncertainties were greatly magnified, to say the least, for the Philadelphia delegates because nothing like the Electoral College had previously been seen on the face of the earth. AMAR, *supra* (manuscript at 438 n.34). By way of example, it is noteworthy that Article I requires the vote of an absolute majority of whole membership of the House in selecting the President when the electoral-college system fails to pick a winner. U.S. CONST. art. II, § 1, cl. 3. This specification made sense precisely because it departed from the otherwise-governing majority-of-a-quorum rules applicable to enacting legislation. In short, “majority rule did not go without saying” when it came to the Electoral College’s picking of Presidents, although it did go without saying in the enactment of ordinary legislation. AMAR, *supra*.

### A. *The Presentment Clause*

The textual case against the Any-Voting-Number Theory draws in part on language that lies almost right beside the term “passed” in the Presentment Clause of Article I, Section 7. According to that clause, as we have seen, “[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President.”<sup>46</sup> The Presentment Clause, however, does not stop there. It goes on to provide that, if the President thereafter disapproves the bill, “he shall return it” to the chamber in which it originated.<sup>47</sup> Then, “[i]f . . . two thirds of that House shall agree to pass the Bill, it shall be sent . . . to the other House, . . . and if approved by two thirds of that House, it shall become a Law.”<sup>48</sup>

The Any-Voting-Number Theory runs headlong into the logically sequenced legislative process that the full text of the Presentment Clause lays down. Under that theory, after all, each chamber of Congress can require a three-quarters or four-fifths or even a unanimous vote for the initial passing of any law. At the same time, that theory would not permit the chambers to require more than a two-thirds vote to override a veto because Article I definitively specifies that, if “two thirds of [both houses] shall agree to pass” an unsigned bill, “it *shall* become a Law.”<sup>49</sup> Does the Constitution really permit the House and the Senate to require a greater percentage of votes to pass a bill in the first instance than the Framers themselves established as the single, fixed percentage of votes needed to override the President’s rejection of a thus-passed measure? The answer must be no, because otherwise Congress could require a greater vote for the *ordinary* act of passing legislation than for the *extraordinary* act of repudiating a presidential veto.<sup>50</sup>

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<sup>46</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (emphasis added).

<sup>50</sup> This conclusion is bolstered by the Presentment Clause’s indication that the President is to have a meaningful role in the bill-enactment process. This is so because, as a practical matter, the Any-Voting-Number Theory would permit Congress to “render[] the President’s concurrence a virtual formality” by effectively ensuring an override even if a veto occurred. Rubinfeld, *supra* note 6, at 84; *see also* Chafetz, *supra* note 18, at 1014 (agreeing that “it would be structurally strange to allow the Senate to impose a higher threshold for passing ordinary legislation than for passing a proposed constitutional amendment or voting to override a presidential veto”). Notably, the Convention debates support this conclusion. Early on, some delegates voiced support for an absolute presidential veto. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98–103 (Max Farrand ed., rev. ed. 1966) [hereinafter FARRAND] (noting the effort of James Wilson and Alexander Hamilton “to give the Executive an absolute negative on the laws”). That approach was abandoned, however, after George Mason of Virginia advocated the current system, under which vetoes could be overridden, but only “by a *greater majority* than was required in the first instance.” *Id.* at 102 (emphasis added) (statement of George Mason).

Faced with this roadblock, some commentators who would countenance departures from majority-based voting on bills have advanced what might be called the *Almost-Any-Voting-Number Theory*. These analysts acknowledge that the Presentment Clause cannot permit the House and Senate to require more votes to present a bill to the President than to override the President's post-presentment veto.<sup>51</sup> Thus, they say, the House and the Senate may adopt supermajority voting rules for passing laws, but only if those rules do not push beyond a two-thirds voting-rule ceiling.<sup>52</sup> This limit, so the argument goes, removes any incongruity between the authority granted by the Rules of Proceedings Clause and the numerical mandates of Article I, Section 7.

The difficulty with this effort to reconcile the Any-Voting-Number Theory with the text of Article I is that it carries the seeds of its own demise. The argument, after all, embraces the idea that the constitutional text does constrain, by implication, the supposed power of the House and the Senate to impose on themselves supermajority voting requirements under the Rules of Proceedings Clause. If there is to be such an implication, however, there is strong reason to say that it should not be one that gives rise to a peculiar and unprecedented principle under which any or all bills may be passed by votes of 1% (or 51%) to 66.7% (or 66.7% minus one vote).<sup>53</sup> Rather, the better implication is the one supported by simplicity, history, and long-accepted practice—namely, that a bill is “passed” if, but only if, it receives a majority vote.<sup>54</sup> In short, the full text of the Presentment

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<sup>51</sup> See Fisk & Chemerinsky, *supra* note 11, at 240–42.

<sup>52</sup> See *id.*; accord Robert S. Leach, *House Rule XXI and an Argument Against a Constitutional Requirement for Majority Rule in Congress*, 44 UCLA L. REV. 1253, 1261 (1997).

<sup>53</sup> This strange range of numerical possibilities itself suggests the unwisdom of embracing the Almost-Any-Voting-Number Theory. Some adherents of that theory say, for example, that all voting rules are fine, including submajority voting rules. See McGinnis & Rappaport I, *supra* note 6, at 489–90, 490 n.38. (Thus the reference to 1%.) Others may lack the temerity to endorse submajority rules, especially in light of the Supreme Court's seeming repudiation of them. See *infra* notes 132–34, 188 and accompanying text. (Thus the reference to 51%.) In addition, it is unclear what the top-end voting number under the Almost-Any-Voting-Number Theory should be. Some might say that the number cannot exceed the voting number required to overturn a veto. (Thus the reference to 66.7%.) Others will find it unacceptable to permit the same voting rule for the ordinary passage of laws as for the extraordinary overriding of vetoes. (Thus, the reference to 66.6% minus one.) It is hard to believe that the founders of our nation meant for interpreters of the Constitution to engage in such elaborate homework in applied mathematics.

<sup>54</sup> Indeed, there is another math-related problem with the Almost-Any-Voting-Number Theory. Although prohibiting rules that require more than a two-thirds vote for passing bills, nothing in the logic of the theory would outlaw, for example, a Senate rule that requires confirmation of presidential appointees by a 70%, 80%, or 90% vote. There is no indication, however, that the Framers had in mind such structure-tilting numerical extremities—and in particular the strange possibility that the Senate could self-impose a stricter supermajority rule for confirming appointees than for passing laws, thereby radically altering the power of presidents to select their key subordinates. See *Skaggs v. Carle*, 110 F.3d 831, 847 (D.C. Cir. 1997) (Edwards, C.J., dissenting) (highlighting this difficulty).

Clause—when read as a whole in light of the most straightforward practical reasoning—creates grave difficulties for the Any-Voting-Number Theory.<sup>55</sup>

### B. *The Vice President Voting Clause*

The norm of mandatory legislative majoritarianism also finds support in Article I, Section 3’s specification that “[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”<sup>56</sup> According to the Any-Voting-Number Theory, this clause sets forth nothing more than a “default rule,” so that the Vice President may cast a tiebreaking vote only when the Senate has not established its own nonmajority voting requirement.<sup>57</sup> This argument falters, however, because the provision simply does not read as a default rule.

To begin with, the clause presupposes that legally consequential tie votes will occur—a result that, under a default-rule reading, the Senate can defeat simply by adopting a generally applicable supermajority or submajority voting rule.<sup>58</sup> The clause also declares that the Vice President “shall have no Vote, unless they be equally divided,” thus implying that he “shall have” a vote if in fact the Senate “be equally divided.”<sup>59</sup> Against this

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<sup>55</sup> See, e.g., AMAR, *supra* note 45 (manuscript at 438) (relying largely on the text’s treatment of veto overrides in concluding that “Article I presupposed that each house would ‘pass’ legislative bills by majority vote”).

<sup>56</sup> U.S. CONST. art. I, § 3, cl. 4.

<sup>57</sup> McGinnis & Rappaport I, *supra* note 6, at 488; *accord* Fisk & Chemerinsky, *supra* note 11, at 241.

<sup>58</sup> Indeed, in THE FEDERALIST NO. 68, Hamilton declared that it was “necessary” to give the Vice President a tiebreaking vote so as to ensure “a definitive resolution of the body.” THE FEDERALIST NO. 68, *supra* note 9, at 461 (Alexander Hamilton). Describing such a power grant as “necessary,” however, is difficult to square with a legal regime in which the Vice President need not be given a vote at all. See King, *Deconstructing* Gordon, *supra* note 6, at 182 n.226. Even more to the point are the observations of Justice Joseph Story. He explained, in his great treatise, that the Vice President Voting Clause was adopted because, “if no casting vote were allowed” when the body was evenly split, “then the indecision and inconvenience might be very prejudicial to the public interests.” 2 STORY, *supra* note 45, § 736, at 211. Under these circumstances, he continued, “the vice president would seem to be *the most fit arbiter* to decide, because he would be the representative, not of one state only, but of all.” *Id.* (emphasis added). Focusing on these points, Justice Story attributed to the Framers the understanding that “[i]n all questions before the senate he might safely be appealed to, as a fit arbiter upon an equal division.” *Id.* § 735, at 210 (emphasis added). Viewing the Vice President as “the most fit arbiter” in “all questions before the senate” does not jibe with a legal regime under which the Senate may freely render him *not* the arbiter in tie-vote cases either in part or in whole. Yet that is exactly the regime that the Any-Voting-Number Theory seeks to attribute to the Framers and to do so in the absence of any supportive framing-era evidence.

<sup>59</sup> See, e.g., 2 FARRAND, *supra* note 50, at 537 (statement of Roger Sherman) (assuming that the Senate’s presiding officer would have no vote “unless when an equal division of votes might happen”); LUTHER STEARNS CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA ¶ 298, at 115 (Boston, Little, Brown & Co. 1856) (recognizing that the Vice President “shall give the casting vote, when the body over which he presides is equally divided”); see also 1 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE

backdrop, the Any-Voting-Number Theory cannot possibly be given full sway. Consider a Senate rule that specifies that a bill passes only if it receives fifty-one votes from then-sitting Senators. Such a rule would be unconstitutional on its face because, under it, even when the Senate stood “equally divided” in a 50–50 deadlock, the Vice President would be divested of his constitutionally mandated and determinative vote.<sup>60</sup> And if the Senate cannot install a 51-vote requirement in keeping with the internal structure of the Vice President Voting Clause, there is no apparent reason why it should be able to install a 52-vote requirement, or a 60-vote requirement, or a 67-vote requirement.

Again, the key point is apparent. The text of the Vice President Voting Clause comports most logically with the Framers’ endorsement of a straightforward and fixed norm of legislative majoritarianism.<sup>61</sup> Indeed, the Clause fits together with this norm in a distinctly compelling and elegant way by establishing that outcomes in the Senate *are* to be decided by majority vote—with the outcome in exceptional cases to turn on the majority’s will as determined by the majority-creating action of the body’s presiding officer.<sup>62</sup>

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COMMONWEALTH OF VIRGINIA app. D, at 224–25 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter TUCKER] (describing the Vice President’s tiebreaking voting power as “a very important trust”); cf. Henry Barrett Learned, *Casting Votes of the Vice-Presidents, 1789–1915*, 20 AM. HIST. REV. 571, 571 (1915) (noting that through 1915 “there appear to have been 179 instances of the use of the casting vote by the Vice-President in the Senate”). See generally Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 400–01 & n.119 (2004) (noting “the framers’ decision to grant the vice president a tiebreaking vote” and describing it as a “significant power”).

<sup>60</sup> A nitpicking critic might challenge this statement on the ground that the Vice President does “have” a “vote” in this setting, even though the vote has no effect. There are, however, two key difficulties with this stance. First, it is no easy thing to say (at least with a straight face) that the Vice President has a “vote” when that supposed vote involves an utterly meaningless act. Second, this characterization of Article I, Section 3 offends the whole sense of the Clause, which is that the Vice President’s follow-up vote in the event of a tie will not only be meaningful, but meaningful in a powerful and dramatic sense in light of its decisive, tiebreaking quality.

<sup>61</sup> The textual context in which the founders granted the tiebreaking power further supports this conclusion. To begin with, the tiebreaking power is one of only two powers given to the Vice President in the entire original Constitution, with the other involving the power of the Vice President to preside over the Senate. It thus seems a matter of no little ambitiousness to say that fully half of the constitutionally vested powers of this nationally selected officer may be entirely stripped away by the unilateral action of the very body over which he is to preside. In addition, given the Constitution’s command that the Vice President “shall preside” over the Senate, that body plainly could not provide by rule that some person other than the Vice President should be its presiding officer. In its nature, then, Article I, Section 3 puts a designated-presiding-officer limitation on the Senate’s “Rules of Proceedings” power, which it then marries in a single sentence with the intimately related authority to break tie votes. The close functional and textual kinship between these two powers gives reason to conclude that the latter, like the former, is not freely removable by way of Senate rule.

<sup>62</sup> This conclusion is emphatically confirmed by the well-recognized historical purpose of the Vice President Voting Clause. As the Framing generation recognized, that purpose was to give the Vice President “the casting vote” in his capacity as President of the Senate. 3 ELLIOT’S DEBATES, *supra* note

### C. *The Enumeration of Supermajority Voting Rules*

A third textual problem for the Any-Voting-Number Theory stems from the Constitution's specification of five situations—and only five situations—in which the House or Senate is to act by supermajority vote: when either house expels a duly elected member,<sup>63</sup> when the Senate convicts Presidents or other high officers on impeachment charges,<sup>64</sup> when the Senate ratifies a treaty,<sup>65</sup> when the chambers put forward constitutional amendments for action by the states,<sup>66</sup> and (as we already have seen) when the chambers act to overturn presidential vetoes.<sup>67</sup> Not surprisingly, adherents of the Any-Voting-Number Theory ascribe to this enumeration only the narrowest of negative implications. They say that the listing means merely that interpreters may not derive from the “Constitution itself” any

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31, at 489–90 (statement of James Monroe) (“[The Vice President] is to succeed the President, in case of removal, disability, &c. [sic], and is to have the casting vote in the Senate”); *accord* Remarks of Robert Whitehill to the Pennsylvania Convention (Dec. 7, 1787), in 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 512, 512 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY] (noting that the Vice President “has the casting vote in the Senate”); THE FEDERALIST NO. 68, *supra* note 9, at 461 (Alexander Hamilton) (noting that the Vice President “should have only a casting vote”); *see also* TUCKER, *supra* note 59 (recognizing that the Vice President “is entrusted with” the “casting vote”); WILLIAM SMITH, A COMPARATIVE VIEW OF THE CONSTITUTIONS OF THE SEVERAL STATES WITH EACH OTHER, AND WITH THAT OF THE UNITED STATES 13 (Philadelphia, John Thompson 1796) (noting general state practice under which the presiding officer of the legislative house “has only the casting vote”); 2 STORY, *supra* note 45, § 736, at 211 (discussing the Vice President’s constitutionally vested power in terms of “a casting vote”). As Noah Webster made clear in his 1828 dictionary, the “casting-vote” was then understood to mean “[t]he vote of a presiding officer, in an assembly or council, which decides a question, when the votes of the assembly or house are equally divided between the affirmative and negative.” 1 WEBSTER, *supra* note 35, at 33.

The Any-Voting-Number Theory simply cannot be squared with the Framers’ design to give the Vice President the casting vote power. After all, the most immediate effect of supermajority voting rules is to render tie votes irrelevant, including for the Vice President. Such rules thus necessarily strip that officer of the “deciding” vote, 1 WEBSTER, *supra*, at 33 (definition of “casting”), or the “decisive” vote, 2 OXFORD ENGLISH DICTIONARY 956 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (definition of “casting”), that—as a basic definitional matter—the Framers’ vesting of “the casting vote” was meant to create. *See* THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE: FOR THE USE OF THE SENATE OF THE UNITED STATES 133 (Washington, Joseph Milligan & William Cooper 1812) (“In Senate, if they be equally divided, the Vice-President announces his opinion, which decides.”).

<sup>63</sup> U.S. CONST. art. I, § 5, cl. 2.

<sup>64</sup> *Id.* § 3, cl. 6.

<sup>65</sup> *Id.* art. II, § 2, cl. 2.

<sup>66</sup> *Id.* art. V.

<sup>67</sup> Amendments to the Constitution set forth two more supermajority voting rules. One bars one-time government servants who had joined the Confederacy from assuming important positions in the federal government absent supermajority clearance. *See id.* amend. XIV, § 3. Another permits Congress by a two-thirds vote to uphold a disability-based suspension of the President initiated by the Vice President and the cabinet. *See id.* amend. XXV, § 4. These provisions are of a piece with the Impeachment and Expulsion Clauses because they involve critical personnel matters concerning high government officials. At the least, they do not involve anything remotely like the enactment of ordinary laws.

further supermajority voting mandates.<sup>68</sup> The gist of this reasoning is that there is no inescapable logical necessity to conclude that the Framers' itemization of five supermajority voting rules forecloses the option of self-imposing additional rules of that kind.<sup>69</sup> Thus, the five exceptions constitute only a "minimal list" to which each chamber may freely add.<sup>70</sup>

The difficulty with this argument is that the negative-implication-based interpretive principle of *expressio unius est exclusio alterius* is not a rule of inescapable logical necessity; rather, it is a rule of "sensible inference."<sup>71</sup> And in keeping with that sensible-inference approach, the Court has not hesitated to apply the *expressio unius* principle to deem textual itemizations exclusive in dealing with interpretive issues closely parallel to the one considered here.<sup>72</sup> Indeed, this approach has controlled analysis in such landmark rulings about constitutional structure as *Marbury v. Madison*,<sup>73</sup> *Powell v. McCormack*,<sup>74</sup> and *INS v. Chadha*.<sup>75</sup>

*Chadha* illustrates the point. There, Congress claimed a power to pass laws that would permit either chamber to overturn agency actions, made pursuant to a statutory delegation of authority, by way of a unicameral override.<sup>76</sup> The challenger argued that these "legislative vetoes" violated the Presentment Clause because they involved congressional interventions undertaken without adherence to the constitutional requirements of bicameralism and presentment.<sup>77</sup> In dissent, Justice White rightly noted that the constitutional text did not "directly . . . prohibit the legislative veto" when issued pursuant to a law that itself had run the gauntlet of enactment by both houses and submission to the President.<sup>78</sup> The majority, however,

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<sup>68</sup> McGinnis & Rappaport II, *supra* note 6, at 328 n.9.

<sup>69</sup> See McGinnis & Rappaport I, *supra* note 6, at 488; *accord* Chafetz, *supra* note 18, at 1014 (noting that the analysis of Professors McGinnis and Rappaport focuses on what is "logically possible"); Fisk & Chemerinsky, *supra* note 11, at 241 (finding significance of the itemization in what the words "necessarily mean" so as not to render them "superfluous").

<sup>70</sup> Bloch, *supra* note 3, at 4.

<sup>71</sup> *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002).

<sup>72</sup> See, e.g., Roberts, *supra* note 11, at 527 n.95.

<sup>73</sup> 5 U.S. (1 Cranch) 137 (1803) (discussed *infra* note 84).

<sup>74</sup> 395 U.S. 486 (1969) (discussed *infra* note 85).

<sup>75</sup> 462 U.S. 919 (1983).

<sup>76</sup> *Id.* at 944.

<sup>77</sup> *Id.* at 967.

<sup>78</sup> *Id.* at 977 (White, J., dissenting); *accord*, e.g., Bloch, *supra* note 3, at 2. For this reason, Professors McGinnis and Rappaport gloss over an important complexity in asserting that "*Chadha* provides no guidance" because there "the Constitution contain[ed] . . . a requirement" of bicameralism and presentment. See McGinnis & Rappaport I, *supra* note 6, at 492. The problem with this assertion lies in its conclusory nature, because the whole question in *Chadha* was whether the Constitution required bicameralism and presentment in the context of legislative vetoes. To repeat: the question in *Chadha* was conceptually the same as the question presented here—namely, whether generally applicable constitutional requirements of bicameralism and presentment had enough of a default-rule character to permit Congress to remove those steps when acting pursuant to a previously enacted law.



rejected the idea that Congress could empower itself to take later unicameral action even in this distinctive setting, emphasizing in so ruling that there are only “four provisions in the Constitution, explicit and unambiguous, by which one House may act alone.”<sup>79</sup>

The underlying logic of the Any-Voting-Number Theory conflicts with the underlying logic of *Chadha*. In that case, the Court did not focus solely on inescapable logical necessity in evaluating the significance of the “four provisions” on which it relied. If the Court had, it would have concluded that the four-part enumeration signaled only that interpreters could not find in the “Constitution itself” any fifth or sixth or seventh authorization of unicameral legislative action.<sup>80</sup> The Court, however, eschewed that route, thus rejecting the narrow view of the *expressio unius* principle on which the Any-Voting-Number Theory is built. According to the Court in *Chadha*, because the text-based constitutional exceptions were “narrow, explicit, and separately justified,” the claimed “[c]ongressional authority” to add to these exceptions “is not to be implied.”<sup>81</sup> The logic of *Chadha* applies here. The Constitution’s specification of “carefully defined exceptions” to a generally operative lawmaking norm—there, bicameralism and presentment; here, majority voting—signals that subconstitutional creation of additional exceptions is, as the Court declared in *Chadha*, “not authorized by the constitutional design.”<sup>82</sup>

At the least, *Chadha* confirms the rightness of applying the *expressio unius* principle with a high level of seriousness when efforts are made to depart from standard lawmaking processes. And in light of that approach, it is no small matter that four special reasons counsel application of the *expressio unius* principle here. First, the Framers’ singling out of only a circumscribed set of supermajority voting rules suggests on its face a plan to mark out exceptions from how Congress will operate in ordinary practice. According to the Any-Voting-Number Theory, however, the two houses of Congress may craft supermajority voting rules that cover each and every action they might take, thus causing the Framers’ exceptions not

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<sup>79</sup> *Chadha*, 462 U.S. at 955 (footnote omitted).

<sup>80</sup> See *supra* notes 68–70 and accompanying text.

<sup>81</sup> *Chadha*, 462 U.S. at 956 (emphasis added).

<sup>82</sup> *Id.* This conclusion is confirmed by evidence drawn from the Philadelphia Convention itself. At the Convention, John Dickinson specifically asserted that if the constitutional text were to set forth a limited number of qualifications for holding office, such a “partial [list] would by implication tie up the hands of the Legislature from supplying the omissions” in that list by later imposing additional qualifications. See 2 FARRAND, *supra* note 50, at 123 (statement of John Dickinson). Particularly because Dickinson was a leading lawyer of his day, see DAVID O. STEWART, *THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION* 33, 63 (2007), his understanding of the operation of the *expressio unius* principle provides a strong indicator of the Constitution’s original meaning. And if a limited listing of qualifications would “by implication” bar the houses of Congress from promulgating additional qualifications, then there is good reason to conclude that a limiting listing of supermajority voting requirements should likewise “by implication” bar the houses from promulgating additional supermajority voting rules.

to operate as exceptions at all.<sup>83</sup> Second (as we have already seen), the case for viewing the textual itemization as exclusive is bolstered by features of the constitutional text that reach well beyond the enumeration itself.<sup>84</sup> Third (as we will soon see), the inference of exclusivity is reinforced in this setting by a rich body of historical evidence.<sup>85</sup>

Finally, the matters that the Framers singled out for supermajority voting requirements—such as presidential impeachment, constitutional amendment, and expulsion of elected federal representatives—were self-

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<sup>83</sup> See *Gordon v. Lance*, 403 U.S. 1, 6 (1970) (describing our constitutional system, in light of the five-case itemization of supermajority voting rules, as one in which “a simple majority vote is insufficient on *some* issues” (emphasis added)).

<sup>84</sup> See *supra* Part I.A, I.B. Among other things, this fact aligns the argument made here with the reasoning of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). There, as Professor Van Alstyne has famously observed, the Supreme Court could have easily read Article III’s listing of original-jurisdiction cases as establishing only a default rule, such that Congress could add cases to that jurisdiction, just as it had (in the Court’s view) in adopting the Judiciary Act of 1789. See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 30–33. The Court, however, deemed the constitutional listing not subject to congressional tinkering, relying on the combined effect of the *expressio unius* principle and confirmatory implications it detected in the separate textual passage that treated the Court’s appellate jurisdiction. Here, in similar fashion, implications from both the Presentment Clause and the Vice President Voting Clause offer strong corroborative reasons to apply the *expressio unius* principle with respect to supermajority voting rules. See Fisk & Chemerinsky, *supra* note 11, at 239 (acknowledging that application of *expressio unius* principle here is supported by the “Court’s reasoning in *Marbury*”).

<sup>85</sup> This fact renders the reasoning of *Powell v. McCormack*, 395 U.S. 486 (1969), highly pertinent here. There, the House refused to seat a recent election winner, Adam Clayton Powell, in part on the ground that he had “wrongfully diverted House funds for the use of others and himself.” *Id.* at 492. The House based this action on its textual power to “be the Judge of the Qualifications of its own Members.” *Id.* at 521 (quoting U.S. CONST. art. I, § 5, cl. 1) (internal quotation marks omitted). Mr. Powell argued in response that the Qualifications Clause authorized exclusion only if the would-be member did not meet the textually enumerated mandates of eligibility, including that he be at least twenty-five years old, an American citizen for at least seven years, and a resident of the state from which he was elected. *Id.* at 537 (citing U.S. CONST. art. I, § 2, cl. 2). Proponents of exclusion responded that the Constitution nowhere specified that the age, citizenship, residency, and other specifically enumerated requirements (for example, not having been previously convicted on impeachment charges, see U.S. CONST. art. I, § 3, cl. 6) were exclusive, so that the House could “supplement” these “minimum” requisites without the need for a constitutional amendment. *Powell*, 395 U.S. at 557 (Douglas, J., concurring) (emphasis omitted). The Court, however, rejected this claim of “discretionary power” to make “additions” to the constitutional listing, reasoning that the specific enumeration of membership requirements was “unalterably” fixed. *Id.* at 534, 537 n.69, 546 n.84 (quoting 113 CONG. REC. 4998 (1967) (statement of Rep. Emanuel Celler)) (internal quotation mark omitted). The Court based this conclusion on “the records of the debates during the Constitutional Convention; available commentary from the post-Convention, pre-ratification period; and early congressional applications of Art. I, § 5,” as well as “pre-Convention practices,” *id.* at 521—that is, precisely the same forms of historical evidence collected and relied on here. The resulting conclusion is straightforward: Just as surely as the Court’s *expressio unius* treatment of listed member qualifications comported with “the basic principles of our democratic system” in *Powell*, *id.* at 548, those same basic principles dictate that the houses of Congress may depart from the rule of majority voting only in those instances where the Constitution itself requires the exceptional act of supermajority decisionmaking.

evidently extraordinary in character.<sup>86</sup> The Any-Voting-Number Theory, however, would permit either chamber to extend supermajority voting rules to the enactment of any legislation, including the most inconsequential private bills. Such a result clashes with both common practice and common sense.<sup>87</sup> No less important, it contradicts the conclusion drawn by the great early treatise writer Justice Joseph Story, who found in the constitutional text a clear indication that “departure from the general rule, of the right of a majority to govern, *ought not to be allowed but upon the most urgent occasions.*”<sup>88</sup>

All of these considerations support the conclusion that the Constitution’s explicit itemization of five specialized supermajority rules carries with it the implication that the houses of Congress may not freely add more. And the broader trilogy of textual arguments—based on the Presentment Clause, the Vice President Voting Clause, and the *expressio unius* canon—provides an even sturdier textual foundation for concluding that bills are “passed” if they receive a majority vote.

## II. SUPERMAJORITY VOTING, CONSTITUTIONAL STRUCTURE, AND RULES OF PROCEEDINGS

Advocates of the Any-Voting-Number Theory emphasize that sound constitutional interpretation requires attentiveness to the document’s overall “structure,” so as to interpret it “holistically,” rather than in a spirit of

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<sup>86</sup> See Remarks of George Clinton to the New York Convention (July 2, 1788), in 22 DOCUMENTARY HISTORY, *supra* note 62, at 2058, 2071 (John P. Kaminski et al. eds., 2008) (describing the “principle” of the Framers as “in Matters great and Important to have the Concurrence of more than a Majority”). See generally Chafetz, *supra* note 18, at 1014 (noting the obvious “weightiness of the issues for which the Constitution provides supermajority requirements”); Benjamin Lieber & Patrick Brown, Note, *On Supermajorities and the Constitution*, 83 GEO. L.J. 2347, 2376 (1995) (noting the Framers’ plan to “avoid” supermajority voting “except in extraordinary circumstances”).

<sup>87</sup> See, e.g., AMAR, *supra* note 45 (manuscript at 437–38) (suggesting that the Framers plainly intended that constitutionally specified supermajority rules “were designed to be *more demanding* than the simple majorities for ordinary statutes”).

<sup>88</sup> 2 STORY, *supra* note 45, § 887, at 354 (emphasis added). In the face of these considerations, Professors McGinnis and Rappaport defend their tightfisted view of the *expressio unius* principle not by relying on evidence from the framing period, but instead by invoking the Constitution’s Legislative Journal and State of the Union Clauses. See U.S. CONST. art. I, § 5, cl. 3; *id.* art. II, § 3. They write:

The Constitution requires each house to keep a journal, but no one would argue that this provision disables each house from directing under its Rules of Proceedings Clause that other kinds of records of its proceedings also be printed. The Constitution requires the President to report on the “State of the Union,” but no one would argue that he is constitutionally disabled from sending messages to Congress on other subjects.

McGinnis & Rappaport I, *supra* note 6, at 488 (footnotes omitted). This argument is inapposite, because not one of the four considerations identified here—concerning itemization of multiple exceptions, the presence of confirmatory text, the role of corroborative history, and the Framers’ obvious effort to single out special cases for special treatment—applies, even weakly, to hypotheticals built on the Constitution’s treatment of legislative journals and State of the Union messages.

“linguistic isolation.”<sup>89</sup> They are right to advocate this approach.<sup>90</sup> But they misstep in applying it. We already have seen, for example, why the Any-Voting-Number Theory raises tensions with Article I’s presentment-and-override lawmaking system and the Framers’ grant to the Vice President of a tiebreaking vote. Other structural difficulties will come into view when we turn to the history of the framing. One structural problem, however, is so significant that it merits immediate attention. The difficulty is that the Any-Voting-Number Theory is at war with itself.

The inherent tension arises because that theory posits, and even depends on, its own structural principle of legislative majoritarianism; indeed, it posits two such principles. First, adherents of the Any-Voting-Number Theory acknowledge that legislative majoritarianism is a “default rule” that always controls, absent contrary specification by House or Senate Rule.<sup>91</sup> This default rule, however, is not set forth in the constitutional text; rather, it emanates from nontextual premises that support majority decisionmaking. Put another way, Any-Voting-Number Theory proponents recognize that structural extrapolation of one important majority-based voting rule is entirely uncontroversial. The question presented here is thus revealed to be a focused one. It does not concern great battles over textualism versus atextualism, nor over disciplined versus free-form constitutional interpretation. Rather, the relevant question concerns which of the two types of majority voting rules is more sensibly attributed to the Framers in the absence of a totally explicit textual treatment: a *default* rule of legislative majoritarianism or a *fixed* rule of legislative majoritarianism. All the arguments offered above and below demonstrate that the fixed rule fits best with the Framers’ original plan.

The second principle of legislative majoritarianism embraced by advocates of Any-Voting-Number Theory exposes their approach to even greater difficulties. The defense of Rule XXI(5)(c) offered by Professors McGinnis and Rappaport rests on the underlying premise that the House must retain “ultimate power” to repeal that rule, or any supermajority voting rule, by way of majority vote.<sup>92</sup> In other words, the promulgation of a supermajority rule for votes on bills is constitutionally acceptable only because it “involves a majority imposing a supermajority requirement upon itself until the majority decides to eliminate it.”<sup>93</sup> Professors McGinnis and Rappaport thus endorse both a default-rule norm of legislative

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<sup>89</sup> See McGinnis & Rappaport II, *supra* note 6, at 346–47.

<sup>90</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 905 (1997) (looking, in the absence of textual determinacy, for interpretive guidance “in the structure of the Constitution”); McGinnis & Rappaport II, *supra* note 6, at 347 n.89 (noting Blackstone’s support of arguments from structure).

<sup>91</sup> McGinnis & Rappaport I, *supra* note 6, at 488.

<sup>92</sup> Roberts, *supra* note 11, at 530 n.105; *accord id.* at 529–31 (endorsing the principle of “ultimate majority control” and ascribing the same view to McGinnis and Rappaport).

<sup>93</sup> McGinnis & Rappaport I, *supra* note 6, at 491.

majoritarianism and a fixed non-default-rule norm of legislative majoritarianism. In a critical move, however, they define the latter norm as one that requires only that the House or Senate not depart from the value of legislative majority rule too much.

But how much is too much? Professors McGinnis and Rappaport, for example, state that their ultimate-control principle permits the House to pass a three-fifths supermajority voting rule (Rule 1) together with another rule under which Rule 1 is itself repealable only by a supermajority vote (Rule 2).<sup>94</sup> They say that this arrangement works, however, only because “a majority could simply pass resolutions that repealed the repeal rule and the three-fifths rule” at the same time.<sup>95</sup> But what if the House could not act in this way? What if, for example, Rule 2 was itself repealable under yet another rule (Rule 3) by only a three-fourths vote? And what if another House rule (Rule 4) barred near-in-time repeals of Rule 1, Rule 2, and Rule 3? Professors McGinnis and Rappaport acknowledge that “[i]t is not clear what limitations, if any, the Constitution imposes on a chamber’s power to prevent a majority from obtaining a vote on a measure” that imposes a supermajority rule.<sup>96</sup> They also acknowledge “that the chambers cannot have unlimited discretion to pass rules that regulate the opportunity to hold votes, because some versions of such rules function like extreme insulated repeal rules.”<sup>97</sup> But what versions of what rules fall victim to this limit? Are our hypothetical Rules 3 and 4 invalid because they are “extreme insulated repeal rules”? And, why, more fundamentally, would we suppose that the Framers meant to protect a concededly irreducible norm of legislative majoritarianism only in such a circuitous and conceptually knotty way?<sup>98</sup> The proper answer to these questions is suggested by Hamilton’s admonition that “a spirit of . . . too great abstraction and refinement” may “lead men astray from the plainest paths of reason.”<sup>99</sup> If in fact an irreducible principle of legislative majoritarianism inheres in the Constitution (as promoters of the Any-Voting-Number Theory concede), that principle should embody “the most obvious, easy, and natural criterion

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<sup>94</sup> *Id.* at 503–07.

<sup>95</sup> *Id.* at 503–04.

<sup>96</sup> *Id.* at 507 n.117.

<sup>97</sup> *Id.* at 508 n.117.

<sup>98</sup> Consider, for example, the question presented if the Senate had passed Rule XXI(5)(c). That rule would be repealable (in theory) by majority vote. But debate on changing the rule could itself be stopped only by a supermajority vote—indeed, a 67% cloture vote, rather than the usual 60% vote—because the matter would concern a rule change, rather than an ordinary bill. *See* U.S. SENATE COMM. ON RULES & ADMIN., *supra* note 20, at 20 (Rule XXII). To be sure, this supermajority cloture rule would be repealable (in theory) by majority vote, but some form of the rule in fact now has stood for nearly a century. *See* Fisk & Chemerinsky, *supra* note 11, at 194–95. Would this arrangement offend the “ultimate power” requirement? Who knows?

<sup>99</sup> *See* THE FEDERALIST NO. 12, *supra* note 9, at 74 (Alexander Hamilton).

of determination”<sup>100</sup>—namely, that the vote of a majority is determinative in passing all ordinary legislation.<sup>101</sup>

Looking at the Constitution through a broader lens confirms this conclusion. The Framers’ work centered on constructing an intricate balance of powers among the three federal branches and between the nation and the states. The crafting of this balance involved the use of a rich array of techniques: creating different branches, dividing the legislature into two houses, giving each power center different but overlapping authority, providing differing modes of selection and different terms of office for members of each branch and each congressional chamber, and divvying up authority between federal and state officials in complex ways that permitted each group to serve as a watchdog of the other.<sup>102</sup> Of special importance, particularly to James Madison, was the channeling of increased authority to the far-reaching national governing unit. This move, Madison predicted, would foster the selection of the most qualified legislators and impede the too-ready implementation of plans of factional oppression.<sup>103</sup> Through all of these means, and others as well, the Framers created a complex equilibrium of powers, meticulously designed to ensure that no arm of government would have too much or too little strength.

The Framers’ intricate architecture, however, becomes subject to radical alteration if the House and the Senate can freely put in place supermajority bill-passing voting rules. Supermajority rules adopted by the Senate, for example, steal power away from the House by making legislative initiatives of the lower chamber far more difficult to transform into binding law. In similar fashion, supermajority rules of the House dilute the policymaking power of the Senate—an outcome that likewise contravenes the Framers’ attempt to establish a system in which “*equal* authority . . . will subsist between the two houses on all legislative subjects.”<sup>104</sup> Supermajority rules, whether promulgated by the House or the Senate, truncate executive authority by constricting the President’s ability to pursue new programs and to wield the threat of the veto power in

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<sup>100</sup> Letter from An Impartial Citizen V to the Petersburg Virginia Gazette (Feb. 28, 1788), in 8 DOCUMENTARY HISTORY, *supra* note 62, at 428, 432–33 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (specifically endorsing this approach in defense of a rule of recognition “fixed upon a majority of voices” in the legislative chamber).

<sup>101</sup> See Rubinfeld, *supra* note 6, at 87 (noting the oddity of the position of advocates of the Any-Voting-Number Theory that “majority rule is to be read into [the Rules of Proceedings Clause] *despite* the Constitution’s silence on the subject, whereas it must not be read into [the Presentment Clause] *because* of the Constitution’s silence on the subject”); see also Bloch, *supra* note 3, at 5 (also emphasizing this point); *infra* notes 190–96 and accompanying text (emphasizing relative simplicity and workability of fixed majority-voting-on-bills approach).

<sup>102</sup> See THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 7–8 (Ralph Ketcham ed., 1986) [hereinafter CONSTITUTIONAL CONVENTION DEBATES].

<sup>103</sup> See THE FEDERALIST NO. 10, *supra* note 9, at 60–61 (James Madison).

<sup>104</sup> THE FEDERALIST NO. 58, *supra* note 9, at 393 (James Madison) (emphasis added).

bargaining over changes to legislation. Supermajority rules also can create de facto legislative immunities for states, by broadly protecting them from preemption of their laws or other meddlesome forms of federal control. The bottom line is that permitting promulgation of these rules creates an opening for far-reaching alterations of the Constitution's basic allocation of governing powers.<sup>105</sup>

Defenders of the Any-Voting-Number Theory have an answer to this big-picture critique. They say, in effect, that the authority to self-impose supermajority voting rules is itself one component of the Framers' intricate tapestry of blended powers.<sup>106</sup> They argue in particular that the Framers endorsed the supermajority-vote-checking mechanism by vesting in each house of Congress the power to "determine the Rules of its Proceedings."<sup>107</sup> We will soon see why this argument overlooks the Framers' understandings of how legislative majoritarianism fits together with republican self-rule and other core values embraced in the constitutional plan.<sup>108</sup> There is, however, a more immediate problem with this argument: it places on the narrow shoulders of the Rules of Proceedings Clause more weight than the Clause can carry. Indeed, as we have seen, that theory attributes to this once-little-noticed provision—the words of which plainly focus on internal matters of procedural self-regulation—a large, if not transformative, role in

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<sup>105</sup> See Bloch, *supra* note 3, at 2–4 (emphasizing the “distorting impact adding supermajority requirements can have on the other branches”); King, *Deconstructing Gordon*, *supra* note 6, at 176–77; Rubinfeld, *supra* note 6, at 79. In a related vein, self-imposed supermajority voting rules clash with the Framers' design to give “plenary” authority to Congress to pursue the purposes entrusted to it by Article I. *Gibbons v. Ogden*, 22 U.S. 1, 46 (1824). In particular, the Framers chose to vest Congress with “ample means” to wield “ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends.” *McCulloch v. Maryland*, 17 U.S. 316, 408 (1819). In speaking of federal taxes, for example, Alexander Hamilton wrote that “future necessities admit not of calculation or limitation,” so that “the power of making provision for them as they arise, ought to be . . . unconfined.” THE FEDERALIST NO. 30, *supra* note 9, at 190 (Alexander Hamilton). It is not easy to square an “unconfined” taxing authority with the validity of House and Senate rules that systematically do confine the enactment of taxing measures by requiring all such measures to secure a supermajority vote. This argument, moreover, is not merely an extrapolation distilled from snippets of the historical record. Hamilton himself effectively advanced the same proposition at the New York Ratification Convention. See Remarks of Alexander Hamilton to the New York Convention (July 2, 1788), in 22 DOCUMENTARY HISTORY, *supra* note 62, at 2058, 2072 (John P. Kaminski et al. eds., 2008) (excoriating Antifederalist demands for a two-thirds-vote requirement for congressional borrowing because “we ought not do any thing to impede a Loan when necessary” and “especially” when “the Gen[era]l defence is concerned”); see also 1 STORY, *supra* note 45, § 330, at 299 (“[T]he majority must have a right to accomplish that object by the means, which they deem adequate for the end.”).

<sup>106</sup> See, e.g., Fisk & Chemerinsky, *supra* note 11, at 244–45. In a related form of structural argument, Professors Fisk and Chemerinsky expend much energy seeking to prove that “majoritarianism is not a universal principle of American government.” *Id.* That is true, see, e.g., *supra* notes 63–67 and accompanying text, but beside the point. The question here is not about a “universal principle”; instead, it is about the proper meaning to associate with the word “passed” in Article I, Section 7, in light of a sweeping range of textual, structural, and historical arguments.

<sup>107</sup> U.S. CONST. art I, § 5, cl. 2.

<sup>108</sup> See *infra* Part III.

the constitutional allocation of government powers.<sup>109</sup> Not one shred of evidence from the framing era, however, supports the attribution of such an intention to the Framers. To the contrary, the historical record indicates that the Clause drew no attention at all in the Philadelphia assembly, at any of the ratification conventions, or at any time in between.<sup>110</sup> And it simply is not easy to believe that the Framers meant the Rules of Proceedings Clause to carry with it a power to reframe the overall structure of state and federal powers, when not one speaker in any of these settings deemed it consequential enough to merit even a passing comment.

Ascribing to the Rules of Proceedings Clause this critical role is further undermined by another consideration: close inspection reveals that the provision is best viewed as having no independent significance in interpreting the scope of the federal legislative authority. As Joseph Story explained in his own terse account of the clause, it has a “propriety” that “[n]o person can doubt,” because even “[t]he humblest assembly of men is understood to possess [the] power” to make rules for their internal operation.<sup>111</sup> Without that power, after all, “it would be utterly impracticable” for a legislature “to transact . . . business . . . either at all, or at least with decency, deliberation, and order.”<sup>112</sup> Put another way, it is with the Rules of Proceedings Clause as it is, for example, with the President’s expressly granted authority to seek opinions from cabinet members.<sup>113</sup> These powers naturally flowed to the relevant government decisionmakers, and their existence was merely reaffirmed by the constitutional text.<sup>114</sup>

Viewed from this vantage point, the controlling constitutional question appears in a clearer light: Did a power to abandon deeply rooted norms of

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<sup>109</sup> See *supra* notes 102–05 and accompanying text.

<sup>110</sup> See, e.g., Leach, *supra* note 52, at 1257 n.10 (noting the absence of the Rules of Proceedings Clause in early drafts of the Constitution and the delegates’ later agreement to it “without discussion”); Roberts, *supra* note 11, at 532 (noting that the Rules of Proceedings Clause “apparently was not debated by the Convention” and “was not addressed in *The Federalist*” or “a subject of controversy during the state ratification debates”).

<sup>111</sup> 2 STORY, *supra* note 45, § 835, at 298.

<sup>112</sup> *Id.*

<sup>113</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>114</sup> See Roberts, *supra* note 11, at 531–32 (noting that Rules of Proceedings Clause “apparently was not debated” because it appears “[o]n its face” to be a “truism” and “beyond controversy,” that it was “probably deemed too obvious to be discussed,” and that “[a]ll legislative bodies . . . formulate and adopt rules governing their proceedings as soon as possible after convening”). To be sure, one might object to this interpretation on the theory that it renders the Rules of Proceedings Clause mere surplusage. The Framers, however, recognized that some clauses of the Constitution were to work in exactly the same power-confirmatory way. See THE FEDERALIST NO. 33, *supra* note 9, at 204–06 (Alexander Hamilton) (noting that the Supremacy Clause and the Necessary and Proper Clause “are only declaratory of a truth, which would have resulted by necessary and unavoidable implication from the very act of constituting a Federal Government”; adding that “the constitutional operation of the intended government would be precisely the same, if these clauses were entirely obliterated”; but also observing that they were nonetheless included “for greater caution” so as to “leave nothing to construction”).



majority decisionmaking, to establish all manner of submajority and supermajority voting rules, and thus to meddle with the basic structures of governance, devolve upon each chamber of Congress not by way of express textual grant but by implication from those bodies' mere existence? Or, to build on Justice Story's thought, did the inherent power of each body to promulgate rules to facilitate internal "decency, deliberation, and order" carry along with it a de facto capacity to recalibrate the Constitution's otherwise-controlling allocations of power among the House, Senate, President, and states? To discover such an implied authority requires an inventiveness of impressive proportions.<sup>115</sup>

There is another difficulty as well. Even if the Rules of Proceedings Clause does have an independent power-conferring significance, the Framers' chosen phrase, "Rules of . . . Proceedings," on its face suggests a contrast with "Rules of Decision"—in much the same way that lawmakers often place "procedural law" and "substantive law" into mutually exclusive categories.<sup>116</sup> Building on this idea, it merits emphasis that the Framers never suggested that a proper goal of the Rules of Proceedings Clause was to go beyond procedural self-regulation, in a manner that permitted the House and Senate to tilt the legislative scales in a significant way for or against particular substantive outcomes—to make it hard to pass tax laws, to make it easy to pass pay increases, or to make it deeply difficult to alter as a general matter any feature of the legal landscape. For these reasons, one must strain to find in that Clause even standing alone—that is, even ignoring altogether any external, overriding norm of majority voting—a font of implied authority to self-impose supermajority voting rules.<sup>117</sup>

The Court's ruling in *Cook v. Gralike*<sup>118</sup> supports this view. That case involved the question whether a state could disadvantage candidates for federal office who failed to follow state instructions to back term-limit reform by prominently flagging that fact on the ballot.<sup>119</sup> The state argued that it could take this action pursuant to its constitutional power to regulate the "Manner of holding Elections for Senators and Representatives."<sup>120</sup> The Court, however, rejected this argument. In its view, the Elections Clause

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<sup>115</sup> See Rubinfeld, *supra* note 6, at 87 (urging that Any-Voting-Number Theory advocates "want to take the clause that, naturally enough, confers upon each legislative chamber authority over its own parliamentary proceedings and turn it into something more: a power within each chamber fundamentally to disrupt the basic structure of national lawmaking").

<sup>116</sup> See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–11 (1941).

<sup>117</sup> See *INS v. Chadha*, 462 U.S. 919, 956 n.21 (1983) (describing congressional rule-making authority as involving only "a closely circumscribed legislative arena").

<sup>118</sup> 531 U.S. 510 (2001).

<sup>119</sup> In particular, Missouri law specified that the legend "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS" or "DECLINED TO PLEDGE TO SUPPORT TERM LIMITS" be printed on ballots near the names of noncomplying candidates. *Id.* at 514–15 & 514 n.2 (internal quotation marks omitted).

<sup>120</sup> *Id.* at 513, 522 (internal quotation mark omitted) (citing U.S. CONST. art I, § 4, cl. 1).

was only “a grant of authority to issue *procedural* regulations, and not . . . a source of power to . . . favor or disfavor a class of candidates.”<sup>121</sup> The Court also went on to conclude that the “political disadvantage” imposed on term-limit-opposing office seekers by the unflattering ballot notice caused the rule to fall into the substantive, rather than the procedural, camp.<sup>122</sup>

This holding stands in obvious tension with rules that mandate supermajority support to pass certain categories of bills. On the reasoning of *Cook*, these rules reach well beyond such “procedural” matters as the sequencing of balloting, the duration of debating periods, and the form of “making and publication” of votes.<sup>123</sup> Rather, they impose a “disadvantage” on a class of bills, just as surely as the rule in *Cook* imposed a “disadvantage” on “a class of candidates.”<sup>124</sup> Indeed, while “the precise damage” the ballot labels caused was “disputed” in *Cook*,<sup>125</sup> the result-tilting consequence of supermajority voting rules is unmistakably—even numerically—clear. Under the logic of *Cook*, these rules thus do not merely “regulat[e] . . . procedural mechanisms.”<sup>126</sup> As a result, they may well be ultra vires because the Rules of Proceedings Clause, just like the Elections Clause as interpreted in *Cook*, focuses on creating “*procedures* for internal governance.”<sup>127</sup>

Proponents of the Any-Voting-Number Theory might respond to this challenge by claiming that supermajority voting rules are simply not a big deal. This response again builds on the underlying premise of that theory—namely, that the House and the Senate always remain free to repeal supermajority voting rules by majority vote.<sup>128</sup> In particular, so the argument goes, supermajority voting rules neither threaten constitutional structures nor dictate substantive results because the “ultimate power” of legislative majorities to displace them always remains in the hands of each chamber.<sup>129</sup> The lesser problem with this line of reasoning is that it rests on near self-contradiction. Put simply, it makes little sense for constitutional

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<sup>121</sup> *Id.* at 523 (emphasis added) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 833–34 (1995)).

<sup>122</sup> *Id.* at 525–26.

<sup>123</sup> *Id.* at 523–24 (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

<sup>124</sup> *Id.* at 525; *see id.* at 516 (quoting *Gralike v. Cook*, 996 F. Supp. 901, 910 (W.D. Mo. 1988), as reading the state rule as creating “the threat of being disadvantaged in the election”).

<sup>125</sup> *Id.* at 525.

<sup>126</sup> *Id.* at 526; *see also* McGinnis & Rappaport I, *supra* note 6, at 497 (describing as “substantive” the question of “[h]ow much influence should a legislative minority have over the content of legislation”).

<sup>127</sup> Chafetz & Gerhardt, *supra* note 18, at 253 (statement of Professor Gerhardt) (emphasis added). For variations on this line of argument, *see Open Letter*, *supra* note 6, at 1542; Bloch, *supra* note 3, at 2; and Lieber & Brown, *supra* note 86, at 2362 (arguing that Rule XXI(5)(c) “appears calculated to achieve a substantive result backed by the current majority”).

<sup>128</sup> *See* McGinnis & Rappaport I, *supra* note 6, at 484.

<sup>129</sup> *See supra* notes 92–93 and accompanying text.

decisionmakers to fend off powerful textual, structural, and historical arguments so as to sustain such rules on the ground that they have no real-world significance. After all, if they had no real-world significance, they would hardly be worthy of defense.

The larger problem with the argument is that supermajority voting rules *are* a big deal. At least as a general matter, lawmakers adopt rules so that they will have effects, not so that they will fade into nothingness, and this is surely the case with supermajority voting requirements. Professors McGinnis and Rappaport recognize the practical impact of these rules, notwithstanding their posited exposure to “ultimate” majority control.<sup>130</sup> And all doubts fall away when one considers the present-day Senate. Why? Because, as one seasoned Senator recently observed, the effect of that body’s supermajoritarian filibuster rule—even if technically repealable by majority vote—is so profound that it makes it “all but impossible to conduct everyday business.”<sup>131</sup> In short, because supermajority voting rules can and do have broad on-the-ground consequences, any structural defense of them based on their supposed lack of importance stands on feet of clay.

Recognizing the significant effects of supermajority voting rules suggests another structural reason for finding them inconsistent with the constitutional plan. This is so because, with regard to important legislative decisions, the Framers insisted on the use of bicameralism and presentment, or parallel safeguards, to ensure high levels of institutional care. If the power to make supermajority voting rules stems from the Rules of Proceedings Clause, however, such rules may be promulgated with neither bicameralism nor presentment nor anything like them because that Clause—in keeping with its limited internal-procedure-related purposes—permits each house to act without the other. Can it be that the Framers meant that voting rules of key significance in the lawmaking process are the proper subject of adoption not only in the absence of constitutional amendment, but by a house of Congress acting entirely on its own? The core structural theme of strong checks and balances conjoins with text and history to signal that the answer to this question is “no.”

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<sup>130</sup> See McGinnis & Rappaport II, *supra* note 6, at 345–46 (emphasizing that supermajority voting rules “cannot be dismissed as merely hortatory” but instead have “real world effects,” that “[t]he repealability of a rule does not in general make it ineffective,”; that supermajority rules at least “represent a public precommitment by the majority to a policy,” and that this precommitment “makes it more politically costly” to repeal the supermajority voting rule than “to simply vote for a tax increase”); see also, e.g., King, *Deconstructing Gordon*, *supra* note 6, at 190–91; King, *Use of Supermajority*, *supra* note 6, at 404 (noting “the inherent inertial power of supermajority provisions”); Roberts, *supra* note 11, at 519 (noting that supermajority rules, even if subject to majority-vote change, are not “useless” in part because “they represent Congress’s effort to discipline itself”); *id.* at 530 (reiterating that such rules foster “stability”); *id.* at 538 (noting that Senate’s supermajority Cloture Rule “exerts a strong pull,” even if repealable at any time as a theoretical matter).

<sup>131</sup> Tom Harkin, *Fixing the Filibuster*, HUFFINGTON POST (Feb. 12, 2010, 10:39 AM), [http://www.huffingtonpost.com/sen-tom-harkin/fixing-the-filibuster\\_b\\_459969.html](http://www.huffingtonpost.com/sen-tom-harkin/fixing-the-filibuster_b_459969.html).

## III. SUPERMAJORITY VOTING RULES AND CONSTITUTIONAL HISTORY

As Parts I and II show, many textual and structural considerations show that the Any-Voting-Number Theory does not fare well under a full-scale originalist analysis. And as it turns out, a close look at the conditions and events of 1787 and 1788 strongly confirms the same conclusion. Indeed, four separate elements of that history indicate that the Framers intended for Congress to engage in lawmaking only by majority vote. Those elements are: (1) the uniform acceptance at the time of parliamentary practice under which majorities controlled legislative action absent contrary constitutional specification, (2) then-dominant philosophical commitments to principles of republicanism that insisted on majority-based lawmaking, (3) the experience-driven goal of the delegates and ratifiers to abandon supermajority voting methods because those very methods had rendered the Confederation Congress highly ineffectual, and (4) the crafting of key political compromises at the Philadelphia Convention, including the Great Compromise, which supermajority voting rules offend. These four considerations, especially in combination, offer a compelling case for concluding that the Any-Voting-Number Theory lacks sound support.

A. *Background Norms of Parliamentary Practice*

1. *Settled Understandings.*—Does our Constitution establish simple-majority voting, to the exclusion of supermajority voting, as the proper manner of enacting ordinary laws, absent a contrary constitutional command? The issue is neither novel nor new. A unanimous Supreme Court addressed this very question in 1892 and came down emphatically on the side of mandatory majority decisionmaking. In *United States v. Ballin*,<sup>132</sup> the Court wrote:

[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations. . . . No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains.<sup>133</sup>

This pronouncement does not say that the Constitution establishes legislative majority voting as only a “default rule” that the legislature (far less, one house of the legislature) can alter. It states that majority voting is the operative “rule for all time” unless there is an exception set forth in the “organic act” under which the legislature is organized—that is, “the Federal Constitution.” Put another way, the Court in *Ballin* declared that a majority vote is always decisive in passing laws because, in contrast to provisions

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<sup>132</sup> 144 U.S. 1 (1892).

<sup>133</sup> *Id.* at 6.

such as the Treaty Clause or Senate Impeachment Clause, the provisions of the Constitution that deal with the passage of laws do not dictate a rule of supermajority approval.<sup>134</sup>

Professors McGinnis and Rappaport recognize that “at first glance” their position contravenes the Court’s pronouncement in *Ballin*.<sup>135</sup> They go on, however, to question the significance of that pronouncement, reasoning that it embodies only a nonbinding dictum because the question in the case focused on quorum requirements rather than supermajority voting rules.<sup>136</sup> Precisely because *Ballin* concerned the Rules of Proceedings Clause, however, it is unlikely that the Court failed to have the nature and limits of that Clause in plain view. Indeed, the Court framed the issue before it not in terms of quorum rules, but in these telling terms: “[W]hat is necessary to constitute the official action of this legislative and representative body?”<sup>137</sup>

All of this matters, but lurking in the background is a deeper and more important point. Even if the declaration in *Ballin* had been pure *obiter*, the Court said what it said because, for the Justices, it was obvious and uncontroversial. Put simply, the Court concluded without difficulty that Congress had to engage in lawmaking by way of majority-based voting.<sup>138</sup> With this thought in view, it is worth asking a simple question: If the background understanding of a unanimous Supreme Court in 1892 was that bills have “passed” so long as they have received a majority vote, why should we suppose that that was not the background understanding of the Framers in 1787 and 1788? Professors McGinnis and Rappaport point to no intervening legal developments that could have led the Court to take a radically different view of how legislatures operate than was taken by the Framers themselves. These skilled analysts point to no previously unavailable evidence drawn from the Convention or ratification debates that

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<sup>134</sup> A near-century later, the Court reiterated that “the Constitution’s prescription for legislative action” is “passage by a majority of both Houses,” *INS v. Chadha*, 462 U.S. 919, 958 (1983), and alluded without equivocation to “the simple majority required for passage of legislation.” *Id.* at 956 n.21.

<sup>135</sup> McGinnis & Rappaport I, *supra* note 6, at 492–93. Even so, they go on to float the idea that “the better interpretation” of the statement in *Ballin* is that the Court meant to set forth only a “default rule” that permits self-imposition of supermajority voting rules. *Id.* at 493. The language of *Ballin* is there for all to see and a default-rule translation is (to say the least) not easy to reconcile with the Court’s declaration that “the rule” of majority voting applies “except” when there are “prescribed specific limitations” on majority voting “in the Federal Constitution” itself. *Id.* at 492–93 (quoting *Ballin*, 144 U.S. at 6).

<sup>136</sup> *Id.* at 493 (asserting that the question of self-imposed supermajority voting rules was “neither discussed in the opinion nor raised by the facts of the case”).

<sup>137</sup> *Ballin*, 144 U.S. at 7.

<sup>138</sup> The Court in *Ballin* did not stand alone in this regard. Indeed, one then-leading treatise writer on American constitutional law had previously expressed exactly the same view. See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 141 (Boston, Little, Brown & Co. 1868) (“A simple majority of a quorum is sufficient, unless the [C]onstitution establishes some other rule . . .”).

contradicts the view of legislative operations endorsed by nine Justices in *Ballin*.

In fact, the historical record confirms the *Ballin* Court's conclusion in the strongest way. At the time of the framing, the English Parliament had always and only acted through majority voting.<sup>139</sup> State legislative practice was likewise universally rooted in the norm of majoritarian decisionmaking.<sup>140</sup> The Philadelphia Convention and each of the thirteen state ratification conventions themselves acted according to the principle of majority, not supermajority, rule.<sup>141</sup> The early House and Senate passed all

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<sup>139</sup> See, e.g., Rubinfeld, *supra* note 6, at 77 (“Majority rule was . . . the established practice of the British Parliament . . .”); McGinnis & Rappaport II, *supra* note 6, at 341 (“[M]ajority rule did govern the British Parliament . . .”). See generally *Loving v. United States*, 517 U.S. 748, 766 (1996) (“[E]vents of the English constitutional experience . . . were familiar to [the Framers] and inform our understanding of the purpose and meaning of constitutional provisions.”); McGinnis & Rappaport II, *supra* note 6, at 348 (emphasizing, albeit in another context, that “[h]istory . . . helps resolve ambiguities because the Constitution established its system of political governance against the backdrop of the English Constitution—itself a distillation of established practices”).

<sup>140</sup> See King, *Deconstructing Gordon*, *supra* note 6, at 178 (“[T]here has yet to be offered an example of where a rule analogous to . . . House Rule [XXI(5)(c)]—a rule in which a legislative body adopts for itself a supermajority requirement on certain substantive legislation—has ever been used by . . . any of the original thirteen Colonial legislatures or in any established parliamentary body preceding the adoption of the Constitution.”); see also AMAR, *supra* note 45 (“[N]either Parliament nor any state circa 1787 generally required more than simple house majority votes for the passage of bills or the adoption of internal house procedures, even though in many of these states no explicit clause explicitly specified this voting rule. In America circa 1787, majority rule in these contexts thus truly did go without saying.”). This idea was captured during the ratification period itself. See Letter from An Independent Freeholder to the Winchester Virginia Gazette (Jan. 25, 1788), in 8 DOCUMENTARY HISTORY *supra* note 62, at 325, 325–26 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (“I can conceive no reason why the ordinary business of legislation should not be determined in Congress by a majority of voices *as is done in all our assemblies, and other public bodies*.” (emphasis added)). Consistent with this history, it was also the case that “simple majority vote by colony was used to decide matters” during the 1770s in the Continental Congress. CALVIN JILLSON & RICK K. WILSON, CONGRESSIONAL DYNAMICS: STRUCTURE, COORDINATION AND CHOICE IN THE FIRST AMERICAN CONGRESS, 1774–1789, at 53 (1994).

<sup>141</sup> With respect to the state ratifying conventions, each one operated according to “simple majority rule.” See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 750 (1994); *id.* at 764 (noting that Madison observed in THE FEDERALIST NO. 40 that states would act in this manner); see also AMAR, *supra* note 45 (manuscript at 70) (adding that state conventions acted in this manner even though “the federal Constitution’s text contained not a single word specifying majority rule as the proper metric,” and that majority rule in this context “[e]vidently . . . went without saying”). Indeed, state ratification conventions adopted simple majority rule even in settings where “pre-existing state constitutions could plausibly have been construed to require something more than a simple majority vote.” *Id.* Even against this backdrop, however, no hue and cry—or even a whisper of objection—over majority-based voting was raised. Rather, as Professor Amar has documented, leading opponents of the Constitution repeatedly emphasized the need, under established principles, for the minority to accede to the vote of the majority of the body. *Id.* at 72. For example, Patrick Henry, who bitterly opposed the proposed Constitution, bluntly observed at the hard-fought Virginia Ratification Convention that “[i]f this be the opinion of the majority, I must submit.” Remarks of Patrick Henry to the Virginia Convention (June 5, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 62, at 943, 956 (John P. Kaminski & Gaspare J. Saladino eds.,

laws by way of majority vote,<sup>142</sup> and in fact they unwaveringly adhered to that practice until Rule XXI(5)(c) took hold in 1975.<sup>143</sup> The records of the Philadelphia Convention and the follow-up ratification process contain not one statement by one person that even hints that the houses of Congress could impose on themselves supermajority voting rules.<sup>144</sup> On the other hand, those records contain many statements that presuppose or endorse majority voting on bills.<sup>145</sup> James Madison captured the mood at the

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1990). All of this underscores the deep-seated commitment at the time to majority voting by parliamentary bodies, at least absent a contrary signal in an extraordinary form of background law.

<sup>142</sup> See Roberts, *supra* note 11, at 525.

<sup>143</sup> See Skaggs v. Carle, 110 F.3d 831, 834 (D.C. Cir. 1997) (noting the statement of the clerk of the House of Representatives that “[t]he House has never failed to deem passed a bill that has received the support of a simple majority”); King, *Deconstructing Gordon*, *supra* note 6, at 178 (asserting that the supermajority-to-pass-a-bill approach had “never been part of either the House or the Senate” until adoption of Rule XXI(5)(c)). See generally *supra* note 10 (collecting additional authorities). This consistent practice of not acting pursuant to a supposed congressional power—especially for many years immediately following the nation’s founding—tellingly illuminates the original meaning of the Constitution. See, e.g., Printz v. United States, 521 U.S. 898, 905 (1997) (interpreting the Constitution in light of the enactments of the earliest Congresses). This same view of the Constitution’s meaning also comports with the persistent centrality of majority voting throughout the politics of our nation, which has been noted by both the Supreme Court and others. See, e.g., PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787–1788, at 296–97, 369 (2010) (noting early opposition to nonmajority voting requirements, and detailing a number of votes leading up to New York’s ratification of the Constitution, all of which were decided by majority vote). The centrality of majoritarianism has, both wisely and unsurprisingly, continued to be a key theme throughout American history. See, e.g., Reynolds v. Sims, 377 U.S. 533, 566 (1964) (“[T]he democratic ideals of equality and majority rule . . . have served this Nation so well in the past . . .”); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7 (1980) (describing majority rule as “the core of the American governmental system”).

<sup>144</sup> See *supra* note 110 and accompanying text; see also SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE 33 (1997) (“The records of the convention and the arguments in the Federalist Papers give no indication that the framers either anticipated or desired procedural protection for Senate minorities.”). This point is of particular significance because the Supreme Court has declared that such omissions are helpful in ferreting out original meaning. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 812 (1995) (“We . . . find compelling the complete absence in the ratification debates of any assertion that States had the power to add qualifications [for federal representatives].”).

<sup>145</sup> See, e.g., Letter from An Impartial Citizen to the Petersburg Virginia Gazette (Jan. 10, 1788), in 8 DOCUMENTARY HISTORY, *supra* note 62, at 293, 295 (John P. Kaminski & Gaspare J. Saladino eds., 1988) (“The Executive has . . . no absolute negative on the laws, but a power of preventing the *passing a law by a bare majority* . . .” (emphasis added)); Letter from the Federal Farmer to the Republican (Oct. 10, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 62, at 30, 30–31 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (“[T]he house of representatives, the democratic branch, as it is called, is to consist of 65 members . . . . Thirty-three representatives will make a quorum for doing business, and a majority of those present determine the sense of the house.”); Remarks of James Wilson to the Pennsylvania Convention (Dec. 4, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 62, at 487, 493 (listing as one reason for adopting the Constitution that “[e]verything almost is transacted by a *majority*. The minority do not govern.”); The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents (Dec. 18, 1787), in 15 DOCUMENTARY HISTORY, *supra* note 62, at 13, 26 (John P. Kaminski & Gaspare J. Saladino eds., 1984) (“The house of representatives is to consist of 65 members . . . . Thirty-three members will form a quorum for doing

Virginia Ratification Convention when he lit into late-blooming Antifederalist proposals to tack additional supermajority voting rules onto the Constitution. As he declared:

This policy of guarding against political inconveniences, by enabling a small part of the community to oppose the Government, and subjecting the majority to a small minority is fallacious. In some cases it may be good; in others it may be fatal. In all cases it puts it in the power of the minority to decide a question which concerns the majority.<sup>146</sup>

Statements to the same effect came from such luminaries as Alexander Hamilton<sup>147</sup> and James Wilson,<sup>148</sup> “one of the Constitution’s two most important Framers, and the leading lawyer in America.”<sup>149</sup> Perhaps the most telling observation came from the wise and worldly Benjamin Franklin, who reminded his fellow delegates that supermajority voting rules were “contrary to the common practice of Assemblies in all Countries and Ages.”<sup>150</sup>

To be sure, as Professors McGinnis and Rappaport emphasize, the Articles of Confederation required supermajority votes for the pre-Constitution Congress to act in important areas.<sup>151</sup> But, consistent with the

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business; and 17 of these, being the majority, determine the sense of the house. . . . [In the Senate] fourteen senators make a quorum; the majority of whom, eight, determines the sense of that body: except in judging on impeachments, or in making treaties, or in expelling a member, when two thirds of the senators present, must concur.”); *see also* Letter from Antoine de la Forest, French Vice Consul for the United States, to Comte de Montmorin, French Minister of Foreign Affairs and Minister of Marine (Sept. 28, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 62, at 259, 260 (John P. Kaminski & Gaspare J. Saladino eds., 1981) (noting, in describing the House of Representatives, that “in it a majority of individuals, and no longer that of States, will decide all questions”); *see generally infra* notes 156, 199–217, 230–31, 248–61 and accompanying text (collecting various additional statements).

<sup>146</sup> Remarks of James Madison to the Virginia Convention (June 24, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 62, at 1473, 1503 (John P. Kaminski & Gaspare J. Saladino eds., 1993). As Madison’s statement highlights, untempered endorsement of majoritarian lawmaking surfaced not only at the Philadelphia Convention, but in the ratification proceedings as well. For example, in both Virginia and New York, focused proposals to require supermajority votes on such matters as regulating commerce and borrowing money were pushed forward. In response, key Federalists—in particular, Madison, Hamilton, and John Jay—decried these initiatives as unjust and action-stifling tools of minority control. *See MAIER, supra* note 143, at 297, 367–69.

<sup>147</sup> *See infra* notes 216–17, 251–61 and accompanying text.

<sup>148</sup> *See infra* note 215 and accompanying text.

<sup>149</sup> Amar, *supra* note 141, at 765.

<sup>150</sup> 1 FARRAND, *supra* note 50, at 198 (statement of Benjamin Franklin). Professors McGinnis and Rappaport have noted that “[w]hen the Framers drafted the Constitution, they did so against a traditional understanding of the limits of legislative power.” McGinnis & Rappaport I, *supra* note 6, at 505. That is right. And so it follows that the Framers did not envision—precisely because of this “traditional understanding”—that the legislative power could not be made subject to a scattershot array, far less the uniform application, of self-imposed submajority and supermajority voting rules.

<sup>151</sup> *See McGinnis & Rappaport II, supra* note 6, at 341 n.65 (citing ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 6, which required a 9-of-13 vote to take such actions as engaging in war, entering into treaties, and coining, borrowing, or appropriating money).



principle of *Ballin*, the Articles constituted the “organic law” under which that Congress was organized. And no evidence suggests that the Confederation Congress could have or would have sought to impose supermajority voting rules on itself in areas other than those specified in the Articles themselves.<sup>152</sup> In any event, the essential objective of the framing was to get rid of the Articles—and to do so in large part (as we soon shall see) precisely because the supermajority voting constraints they imposed created far-reaching problems. Put simply, at least when it comes to an endorsement of supermajority voting rules, there is no basis for reasoning by analogy from legislative practice under the Articles to how the Framers meant their radically new Constitution to operate.

Pronouncements of leading thinkers of the time confirm that the Framers intended that the chambers of Congress would have to act on bills by majority vote. In his *Second Treatise on Government*, for example, John Locke asserted—in words directly foreshadowing *Ballin*—that “in assemblies empowered to act by positive laws, where no number is set by that positive law which impowers them, the act of the majority passes for the act of the whole, and, of course, determines, as having by the law of nature and reason the power of the whole.”<sup>153</sup> The same view was voiced by Thomas Jefferson, “the great parliamentarian of the early Republic.”<sup>154</sup> Tracking Locke, Jefferson invoked “natural law,” “common law,” and “common right”<sup>155</sup> to posit that:

The first principle of republicanism is, that the *lex-majoris partis* is the fundamental law of every society of individuals of equal rights; to consider the

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<sup>152</sup> Indeed, the Articles expressly indicated that, absent specification of a supermajority rule, action would be determined by “the votes of a majority of the United States in Congress assembled.” ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 6. Professors McGinnis and Rappaport seek to turn this language to their advantage by saying the omission of similar language from the Constitution signaled a design to permit self-imposed supermajority and submajority bill-voting rules. McGinnis & Rappaport II, *supra* note 6, at 342 n.67, 347. This argument lacks force, however, because it seeks to draw a parallel where no basis for doing so exists. Why did the Framers fail to include what could have been only roughly comparable language in the Constitution? Perhaps because, unlike the Articles, the Constitution included no single clause establishing different voting requirements for different categories of legislation. Perhaps because the relevant provision of the treaty-like Articles dealt with majority voting on a state-by-state basis, which had no relevance at all to the new Constitution. Perhaps because the Articles established a majority-of-all-the-states rule, which the Constitution effectively abandoned in its separate Quorum Clause. See *supra* note 45. Whatever the precise reason, the controlling point is that nothing in the historical record indicates that a failure to mention majority voting expressly in the Constitution reflected a plan to shift away from majority rule. To the contrary, that record shows beyond peradventure that the Framers viewed the Articles as having made too little provision for legislative majoritarianism, rather than too much. See *infra* notes 233–62 and accompanying text.

<sup>153</sup> JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 96, at 55 (Thomas P. Peardon ed., Bobbs-Merrill Co. 1952) (1690).

<sup>154</sup> Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 DUKE L.J. 177, 209–10 (2008).

<sup>155</sup> Thomas Jefferson, *Notes on the State of Virginia*, in *THE PORTABLE THOMAS JEFFERSON* 23, 171 (Merrill D. Peterson ed., 1975).

will of the society enounced by the majority of a single vote, as sacred as if unanimous, is the first of all lessons in importance . . . .<sup>156</sup>

William Blackstone, the period's most influential Anglo-American legal thinker, put the point even more bluntly, declaring that, under the British system, "[i]n each house the act of the majority binds the whole."<sup>157</sup> This same understanding surfaced again in the *Commentaries* of Joseph Story, who observed that the Constitution's two-thirds-vote rule for impeachment convictions "deserted" the general principle of "all legislative bodies," under which a "mere majority make the decision."<sup>158</sup> In sum, during the

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<sup>156</sup> Letter from Thomas Jefferson to Baron F.H. Alexander Von Humboldt (June 13, 1817), in 10 THE WRITINGS OF THOMAS JEFFERSON 88, 89 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899). Jefferson's writings abound with such proclamations. See generally Thomas Jefferson, *Notes on the State of Virginia*, in THE PORTABLE THOMAS JEFFERSON, *supra* note 155, at 171 (citing majority rule as "the natural law of every assembly of men, whose numbers are not fixed by any other law"); Thomas Jefferson, *Observations on the Article États-Unis Prepared for the Encyclopedie*, in 4 THE WRITINGS OF THOMAS JEFFERSON 158, 173 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1894) ("[America is] a country where the will of the majority is the law . . . ."); Thomas Jefferson, *The Anas*, in 1 THE WRITINGS OF THOMAS JEFFERSON 154, 215 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1892) ("[T]he will of the majority honestly expressed should give law."); Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON 86, 90 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1895) ("[T]he fundamental law of every society[] [is] the *lex majoris partis*, to which we are bound to submit."); Letter from Thomas Jefferson to the Democratic Citizens of the County of Adams, Pennsylvania (Mar. 20, 1808), in 5 THE WRITINGS OF THOMAS JEFFERSON 262, 262 (H.A. Washington ed., Washington, D.C., Taylor & Maury 1853) ("[A] nation ceases to be republican only when the will of the majority ceases to be the law."); Letter from Thomas Jefferson to the Deputies of the Cherokee Upper Towns (Jan. 9, 1809), in 8 THE WRITINGS OF THOMAS JEFFERSON 228, 229 (H.A. Washington ed., New York, Derby & Jackson 1859) ("Our way is . . . to consider that as law for which the majority votes."); Letter from Thomas Jefferson to George Washington (Sept. 9, 1792), in 6 THE WRITINGS OF THOMAS JEFFERSON 101, 103 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1895) ("[T]he measures of the fair majority . . . ought always to be respected."); Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), in 4 THE WRITINGS OF THOMAS JEFFERSON 473, 479 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1894) ("[I]t is my principle that the will of the majority should always prevail."); Letter from Thomas Jefferson to John Breckenridge (Jan. 29, 1800), in 7 THE WRITINGS OF THOMAS JEFFERSON 416, 417 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1896) (stating that the *lex majoris partis* is a "fundamental law of nature, by which alone self government can be exercised by a society"); Letter from Thomas Jefferson to William Carmichael (June 3, 1788), in 5 THE WRITINGS OF THOMAS JEFFERSON 22, 25 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1895) (endorsing "the principle that the majority must give the law"); Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), available at [http://avalon.law.yale.edu/19th\\_century/jefinaul.asp](http://avalon.law.yale.edu/19th_century/jefinaul.asp) ("[A]bsolute acquiescence in the decisions of the majority[] [is] the vital principle of republics . . . ."); *The Papers of Thomas Jefferson*, PRINCETON UNIV., <http://www.princeton.edu/~tjpapers/index.html> (last visited Aug. 6, 2012).

<sup>157</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*181.

<sup>158</sup> 2 STORY, *supra* note 45, § 776, at 247 (adding that the two-thirds-vote impeachment-conviction rule might have been challenged on this ground); see *id.* § 887, at 354 (noting that the veto override power is based in part on the principle that "all laws . . . passed might, at any time, be repealed at the mere will of the majority"); *id.* § 1091, at 539 (opining that the rejection of supermajority voting rules for navigation acts stemmed in part from "the general impropriety of allowing the minority in a government to control, and in effect to govern all the legislative powers of the majority").

period of the framing, there existed a firm understanding that, when parliamentary bodies legislate, they do so by majority vote.

In the face of these pronouncements, Professors McGinnis and Rappaport direct attention to a general treatment of parliamentary process written by Luther Stearns Cushing in 1856. In one passage in his treatise, Cushing wrote:

[T]he law of the majority is universally admitted in all legislative assemblies; unless, in reference to particular cases, persons or circumstances, a different rule is prescribed, by some paramount authority, or is agreed upon beforehand and established by the assembly itself, by which a smaller number is permitted, or a larger number is required, to do some particular act. But even in these cases, it is the will of the majority that governs; because it is by a major vote, in the first instance, that the rule itself is established . . . .<sup>159</sup>

Based on this text, McGinnis and Rappaport claim that “it was understood in the nineteenth century that legislatures could enact supermajority rules” applicable to the enactment of bills.<sup>160</sup> These sentences, however, do not speak directly to the passage of bills (particularly bills in the Federal Congress), as opposed to, for example, the management of internal proceedings pursuant to mechanisms such as agenda-setting and debate-cloture rules.<sup>161</sup> What is more, in a nearby passage that all but tracks the “passed” language of Article I, Cushing declared without qualification that “whatever is regularly agreed upon by a majority of the members of a

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<sup>159</sup> CUSHING, *supra* note 59, para. 414, at 168 (footnote omitted).

<sup>160</sup> McGinnis & Rappaport I, *supra* note 6, at 493.

<sup>161</sup> See, e.g., *Open Letter*, *supra* note 6, at 1541 (recognizing the potential propriety under the Rules of Proceedings Clause of a supermajority voting rule to suspend the rules in exceptional circumstances because such a rule does not involve substantive decisionmaking but instead the sequencing of business). The point is that the Cushing statement on its face is uncontroversial, because some tasks—such as committee reviews and interchamber negotiations—are unquestionably assignable to groups other than legislative majorities. However, as this article makes clear—and as the unanimous Court recognized in *Ballin*—the enactment of bills other than by majority vote falls into a different category. It is noteworthy in this regard that the quotation from the Cushing treatise endorses action, in certain contexts, not only by a “larger number” than a majority but also and equally action by a “smaller number.” As explained elsewhere, however, the possibility of passing laws by submajority vote has been rejected both in *Ballin* and by the modern Court. See *supra* notes 132–34 and accompanying text. In addition, Cushing endorses at most nonmajority voting rules only “in reference to *particular* cases, persons or circumstances.” See text accompanying *supra* note 159 (quoting this language) (emphasis added). The Any-Voting-Number Theory itself, however, goes much further and thus violates even the most generous reading of Cushing because it countenances supermajority voting rules that apply to *all* bills in an across-the-board fashion. Also of particular significance is the strong indication given by Cushing elsewhere in his treatise that any power to formulate bill-related supermajority voting rules would have no application to the Federal Congress. This inference stems from his unqualified observation that “[i]n the constitution of the United States . . . it is provided, that the [Vice President, in his capacity as presiding officer of the Senate] shall give the casting vote, when the body over which he presides is equally divided.” CUSHING, *supra* note 59, para. 298, at 115 (emphasis added). See generally *supra* Part I.B (discussing the inherent incompatibility of supermajority voting rules with the grant to the Vice President of the casting vote power).

legislative assembly is a thing ‘done *and past*’ by that body.”<sup>162</sup> This statement, it bears emphasis, is particularly suggestive of the meaning of the Presentment Clause because sources from the time demonstrate conclusively that the terms “passed” and “past” were interchangeable under then-prevailing usage.<sup>163</sup> Considered as a whole, then, the passages from Cushing may well cut more against, than for, the Any-Voting-Number Theory. But even if that reading of the textual tea leaves is inadmissible, Luther Cushing, though a fine parliamentarian, was not Thomas Jefferson or a member of his generation.<sup>164</sup> And it is the intensely majority-rule-centered ideas of Jefferson—together with those of Locke, Blackstone, Madison, Hamilton, Wilson, Franklin, and their contemporaries—that dominated the framing of the American Constitution.<sup>165</sup>

The mandatory norm of legislative majoritarianism that these Framers embraced took hold in large measure because it made good sense. We will soon see (in sections B, C and D) why it made sense in light of then-dominant philosophical outlooks and political realities. The point here (that is, in the remainder of section A) is something else—namely, that the norm dovetailed with background *legal* doctrines of which the Framers were well aware. The most salient of those doctrines were the settled prohibition on entrenching legislative programs and the canon of interpretation that eschews absurd results.

2. *The Anti-Entrenchment Rule.*—Empowering the chambers of Congress to install supermajority voting rules for enacting laws would raise pressing tensions with the long-recognized ban on legislative entrenchment. At the core of Britain’s unwritten Constitution, solidly in place at the time of the framing, stood one idea: “Acts of parliament derogatory from the power of subsequent parliaments bind not.”<sup>166</sup> This rule against legislative entrenchment was carried over from the mother country into American

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<sup>162</sup> CUSHING, *supra* note 59, para. 412, at 167 (emphasis added).

<sup>163</sup> 2 WEBSTER, *supra* note 35, at 31. Of no less importance, this treatment of the word “past” in British law was commonplace in the preconstitutional period. See, e.g., LAWS AND ACTS *PAST* IN THE FOURTH AND LAST SESSION OF THE SECOND PARLIAMENT OF OUR MOST HIGH AND DREAD SOVERAIGN CHARLES THE SECOND 1673–74 (Edinburgh, His Majesty’s Printers 1674) (emphasis added). Nor should this parallelism be surprising because “[p]ast originated simply as a variant spelling of *passed*, the past participle of *pass*.” JOHN AYTO, WORD ORIGINS: THE HIDDEN HISTORIES OF ENGLISH WORDS FROM A TO Z 369 (2d ed. 2005).

<sup>164</sup> Not surprisingly, Professors McGinnis and Rappaport themselves emphasize the parliamentary writings of Thomas Jefferson, albeit in other contexts. See McGinnis & Rappaport II, *supra* note 6, at 332 n.26 (citing these materials regarding the “right and duty” of members to vote); *id.* at 333 n.28 (same).

<sup>165</sup> See King, *Deconstructing Gordon*, *supra* note 6, at 178 n.212 (dismissing Cushing’s statement as “to say the least, less than compelling”).

<sup>166</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*90; see also Chafetz, *supra* note 18, at 1029 (relying on Bacon, Coke, Petyt, Blackstone, and Dicey in asserting that “canonical sources on English law certainly support a constitutional principle against legislative entrenchment”).

law,<sup>167</sup> and the Supreme Court has endorsed it time and again.<sup>168</sup> For instance, the Court has recognized that “no one legislature can, by its own act, disarm their successors of any . . . powers.”<sup>169</sup> The Court has also declared: “The latter [legislatures] have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality.”<sup>170</sup>

Supermajority voting rules raise difficulties under this principle because any such rule makes it harder for Congress to act, in whatever field the rule touches, than was the case before the rule came to be.<sup>171</sup> Consider, for example, a new rule that provides that the Senate cannot pass civil rights laws except by a two-thirds vote. This rule would lock in federal civil rights law as it stood on the date of the rule’s adoption because that law could no longer be modified except by way of supermajority, rather than simple majority, action. The resulting discordance between supermajority voting rules and the anti-entrenchment principle could not be more apparent.<sup>172</sup>

Defenders of the Any-Voting-Rule Theory object to this analysis by recurring to a now-familiar centerpiece of their thinking. They say that supermajority voting rules do not unduly entrench preexisting law because the houses of Congress retain the “ultimate power” to repeal those rules (including, for example, our hypothetical two-thirds-vote civil rights rule) by majority vote.<sup>173</sup> As we already have seen, however, this argument runs

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<sup>167</sup> See, e.g., AMAR, *supra* note 45 (manuscript at 449, 476 n.56) (noting that there is “[c]lear evidence that the founding generation accepted” the anti-entrenchment principle); Chafetz, *supra* note 18, at 1033 (concluding that “American history, like the British, . . . evinces a strongly anti-entrenchment view”); John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL’Y 181, 204 (2003); Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379, 404–05; Fisk & Chemerinsky, *supra* note 11, at 247.

<sup>168</sup> See, e.g., *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932) (“[T]he will of a particular Congress . . . does not impose itself upon those to follow in succeeding years.”); *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1898) (noting the “general policy” that “each subsequent legislature has equal power to legislate”).

<sup>169</sup> *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 431 (1853).

<sup>170</sup> *Newton v. Comm’rs*, 100 U.S. 548, 559 (1879).

<sup>171</sup> See Chafetz, *supra* note 18, at 1034.

<sup>172</sup> To be sure, some commentators have challenged the validity of the anti-entrenchment doctrine altogether. See Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002). But the Court has embraced the principle over many years while never signaling reservations about its deep historical roots or its centrality to American law. See *supra* notes 168–70 and accompanying text.

<sup>173</sup> See *supra* notes 92–93 and accompanying text. The McGinnis-Rappaport position on the power of majorities to alter rules by majority vote is not universally shared. In particular, Virginia Seitz and Joseph Guerra argue that there is no constitutional bar on requiring supermajority votes to change rules even if there is such a bar with respect to changing laws. See Virginia A. Seitz & Joseph R. Guerra, *A Constitutional Defense of “Entrenched” Senate Rules Governing Debate*, 20 J.L. & POL. 1, 3 (2004). From this vantage point, the Any-Voting-Number Theory must fail because no plausible view of the anti-entrenchment principle can tolerate supermajority requirements both for rules *and* for laws.

up against hard reality because supermajority rules, once promulgated, do have continuing effects regardless of the doctrines that govern their repealability.<sup>174</sup> Those effects, moreover, are magnified in the Senate because it has always been viewed as a “continuing body,” with the consequence that its rules remain operative, often for decades, until affirmatively singled out for alteration.<sup>175</sup> For these reasons, our hypothesized civil-rights-law supermajority voting rule makes it harder to adopt civil rights laws than was the case before—a result that defeats the “perfect equality” of legislatures over time that the prohibition on entrenchment purports to vindicate.<sup>176</sup>

The Framers knew the anti-entrenchment doctrine well.<sup>177</sup> It was a central—perhaps *the* central—doctrine of then-extant British constitutional law.<sup>178</sup> There is no reason to believe that the Framers lost track of that doctrine as they shaped the charter of 1787. As a result, good reason exists to believe they meant to endorse the mode of passing laws most attuned to that doctrine’s purposes and commands. That mode reflects an uncomplicated idea—namely, that *all* legislatures at *all* times will enact *all* laws by simple majority vote.

3. *Absurd Results.*—There is another reason rooted in background law for concluding that the Framers embraced an unbridgeable mandate of legislative majoritarianism. The reason is that a rejection of that mandate is in tension with the canon of construction that abjures “absurd results.”<sup>179</sup> Professor Rubinfeld’s argument against the Any-Voting-Number Theory centered on this point.<sup>180</sup> He suggested, for example, that the theory would authorize a “Big Three Rule,” under which votes cast by House members from California, New York, and Texas would not count in determining the fate of a bill.<sup>181</sup> In reaching this conclusion, Professor Rubinfeld reasoned that the Big Three Rule should be no more constitutionally problematic than Rule XXI(5)(c), if in fact the Rules of Proceedings Clause permits the House to fiddle with voting rules in wide-open fashion. Professors

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<sup>174</sup> See *supra* notes 130–31 and accompanying text.

<sup>175</sup> See Aaron–Andrew P. Bruhl, *Burying the “Continuing Body” Theory of the Senate*, 95 IOWA L. REV. 1401, 1406 (2010).

<sup>176</sup> *Newton v. Commr’s*, 100 U.S. 548, 559 (1879).

<sup>177</sup> See McGinnis & Rappaport II, *supra* note 6, at 345.

<sup>178</sup> See *supra* note 166 and accompanying text.

<sup>179</sup> E.g., *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*91 (agreeing that the law eschews “absurd consequences, manifestly contradictory to common reason”).

<sup>180</sup> See Rubinfeld, *supra* note 6, at 79–80. Professor Chafetz has also advanced an absurd-results argument, claiming that if the word “passed” permits either house of Congress to impose supermajority voting requirements, then the word “elected” in the Seventeenth Amendment should logically permit that house to install a supermajority election requirement to displace incumbent House Members or Senators. Chafetz, *supra* note 18, at 1013.

<sup>181</sup> See Rubinfeld, *supra* note 6, at 79–80.

McGinnis and Rappaport responded by claiming that neither the Big Three Rule nor any of several other nightmarish voting methods Professor Rubinfeld had concocted would pass constitutional muster under the theory they espoused. As for the Big Three Rule, it could not stand because it would violate the House Composition Clause, which states that “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States,”<sup>182</sup> thus implying that each House member must receive one equally weighted vote.<sup>183</sup> According to Professor Rubinfeld, however, the making of this argument hoisted Professors McGinnis and Rappaport on their own petard. The problem, he asserted, was that deriving an unabridgeable one-equally-weighted-vote rule from the sparse language of the House Composition Clause (which on its face speaks only to membership in the House, rather than to voting rules) entailed an even more adventurous non-text-based interpolation than deriving a fixed principle of majority voting from the word “passed” in Article I, Section 7.<sup>184</sup>

One need not work through each of Professor Rubinfeld’s feared applications of the McGinnis-Rappaport approach—and each of his adversaries’ intricate rejoinders—to come away with nervousness about the approach itself. The very existence of such vexing quandaries throws the Any-Voting-Number Theory into a negative light, at least if one values the avoidance of needless complexity in basic rules of law. And the problem is worse—indeed, much worse—than that. For whatever one concludes about the Big Three Rule, the constitutional principle advanced by Professors McGinnis and Rappaport invites the installation of a bizarre assortment of congressional voting methodologies.

One set of problems concerns the interaction of different clauses in the Constitution. We have already seen that the Any-Voting-Number Theory produces one serious anomaly—namely, that Congress can subject itself to a higher bar to pass a law than to override a presidential veto.<sup>185</sup> The Treaty Clause raises a related problem. Because of the extraordinary characteristics of treaties, Article II requires the Senate to approve them by a two-thirds vote. Of particular importance for our purposes, the Treaty Clause on its face forecloses the imposition of any stricter ratification benchmark by expressly stating that treaties come into effect “provided two thirds of the

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<sup>182</sup> U.S. CONST. art. I, § 2, cl. 1.

<sup>183</sup> See McGinnis & Rappaport II, *supra* note 6, at 333 n.28.

<sup>184</sup> See Rubinfeld, *supra* note 6, at 83. There is more to be said about the reliance Professors McGinnis and Rappaport place on the House and Senate Composition Clauses. Of particular importance, as we have seen, they find latent in these Clauses a strong principle that each House member (and presumably each Senator) must have an equally weighted vote. Recognizing this norm of equality, however, puts supermajority rules in danger because such rules afford bill opponents and bill proponents, very different—and thus unequal—levels of decisionmaking power. See *infra* notes 287–90 and accompanying text.

<sup>185</sup> See *supra* Part I.A.

Senators present concur.”<sup>186</sup> The topsy-turvy result is hard to miss. It arises because the Framers signaled the need for a much-heightened level of legislative consensus in the distinctly important treaty-ratification context, as opposed to the routine-legislation context. Under the Any-Voting-Number Theory, however, the Senate is free to push past a two-thirds voting requirement to enact even the most mundane of bills, while not being free to push past that threshold to approve the most consequential of treaties. Indeed, the theory permits promulgation of rules under which mundane laws must be passed by 75%, 80%, or even greater majorities in *both* the House and Senate, while treaties automatically become federal law upon a 67% vote of the Senate alone. Few will question that an endorsement of this far-more-caution-for-mundane-laws-than-for-treaties outcome would be troublingly strange.<sup>187</sup>

Another set of difficulties is raised by submajority voting rules, which Professors McGinnis and Rappaport do not hesitate to defend.<sup>188</sup> Might it

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<sup>186</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>187</sup> Another form of intertextual problem is raised by the Constitution’s treatment of senatorial consent to presidential nominations. *See id.* The governing clause requires, without more, “the . . . Consent of the Senate” for the appointment of “Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States.” *Id.* Apparently, under the Any-Voting-Number Theory, the Senate could specify by rule that its “consent” is given only if it votes by more than 70% or 80% to approve a presidential appointment. In other words, the Senate could impose on itself a numerical test for approving appointments that is more exacting than the unalterable two-thirds approval requirement for treaties, even though the Framers went out of their way to make it more difficult to approve treaties than to approve presidential appointments.

A kindred problem is posed by the Constitution’s Expulsion Clause, *id.* art. I, § 5, cl. 2, which on its face installed a much more exacting voting rule for expelling members based on wrongdoing than was applicable to excluding them under the Qualifications Clause, *id.* art. I, § 5, cl. 1, due to technical ineligibility. *See Powell v. McCormack*, 395 U.S. 486, 522 (1969). The Constitution’s terms, however, do not explicitly preclude either House from raising the requisite vote for exclusion to two-thirds or three-quarters or even 90%. The self-imposition of any such rule, however, would contravene the Framers’ plain plan to differentiate between these two distinct vehicles for restricting legislative membership. Notably, in defending what became the Expulsion Clause, Madison argued that “the right of expulsion . . . was too important to be exercised by a bare majority of a quorum.” 2 FARRAND, *supra* note 50, at 254. As a result, “[h]e moved that ‘with the concurrence of 2/3’ might be inserted between may & expel.” *Id.* Gouverneur Morris responded that “[t]his power may be safely trusted to a majority.” *Id.* The underlying supposition of both men seems clear: This choice between the vote of a “majority of a quorum” or “the concurrence of 2/3” was binary. There was no suggestion that one chamber might adopt its own rule, under which it would be harder to exclude members for failing to meet technical qualification requirements than to expel them for serious wrongdoing.

<sup>188</sup> *See McGinnis & Rappaport I, supra* note 6, at 490 n.38. Many of us will sense that the Any-Voting-Number Theory’s support of submajority voting rules faces such serious trouble under core democratic principles that those rules cannot possibly stand. Of no small importance, the Supreme Court has indicated its agreement with this conclusion not only in *United States v. Ballin*, 144 U.S. 1, 5–6 (1891), but also in *INS v. Chadha*, 462 U.S. 919, 958 (1983). *See* text accompanying *supra* note 133. And submajority voting rules clash as well with early pronouncements of key authorities. *See, e.g.,* 2 STORY, *supra* note 45, § 699, at 180–81 (noting, in light of the Constitution’s structuring of the House and the Senate, that “[n]o law or resolution can be passed without the concurrence, first of a majority of the people, and then of a majority of the states”). Supermajority-voting-rule defenders might seek to



really be, for example, that a bill can become law based on the affirmative votes of only one Senator and only one House member followed by presidential approval? So long as that result is supported by House and Senate rules, this exotic style of lawmaking would be permissible under the Any-Voting-Number Theory.<sup>189</sup> What if the Senate specified by rule that any measure adopted by majority vote in the House is deemed passed so long as fifteen (or ten or five) Senators vote for it? Such a result would in effect rule-make the Senate out of existence—or at least compromise in the most extreme way that body’s intended checking function.

These difficulties take on an even sharper focus when one recalls that the Any-Voting-Number Theory invites creation of any mix of nonmajority voting rules for any mix of legislative subjects. Different bill-passing rules—of either the supermajority or submajority genre—might be established for laws that deal with tax increases, benefit cuts, agriculture, railroads, banking, and on and on.<sup>190</sup> Proliferating definitional ambiguities would wait in the wings, together with government-delegitimizing protests about unequal access to the federal lawmaking process.<sup>191</sup>

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sidestep these problems by stipulating that the Constitution does impose an unmodifiable requirement of at least a majority vote to pass a law. This response, however, proves too much because the essential problem with supermajority rules (particularly on the view of the Framers themselves) is that they channel controlling voting power to a minority of legislative dissenters. *See infra* notes 233–61 and accompanying text. At the least, such a concession would again signal that the majority voting norm is not a mere default rule subject to freestyle modification under the Rules of Proceedings Clause. *See supra* notes 92–101 and accompanying text. But if that is so, why should the majority voting norm operate as only a *half*-default rule—permitting self-imposed *supermajority* voting requirements while precluding *submajority* voting rules promulgated under the same supposed grant of authority? To say the least, these difficulties cut against acceptance of the Any-Voting-Number Theory.

<sup>189</sup> *See King, Deconstructing Gordon, supra* note 6, at 176–77 (noting that some applications of the Any-Voting-Number Theory would “[o]bviously . . . make a mockery . . . of . . . any notion of democracy”).

<sup>190</sup> *See McGinnis & Rappaport I, supra* note 6, at 489 & n.31 (acknowledging that the Any-Voting-Number Theory could produce a “proliferation” of supermajority voting rules on different subjects as well as rules that establish “unusual or odd proportions” to pass laws; also claiming, however, that “[o]ne would expect a chamber to choose round numbers” in part “to avoid . . . ridicule” (internal quotation mark omitted)).

<sup>191</sup> That theory, for example, welcomes congressional establishment of supermajority rule for enacting tax laws. But is a user fee a tax? Fines, penalties, or interest provisions associated with the nonpayment of taxes? Always? Which ones? It is telling in this regard that Professors McGinnis and Rappaport acknowledge the value of certainty in this area by arguing that the approach offered here should be rejected in part because it involves a “subjective standard” that would “create chaos” as to “what rules were valid.” McGinnis & Rappaport I, *supra* note 6, at 484. The approach offered here, however, is of a distinctly bright-line nature because it targets only rules that, in explicit numerical terms, require a submajority or a supermajority vote to pass laws. Whether this principle reaches other supermajority devices, such as the Senate’s filibuster rules, is an entirely separate question. *See Rubinfeld, supra* note 6, at 88 (distinguishing filibuster rules because they do “not purport to alter the Constitution’s rules of recognition” (emphasis omitted)). Even if it is thus applicable, however, such a conclusion would hardly breed “chaos”; it would simply breed a change in Senate filibuster practice. In

These problems are all the more acute because bill-related voting-number requirements are rules of recognition—that is, part of the foundational body of law that determines whether new rights and duties have been created at all. The Framers appreciated that rules of recognition call for the highest levels of clarity and ease of application.<sup>192</sup> Indeed, the Supreme Court in *Chadha* trumpeted exactly this point. There, as we have seen, the question was whether Congress could establish a procedure that permitted one or both chambers to overturn rules promulgated by agencies without presentment to the President. Highlighting the value of simplicity in rules of recognition, the Court scuttled this “political invention”<sup>193</sup> because it conflicted with the Framers’ “single, finely wrought and exhaustively considered, procedure” for enacting laws.<sup>194</sup>

The procedure for enacting laws envisioned by the Any-Voting-Number Theory was not “exhaustively considered” by the Framers; indeed, the Framers never considered it at all.<sup>195</sup> Nor is that procedure either “single” or “finely wrought.” Instead, the Any-Voting-Number Theory would tolerate a crazy quilt of voting rules in the House and yet another crazy quilt in the Senate. There is no evidence anywhere that the Framers favored such an ahistorical and complicated approach to formulating rules of recognition. The value of legal clarity thus conjoins with the wisdom of avoiding absurd results to confirm that the Framers’ embraced a system of acting on all bills by simple majority vote.<sup>196</sup>

### B. Republicanism

The foregoing discussion shows why the Any-Voting-Number Theory trenches on a settled norm of parliamentary practice, as well as background legal doctrines that the Framers knew well. The Framers, however, were not only learned in the law. They were also students of philosophy. Indeed, they

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any event, operative legal principles cannot be ignored simply because honoring them involves disruption of currently prevailing practices. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>192</sup> *See, e.g.*, 1 FARRAND, *supra* note 50, at 167 (statement of John Dickinson) (favoring the authority of Congress to reject state laws in all cases rather than some because “[h]e thought the danger greater” from a choice “[t]o leave the power doubtful,” thus “opening another spring of discord”). *See generally* Kent Greenawalt, *The Rule of Recognition and the Constitution*, 85 MICH. L. REV. 621, 636 (1987) (emphasizing the need for “principles of authoritative determination” to be “clear and settled,” so that “a legal order can operate . . . smoothly”); McGinnis & Rappaport I, *supra* note 6, at 500 (recognizing that “formal and determinate rules” are “particularly necessary” in “assessing the constitutionality of rules that determine whether congressional legislation is law”).

<sup>193</sup> *Chadha*, 462 U.S. at 945 (internal quotation marks omitted).

<sup>194</sup> *Id.* at 951; *see also* *Clinton v. City of New York*, 524 U.S. 417, 438–40 (1998) (reaffirming importance of a “finely wrought” constitutional lawmaking process in invalidating Congress’s vesting of a “line item veto” power in the President).

<sup>195</sup> *See supra* note 144 and accompanying text.

<sup>196</sup> *See, e.g.*, Bloch, *supra* note 3, at 5 (concluding that Rule XXI(5)(c) is inconsistent with *Chadha*).

were philosophers who lived in an age of unequaled achievement in fertile reflection on the nature of political institutions.

What values marked the political philosophy of the Framers? Above all else, they devoted themselves to the cause of republican self-rule. What is more, their devotion to this idea was acutely personal and intense, because family members, colleagues, neighbors, and friends had fought and died for this cause. As a result, a commitment to republicanism lay at the root of everything the Framers did—so much so that “the general form and aspect of the government” had to be “*strictly* republican” because “no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government.”<sup>197</sup> As Madison wrote in *The Federalist No. 39*: “If the plan of the Convention therefore be found to depart from the republican character, its advocates must abandon it as no longer defensible.”<sup>198</sup>

What, in the Framers’ view, was the relationship between republican self-rule and legislative majoritarianism? On this point, we have powerful evidence. In *The Federalist*, Madison reflected with care on the place of supermajority voting rules in the American system. He began his analysis in his most famous essay, *No. 10*, by explaining that “[w]hen a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens.”<sup>199</sup> (Note here the underlying assumption that majority factions will be able to oppress minorities precisely because they will wield power by majority vote.) According to Madison, it followed that: “To secure the public good, and private rights, against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our enquiries are directed . . .”<sup>200</sup> (Note again that the “danger of such a faction” was the danger of oppression by way of majority vote.)

Madison’s musings did not stop there. He went on to prescribe an antidote to the maladies posed by majority factions. That antidote did not involve supermajority voting rules for an obvious reason: such majority-defeating requirements were in their nature incompatible with “the spirit and the form of popular government.”<sup>201</sup> Instead, the proper cure for

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<sup>197</sup> THE FEDERALIST NO. 39, *supra* note 9, at 250 (James Madison) (emphasis added).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* NO. 10, at 60–61 (James Madison).

<sup>200</sup> *Id.* at 61.

<sup>201</sup> *Id.* This is so because, in the minds of the Framers, popular sovereignty and majority rule were inextricably interlinked. *See, e.g.,* Amar, *supra* note 141, at 760 (emphasizing that “republican principles,” deemed critical by Madison and others, “were rooted in majority rule popular sovereignty” (quoting THE FEDERALIST NO. 43, *supra* note 9, at 291 (James Madison)) (internal quotation mark

majoritarian overreaching began with the idea that “the majority, having such co-existent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.”<sup>202</sup> Put another way, generous portions of government power were to be channeled to the expansive republic that was the nation, within which many interests would clash; stable majorities would be hard to form; and nefarious plans of factional abuse would be hard to hatch because they would be hard to hide.<sup>203</sup> In addition, formation of the large republic would lead to creation of populous voting districts that in turn would produce leaders best situated to withstand the shortsighted pressures of powerful demagogic movements.<sup>204</sup> Finally, structural components of the self-governing unit—such as the separation of federal powers, the requirement of congressional bicameralism, and the retention of states as competing centers of loyalty and power—would cut down the risk that a “sudden breeze of passion” or “transient impulse” would lead to majority oppression of helpless minorities.<sup>205</sup> As Madison observed in concluding *No. 10*: “In the *extent and proper structure* of the Union, therefore, we behold a Republican remedy for the diseases most incident to Republican Government.”<sup>206</sup>

Proponents of the Any-Voting-Number Theory try to tap into this rhetoric by arguing that one part of the “structure of the Union” that offered a “remedy” for majority misdeeds lay in the power of the House and the Senate to place supermajority voting constraints upon themselves. The flaw in this argument is that it does not propose a “Republican remedy” for the diseases of majority faction; instead it proposes what is in its nature a *counter*-Republican remedy. What is more, it propounds a structural check on majority tyranny that the authors of *The Federalist*, who were all but obsessive about this topic, never paused to mention—or even hint at—as being part of the constitutional plan. Most important of all, this argument fails to appreciate what the Framers did say about restraints on majority voting, including as a curative for majority abuses.

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omitted)); King, *Deconstructing Gordon*, *supra* note 6, at 133 (“[P]opular sovereignty [is] a notion that gains practical currency through the fundamental principle of majority rule.” (footnote omitted)). James Wilson made much the same point at the Pennsylvania ratification convention. Regarding our government, he declared, “Who are the majority in this assembly? Are they not the people?” Remarks of James Wilson to the Pennsylvania Convention (Dec. 11, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 62, at 550, 553. Turning to the constitutional plan, he declared that “the Congress” was “to be a faithful representative of the people”—that is, both as to the people as whole (in the House) and to the people as state-defined groups (in the Senate). Speech of James Wilson in the Philadelphia State House Yard (Oct. 6, 1787), in 2 DOCUMENTARY HISTORY, *supra* note 62, at 167, 169.

<sup>202</sup> THE FEDERALIST NO. 10, *supra* note 9, at 61 (James Madison).

<sup>203</sup> *Id.* at 62.

<sup>204</sup> *Id.* at 63.

<sup>205</sup> *Id.* NO. 71, at 482 (Alexander Hamilton).

<sup>206</sup> *Id.* NO. 10, at 65 (James Madison) (emphasis added).

Madison turned to these matters in *The Federalist No. 58*. He recognized there that rules that, “in particular cases, if not in all,” call for “more than a majority of a quorum for a decision” could have produced “some advantages.”<sup>207</sup> In particular, such supermajority voting rules “might have” provided “another obstacle . . . to hasty and partial measures.”<sup>208</sup> The problem was that “these considerations are outweighed by the inconveniencies in the opposite scale.”<sup>209</sup> Worries arose in part from the practical consequences that any supermajority voting rule could have, particularly because “an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences.”<sup>210</sup> But that was not the worst of it: “In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority.”<sup>211</sup>

Close attention to the precise wording of Madison’s statement is well advised. Speaking directly about how “new laws” were “to be passed,” the Father of the Constitution did not say that legislative majoritarianism was merely important; he declared the principle to be “fundamental.” Nor did he say that legislative majoritarianism was supported by one of several fundamental principles; instead supermajority voting rules offended “*the* fundamental principle of free government.”<sup>212</sup> Most important of all, Madison never stated or suggested that his paean to majority voting was aimed at justifying only a default rule. In all of this, as usual, Madison chose his words with care. And his message, rooted in foundational concerns, does not square with a system under which each chamber of Congress can dispense willy-nilly with legislative majoritarianism as the operative method for passing the laws of the land.<sup>213</sup>

Madison’s reflections did not stand alone. Indeed, the republican line of thinking that he espoused pervaded the work of the framing period.<sup>214</sup> The delegates of the Philadelphia Convention, for example, had little

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<sup>207</sup> *Id.* NO. 58, at 396 (James Madison).

<sup>208</sup> *Id.* at 396–97.

<sup>209</sup> *Id.* at 397.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* (emphasis added).

<sup>213</sup> See, e.g., Lieber & Brown, *supra* note 86, at 2350 (reading THE FEDERALIST to show that the Framers “clearly contemplated” majority voting on all bills).

<sup>214</sup> See, e.g., Amar, *supra* note 141, at 765 (noting that “former Philadelphia Convention delegate Caleb Strong observed that ‘in republicks, the opinion of the majority must prevail’” (quoting RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 143 (1969))); *supra* note 156 (noting Jefferson’s endorsement of this view). See generally Amar, *supra* note 141, at 757 (“[T]his linkage between Republicanism and majority rule runs throughout . . . Founding era discourse more generally.”).

difficulty agreeing that members of the House should be elected by the people. The reason why, as James Wilson explained, was that it “will then come nearer to the will or sense of the majority.”<sup>215</sup> Alexander Hamilton took a view of majority voting rules precisely parallel to that of Madison when he wrote that it is a “fundamental maxim of republican government, which requires that a sense of the majority should prevail.”<sup>216</sup> Again, close attentiveness to Hamilton’s word choice is important. The maxim of majority rule of which Hamilton spoke was not just significant; it was “fundamental.” And, as with Madison, the majority-vote principle he endorsed was not put forward as only a weak default rule, but as a strong principle under which “the sense of the majority *should* prevail.”<sup>217</sup>

Professors McGinnis and Rappaport suggest that on close inspection these statements offer little useful insight into the Framers’ views on legislatively self-imposed nonmajority voting rules. They claim, for example, that the pronouncements of *No. 58* are of limited significance because at the Convention “Madison argued for . . . a reversal [of the majority-vote norm] so many times that it is hard to credit that he believed it was fundamental.”<sup>218</sup> On this point, McGinnis and Rappaport go several bridges too far. To the extent that Madison endorsed supermajority rules at the Convention, he did so—like other delegates—only for “special cases” that “merited special consideration.”<sup>219</sup> His actions were thus entirely consistent with his later public assertions that legislative majoritarianism reflects a “fundamental principle.”<sup>220</sup> In addition, while Madison advocated

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<sup>215</sup> 1 FARRAND, *supra* note 50, at 142 (statement of James Wilson).

<sup>216</sup> THE FEDERALIST NO. 22, *supra* note 9, at 139 (Alexander Hamilton).

<sup>217</sup> *Id.* (emphasis added). For a similar view, see King, *Use of Supermajority*, *supra* note 6, at 390–92.

<sup>218</sup> John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 720–21 (2002).

<sup>219</sup> Neals-Erik William Delker, *The House Three-Fifths Tax Rule: Majority Rule, the Framers’ Intent, and the Judiciary’s Role*, 100 DICK. L. REV. 341, 349–50 (1996). See generally *infra* note 220 and accompanying text (detailing Madison’s proposals).

<sup>220</sup> THE FEDERALIST NO. 58, *supra* note 9, at 397 (James Madison). Careful consideration of Madison’s actions at the Constitutional Convention confirms this point. At one point, for example, Madison proposed a supermajority requirement for rejecting judicial appointments. 2 FARRAND, *supra* note 50, at 80 (statement of James Madison). On another occasion he proposed that Congress should be able to veto state laws by way of supermajority action. As with the Constitution’s treatment of expulsion and treaty ratification, however, these proposals did not involve ordinary lawmaking processes, and the latter proposal came only as a fallback after Madison’s initial proposal of a majority-vote congressional override of state laws ran into tough sledding. See 1 *id.* at 21 (setting forth paragraph 6 of the Virginia Plan). It is true that Madison, at one point, proposed a two-thirds voting rule for the taxation of exports. He did so, however, only as a “lesser evil than a total prohibition” on taxing exports, 2 *id.* at 363—an idea that was gaining momentum at the time (and, indeed, was ultimately successful) in the face of Madison’s vigorous pro-federal-power objections. This effort to secure half-a-loaf acceptance of the federal power to tax exports, subject to a supermajority constraint, shows nothing more than that, in this discrete context, Madison had to choose between: (1) his general commitment to legislative majoritarianism and (2) his all-out opposition to limiting the federal taxing power. That he chose as he

some supermajority rules, all of those rules were to be embedded in the Constitution itself<sup>221</sup>—consistent with the Supreme Court’s reaffirmation in *Ballin* that majority voting must control absent contrary instructions in the “organic law.”<sup>222</sup> In any event, Madison set forth his views on the republican-centered fundamentality of majority voting both prominently and emphatically in *The Federalist*, which Supreme Court Justices and others have long looked to as a distinctly powerful indicator of the Constitution’s original meaning.<sup>223</sup>

Advocates of the Any-Voting-Number Theory also offer a line of historical argument framed at the highest level of generality. They say this: Madison, Hamilton, and others did not specifically exclude the possibility of abandoning majority voting under the Rules of Proceedings Clause. At the same time, they endorsed all sorts of government structures designed to impede action by factious majorities, including presentment, bicameralism, and judicial review. As a result (the argument continues), we should be neither surprised nor troubled to discover within our system the additional

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did hardly reveals Madison to be a rabid antimajoritarian. The proper takeaway instead is that all the delegates—including Madison—viewed these supermajority voting proposals as exceptional, rather than routine, in nature.

In any event, Madison’s entire constitutional philosophy was built on the principle of majority decisionmaking. Thus, in THE FEDERALIST NO. 10, he declared it to be “the republican principle” that the view of “less than a majority” can be defeated by “the majority . . . by regular vote.” THE FEDERALIST NO. 10, *supra* note 9, at 60 (emphasis added). For further examples, see I FARRAND, *supra* note 50, at 318 (statement of James Madison) (“According to the Republican theory . . . , Right & power . . . [are] both vested in the majority . . . .”); *id.* at 315 (statement of James Madison) (suggesting during the Philadelphia Convention that under “the social compact of individuals . . . , a Majority would have a right to bind the rest”); CONSTITUTIONAL CONVENTION DEBATES, *supra* note 102, at 11 (noting that Madison consistently opposed state-based representation in the Senate because “it violated the vital republican principle of majority rule”); Amar, *supra* note 141, at 771 n.89 (noting that Madison in February 1787 declared that “the principles of Republican [Governments] . . . rest on the sense of the majority” (quoting WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 40 (1972)) (internal quotation mark omitted)).

<sup>221</sup> See *supra* note 220.

<sup>222</sup> See *supra* notes 133–34 and accompanying text.

<sup>223</sup> See generally Dan T. Coenen, *A Rhetoric for Ratification: The Argument of The Federalist and Its Impact on Constitutional Interpretation*, 56 DUKE L.J. 469, 471–73 (2006) (detailing extensive reliance on THE FEDERALIST, including by the Supreme Court). Notably, Professors McGinnis and Rappaport take aim at THE FEDERALIST NO. 58 in part by claiming that “in other parts of *The Federalist*, Madison was not at all enthusiastic about simple majority rule.” McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 218, at 721. This statement, however, seeks to pare an apple when the matter at hand involves peeling an orange. Of course, Madison was not “enthusiastic about simple majority rules,” particularly in systems modeled after the Greek city-states. See THE FEDERALIST NO. 10, *supra* note 9, at 61 (James Madison) (declaring that such polities “have ever been spectacles of turbulence and contention” and “as short in their lives, as they have been violent in their deaths”). His statements in NO. 58, however, have nothing to do with that subject. Rather, these statements focus on the voting rules of legislative bodies that operate within a *republican* system—that is, a system that should, can, and does constrain “simple majority rule” through use of checking-and-balancing structures. These were the tools with which Madison sought to combat the excesses of majorities—not by fostering the abandonment of majority voting, which he viewed as the cornerstone of republicanism.

protective mechanism of permitting the legislative branches to impose on themselves supermajority voting restrictions.<sup>224</sup>

This argument, however, fails to take account of the Framers' intensely republican frame of mind. If the Framers' only goal had been to check risks posed by oppressive majorities, supermajority voting rules would be fine. But checking oppressive majorities was not the Framers' only goal. Of far greater salience was the plan to construct a government consistent with the republican form, including the "republican principle, which enables the majority to defeat [the minority's] sinister views by regular vote."<sup>225</sup> Simply put, it offends republican principles to govern under voting rules by which power is "transferred to the minority."<sup>226</sup> Indeed, that is precisely why the Framers had to erect checking mechanisms other than supermajority voting rules as tools for controlling majoritarian excess.<sup>227</sup>

The critical point is that all these other mechanisms were themselves consistent with the republican form. American-style bicameralism and presentment (unlike British-style bicameralism and presentment) were republican in nature because they channeled authority to decisionmakers who were accountable either directly or indirectly to the people themselves. The creation of large voting districts was republican in nature because, within those districts, it was the people themselves who voted. Even judicial review was republican in nature because, as Hamilton famously explained in *The Federalist No. 78*, the foundational choices made by "We the People" required effective protection over time.<sup>228</sup> All of these innovations thus worked *within* the republican form to check the risks of majority tyranny. They did not depart from the republican form by inviting

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<sup>224</sup> Professors McGinnis and Rappaport, for example, defend the Any-Voting-Number Theory in part on the ground that "[b]icameralism and the separation of powers make it difficult for mere majorities to pass legislation." McGinnis & Rappaport I, *supra* note 6, at 508. Professors Fisk and Chemerinsky try to launch the same boat, arguing that "[a]lmost all of the institutions created by the Framers of the Constitution reflect a distrust of majorities." Fisk & Chemerinsky, *supra* note 11, at 244; *see also* Chafetz & Gerhardt, *supra* note 18, at 264 (statement of Professor Gerhardt). As explained here, that is precisely the point: The very norm—and thus the risk—of majoritarian legislating provided the cause for the Framers to check the lawmaking process through the construction of other "institutions" also founded on republican principles. *See, e.g.*, Roberts, *supra* note 11, at 525 ("[P]ointing out that the Constitution contains anti-majoritarian elements does not prove that it contains no majoritarian ones. . . . [T]he Framers . . . may well have wanted simple majority voting rules even though they adopted other undemocratic structures."). There is another point, too: If we need to pull out all the stops to interpret the Constitution to attend to our "distrust of majorities," Fisk & Chemerinsky, *supra* note 11, at 244, why should we trust majorities to establish supermajority (and submajority!) voting rules?

<sup>225</sup> THE FEDERALIST NO. 10, *supra* note 9 at 60 (James Madison).

<sup>226</sup> *Id.* NO. 58, at 397 (James Madison).

<sup>227</sup> *See* Norman R. Williams II, *Rising Above Factionalism: A Madisonian Theory of Judicial Review*, 69 N.Y.U. L. REV. 963, 971–74 (1994).

<sup>228</sup> THE FEDERALIST NO. 78, *supra* note 9, at 524 (Alexander Hamilton).



legislative self-imposition of nonmajoritarian—and thus nonrepublican—voting rules for enacting ordinary laws.<sup>229</sup>

Proponents of the Any-Voting-Number Theory are sure to claim that this analysis undervalues Congress’s “ultimate” ability to repeal supermajority voting rules by majority vote.<sup>230</sup> They may also posit that philosophical musings, even from the framing period, are too abstract to be of much help in resolving the specific question considered here. In the face of these possibilities, it is worth circling back to Madison. In *The Federalist No. 54*, the great Framers moved from theory to law. Summarizing how congressional lawmaking would work, he wrote in simple terms: “Under the proposed Constitution, the federal acts . . . will depend merely on the majority of votes in the Federal Legislature . . . .”<sup>231</sup> This pronouncement throws a penetrating beam across our subject. A constitutional system under which the fate of “federal acts . . . will depend *merely* on the majority of votes in the Federal Legislature” is simply irreconcilable with a vacillating default-rule approach under which Congress may dictate that proposed bills will *not* become law even when they *do* secure “the majority of votes.”<sup>232</sup>

### C. Experience-Based Repudiation of Supermajority Voting Rules

The Framers’ rejection of supermajority voting rules did not spring solely from parliamentary postulates or deep philosophical commitments to the cause of republicanism. It also reflected focused goals born of practical concerns. Federal and state authorities launched the Convention of 1787 because, by then, there existed a national consensus that the Articles of Confederation were in need of extensive repair. There was a consensus, too,

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<sup>229</sup> To be sure, in few instances, the Framers imposed supermajority voting rules, but that fact does not compromise their strong overarching republican outlook, especially with regard to the ordinary process of enacting legislation. Supermajority voting rules for treaty ratification and constitutional amendment, for example, dealt with exceptional matter on their face. And supermajority voting for impeachment convictions involved a quasi-judicial action not far removed from the actions of petit juries, which historically had acted by way of supermajority (indeed, unanimous) consensus, rather than simple majority vote.

<sup>230</sup> See McGinnis & Rappaport I, *supra* note 6, at 490 (claiming that Madison was addressing only the question of “a *constitutional* supermajority requirement” and not “a *legislative* supermajority requirement”). Along these lines, in a particularly important passage, Professors McGinnis and Rappaport insist that “While constitutional supermajority requirements conflict with majority rule, legislative supermajority requirements do not. A legislative supermajority rule simply involves a majority imposing a supermajority requirement upon itself until the majority decides to eliminate it.” *Id.* at 491. This assertion is question-begging. One might say in the same vein, that the grant to Congress of legislative power necessarily carries with it a legislative power to give the legislative power away—particularly since Congress could always reclaim its legislative power by exercising its “ultimate” legislative power to do so. Under the most basic of constitutional principles, however, such a default-rule view of the legislative power is untenable. See *Clinton v. City of New York*, 524 U.S. 417, 438–39 (1998).

<sup>231</sup> THE FEDERALIST NO. 54, *supra* note 9, at 371 (James Madison).

<sup>232</sup> *Id.*

on the most basic problems. Above all else, the Articles had produced a federal government that was “frail,”<sup>233</sup> “destitute of energy,”<sup>234</sup> and marked by such an “intrinsic feebleness”<sup>235</sup> that it had become wholly “inadequate to the purpose it was intended to answer.”<sup>236</sup>

Although several problems contributed to the “inefficacy”<sup>237</sup> of the Confederation Congress, one source of difficulty was well understood by all. Even as the Articles vested Congress with a number of major powers—including the powers to requisition funds, to raise armies, to borrow money, to make treaties, to issue coinage, and to govern western lands<sup>238</sup>—they simultaneously provided that that body could act on most important matters only by way of supermajority vote.<sup>239</sup> The results were not surprising. The Confederation Congress confronted difficulty in passing any laws at all.<sup>240</sup> And when it had no choice but to act—for example, in demanding needed monies from the states—it was routinely subjected to holdout moves by groups of state representatives driven by parochial concerns. The result of this system was not only stasis but “imbecility”<sup>241</sup> and “a deep and solemn conviction in the public mind, that greater energy of government is essential.”<sup>242</sup>

Many of the delegates who attended the Philadelphia Convention had served in the Confederation Congress. They had experienced firsthand the debilitating consequences of supermajority voting rules,<sup>243</sup> and this

<sup>233</sup> *Id.* NO. 15, at 98 (Alexander Hamilton).

<sup>234</sup> *Id.* at 93.

<sup>235</sup> *Id.* NO. 22, at 145 (Alexander Hamilton).

<sup>236</sup> *Id.* NO. 2, at 10 (John Jay). *See generally* GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 359 (1969) (“By the middle eighties Congress had virtually ceased trying to govern.”).

<sup>237</sup> THE FEDERALIST NO. 1, *supra* note 9, at 3 (Alexander Hamilton).

<sup>238</sup> *See* ARTICLES OF CONFEDERATION OF 1781, art. IX, paras. 4–5.

<sup>239</sup> *See id.*, art. IX, para. 6 (requiring a vote of nine states on these matters); *see also* McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 218, at 724 (“Because the states feared that the national government would displace their authority, they insisted that the Articles of Confederation require that Congress secure a supermajority before it could take most important actions.”).

<sup>240</sup> For one account of the adverse effects of supermajority voting rules, *see* JILLSON & WILSON, *supra* note 140, at 138–45, 191–92 (1994).

<sup>241</sup> THE FEDERALIST NO. 15, *supra* note 9, at 92 (Alexander Hamilton).

<sup>242</sup> *Id.* NO. 26, at 165 (Alexander Hamilton). As early as 1783, Hamilton had written that supermajority rules under the Articles had been “destructive of vigor, consistency, or expedition in the administration of affairs; tending to subject the *sense* of the majority to *that* of the minority, by putting it in the power of a small combination to retard, and even to frustrate, the most necessary measures.” ALEXANDER HAMILTON, *Resolutions for a General Convention*, in 2 THE WORKS OF ALEXANDER HAMILTON 269, 273 (John C. Hamilton ed., New York, John F. Trow 1850).

<sup>243</sup> *See* BINDER & SMITH, *supra* note 144, at 51 (“The delegates to the Constitutional Convention knew full well from their experiences in the Continental Congresses that requiring supermajorities was a recipe for stalemate and indecision.”); Roberts, *supra* note 11, at 528 (“The leaders of the Convention, who had been members of the Confederation Congress, were . . . frustrated by the supermajority voting rule that governed its operation.”); *see also* King, *Use of Supermajority*, *supra* note 6, at 388

experience had predictable results. The idea of carrying over the Articles' system of supermajority voting to the new federal Congress never drew even a fleeting interest. On only one occasion—when Hugh Williamson took the floor on June 6, 1787—was it hinted that a generalized two-thirds voting rule perhaps should be installed.<sup>244</sup> The response to this overture was deafening silence.<sup>245</sup> No delegate even seconded the motion, and neither Williamson nor any of his colleagues again propounded any remotely comparable idea. In the face of this history, the Any-Voting-Number Theory would permit either chamber to impose supermajority voting rules to pass any and all forms of legislation. There is no evidence that the Framers ever imagined such a thing.<sup>246</sup> Indeed, the delegates offered only a limited number of serious bill-passing supermajority-vote proposals, and the unbroken consistency with which they were repudiated stands at odds with the Any Voting-Number Theory.

It is telling in this regard that no delegate ever argued for anything like that theory, even though opportunities to do so arose on a recurring basis. No one said, in effect: “Even if we reject your proposed supermajority voting rule, either house of Congress can impose that rule if it sees a need to do so under the conditions it then confronts. That possibility should give us at least a measure of comfort in not constitutionalizing your proposed supermajority rule for all time in all circumstances.”<sup>247</sup> What the Framers' statements do reveal is that they rejected supermajority voting requirements for the most simple of reasons: Their experience convinced them that having such rules was a terrible idea. Roger Sherman declared that “to require more than a majority to decide a question was always embarrassing.”<sup>248</sup> James Wilson agreed that “[g]reat inconveniences had . . . been experienced in Congress from the article of confederation requiring nine votes in certain cases.”<sup>249</sup> In short, the Framers “repeatedly

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(highlighting Madison's experiencing of these frustrations). In *THE FEDERALIST*, Alexander Hamilton drew on the history of supermajority rules both around the world and under the Articles of Confederation to reinforce the notion that they did not work in practice. As he explained:

[T]he history of every political establishment in which this principle has prevailed is a history of impotence, perplexity and disorder. Proofs of this position might be adduced from the examples of the Roman tribuneship, the Polish diet and the states general of the Netherlands; did not an example at home render foreign precedents unnecessary.

*THE FEDERALIST* NO. 75, *supra* note 9, at 507–08 (Alexander Hamilton).

<sup>244</sup> See 1 FARRAND, *supra* note 50, at 140 (statement of Hugh Williamson).

<sup>245</sup> *Id.*

<sup>246</sup> See *supra* note 144 and accompanying text.

<sup>247</sup> See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 814–15 (1995) (“The failure of intelligent and experienced advocates to utilize this argument must reflect a general agreement that its premise was unsound . . .”).

<sup>248</sup> 2 FARRAND, *supra* note 50, at 450 (statement of Roger Sherman).

<sup>249</sup> *Id.* at 451 (remarks of James Wilson). The same themes were sounded by delegates to the ratification conventions. See, e.g., Remarks of Alexander Hamilton to the New York Convention (July 2, 1788), in 22 DOCUMENTARY HISTORY, *supra* note 62, at 2058, 2074 (John P. Kaminski et al. eds., 2008)

cited the supermajority requirements of the Articles as a source of frustration and ineffectiveness.<sup>250</sup> This history is of great importance, for it is all but unthinkable that those who wrote and ratified our Constitution meant to provide each legislative chamber with the power to adopt the very sort of rules they denounced as deeply, if not catastrophically, improvident.

*The Federalist* drives home this conclusion. In *No. 22*, Hamilton took aim at supermajority voting rules. He noted that these rules had been defended (as Professors McGinnis and Rappaport have more recently defended them) on the ground they “would contribute to security” by inhibiting excessive and overbearing legislation.<sup>251</sup> Drawing on the lessons of the Articles of Confederation, Hamilton declared that supermajority voting “in practice has an effect, the reverse of what is expected from it in theory.”<sup>252</sup> More particularly, with supermajority rules:

[W]e are apt to rest satisfied that all is safe, because nothing improper will be likely to be done; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.<sup>253</sup>

Hamilton especially feared that:

If a pertinacious minority can controul the opinion of a majority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings.<sup>254</sup>

Such rules would give rise to “tedious delays—continual negotiation and intrigue—[and] contemptible compromises of the public good.”<sup>255</sup>

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(“[T]he Major will should be left open to make the defence and assert the Rights” of the nation; supermajority voting rules “must not fetter the Governmt.”); Remarks of Governor Edmund Randolph to the Virginia Convention (June 6, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 62, at 970, 987 (John P. Kaminski & Gaspare J. Saladino eds., 1990) (criticizing the Articles’ supermajority voting rules because they “prevent energy . . . even in cases wherein the existence of the community depends on vigor and expedition”); Remarks of John Jay to the New York Convention (July 2, 1788), in 22 DOCUMENTARY HISTORY, *supra* note 62, at 2058, 2071 (John P. Kaminski et al. eds., 2008) (“It is unwise to le[a]ve the Volition of the whole to be controuled by a part . . . .” (alteration in original)).

<sup>250</sup> Teter, *supra* note 41, at 570; *accord, e.g.*, Roberts, *supra* note 11, at 528–29 (noting that “[t]hroughout the Convention, in private letters, and in the ratification debates, [the Framers] bemoaned the effect of supermajority voting under the Articles” and that this fact “should be given much greater weight than it has traditionally been given” in evaluating the legality of supermajority voting rules).

<sup>251</sup> THE FEDERALIST NO. 22, *supra* note 9, at 140 (Alexander Hamilton).

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 141 (emphasis omitted).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

Worse yet was the risk of legislative stalemate:

[I]n such a system, it is even happy when such compromises can take place: For upon some occasions, things will not admit of accommodation; and then the measures of government must be injuriously suspended or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savour of weakness—sometimes border upon anarchy.<sup>256</sup>

As a New York representative in the Confederation Congress, Hamilton had seen the impact of supermajority rules, and his declamations of them came with unrelenting vigor. Those rules portended not only “contemptible compromises” but “anarchy.”<sup>257</sup> Their effect was to subject “the regular deliberations and decisions of a respectable majority” to the “caprice, or artifices of an insignificant, turbulent or corrupt junto.”<sup>258</sup> Hamilton set his gaze on how supermajority voting rules worked “in practice,” “in reality,” and in “real operation.”<sup>259</sup> His conclusion was that these rules were not just ill-advised; they were “poison.”<sup>260</sup> These ruminations led Hamilton to conclude—in terms charged with significance for the constitutional question now under consideration—that “*all provisions* which require more than the majority of any body to its resolutions have a direct tendency to embarrass the operations of the government.”<sup>261</sup>

This history highlights two points of significance. First, the Framers condemned the use of supermajority voting requirements for making ordinary laws in the most forceful terms. Second, because they had lived in close quarters with these rules’ doleful consequences, they sought to fend off the dangers that such rules posed in a highly purposeful and self-aware way. These facts clash with the Any-Voting-Number Theory for the simple reason that constitutional interpretation must take account of the Framers’ known aims.<sup>262</sup> Given the Framers’ focused goal of safeguarding the system from the ill effects of supermajority voting rules, there is no good reason to opt for a theory that invites their widespread use (that is, the Any-Voting-Number Theory) over one that excises them from the lawmaking process (that is, the theory of strict and consistent majoritarianism advocated here).

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<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 140.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* NO. 75, at 507 (Alexander Hamilton) (emphasis added).

<sup>262</sup> See McGinnis & Rappaport II, *supra* note 6, at 347 (“Arguments from purpose are . . . essential to resolving [constitutional] ambiguities . . .”).

*D. The Politics of the Framing and Supermajority Voting Rules*

Looking back on more than 230 years of self-rule under a single charter of government, citizens of today may be tempted to underestimate the din of contentiousness that pervaded the Philadelphia Convention. In fact, that gathering was a fractious and tense affair. It lasted four months. Time and again, the threat of impasse loomed. At the end, leading delegates refused to sign the Constitution, and others would have joined the dissenters had they not already headed home in disgust.<sup>263</sup>

This level of testiness should not be surprising. Precisely because the Convention attracted leading statesmen of the day, strongly held views were commonplace and not easily remolded by the guiding hand of two or three dominating figures. The delegates, moreover, came from different states with different economies, geographies, cultures, histories, and problems.<sup>264</sup> Out of the resulting swirl of ever-clashing interests came sometimes-immobilizing discord. How was the Gordian Knot of irreconcilable conflict cut? In Philadelphia in 1787—as in many times and places—the liberating saber blow came from political compromise. And, as it turns out, each of the two greatest compromises reached by the Convention undermines the Any-Voting-Number Theory.

*1. The Slave Trade–Navigation Act Compromise.*—One compromise reached at the Convention specifically concerned supermajority voting rules. More than two months into the proceedings, controversy erupted when the Committee on Detail floated the idea that so-called navigation acts should be subject to enactment only by a two-thirds vote.<sup>265</sup> This initiative reflected the fears of southern delegates that the new Congress would channel the carriage of southern agricultural exports away from cheaper European ships to more costly American ships that operated out of the northern states.<sup>266</sup> Not surprisingly, northern delegates recoiled at this proposed restriction. In the end, however, they could avoid its inclusion in the Constitution only by swallowing the bitter pill of agreeing to afford constitutional protection to the slave trade for twenty more years.<sup>267</sup> The pill was bitter because many northern delegates passionately opposed that barbaric practice<sup>268</sup> and because the deep southern states had pushed their position on this matter to the point of a strident ultimatum.<sup>269</sup> In the end,

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<sup>263</sup> See, e.g., DAN T. COENEN, *THE STORY OF THE FEDERALIST: HOW HAMILTON AND MADISON RECONCEIVED AMERICA* 3–4 (2007).

<sup>264</sup> See CONSTITUTIONAL CONVENTION DEBATES, *supra* note 102, at 8.

<sup>265</sup> See STEWART, *supra* note 82, at 173.

<sup>266</sup> *Id.*

<sup>267</sup> U.S. CONST., art. I, § 9, cl. 1; *id.* art. V.

<sup>268</sup> See STEWART, *supra* note 82, at 194.

<sup>269</sup> 2 FARRAND, *supra* note 50, at 373 (statement of John Rutledge) (“If the Convention thinks that [these states] will ever agree to the plan, unless their right to import slaves be untouched, the expectation is vain. The people of those States will never be such fools . . .”).

however, intensely frustrated northern delegates acceded to the twenty-year-rule because the issue had precipitated a near-month of deadlock and, when push came to shove, they assigned overriding importance to ensuring majority voting on navigation-act bills. As Maryland delegate Luther Martin later reported to his state legislature, the northern delegations were willing to allow a “liberty to prosecute the slave-trade, provided the southern States would, in their turn, gratify them, by laying no restriction on navigation acts.”<sup>270</sup>

With this history in view, it is worth asking this question: In the early years of the Senate, could the six southern states—aided perhaps by roguish Rhode Island or section-straddling Delaware—have placed a “restriction on navigations acts” by adopting a rule that permitted their enactment only by a two-thirds vote?<sup>271</sup> Contrary to the result dictated by the Any-Voting-Number Theory, such a move would have departed from one of the Convention’s most hard-fought and important decisions. Put simply, the delegates who struggled to craft the slave-trade compromise surely would not have tolerated installation of the very supermajority rule that their solemn agreement emphatically repudiated.<sup>272</sup>

2. *The Great Compromise.*—Most students learn that the Constitutional Convention’s critical moment came with the forging of the Great Compromise. They often do not learn, however, of the nearly paralyzing bitterness that marked the weeks that led up to establishment of our curiously constructed two-house Congress. In some respects, the Great Compromise was no compromise at all. From the outset of the Convention, there was broad agreement on the need to establish a bicameral legislature, with at least one chamber selected according to a principle of proportionate representation. The drafters of the discussion-shaping Virginia Plan, however, called for something more. In keeping with the principle that “[t]he majority of people wherever found ought in all questions to govern the minority,” they urged that the principle of proportionate representation

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<sup>270</sup> 3 *id.* app. A, at 211 (emphasis omitted).

<sup>271</sup> Notably, such an outcome, if constitutionally possible, might well have taken hold. *See id.* at 334 (remarks of George Mason to the Virginia Convention) (opining that a majority of states at the Convention favored requiring a two-thirds majority to pass navigation acts “till a compromise took place between the northern and southern states”).

<sup>272</sup> One might respond that this history establishes only that the Constitution bars self-imposed supermajority rules for navigation acts, without diminishing the chambers’ power to develop such rules in all other fields. Nothing whatsoever in the constitutional text, however, lends support to this oddly discriminatory approach, which also flies in the face of Oliver Ellsworth’s observation that the Framers rejected supermajority rules for navigation acts because they “ought to be left *on the same footing* with other national concerns.” Letter from Landholder VI to the Connecticut Courant (Dec. 10, 1788), in 14 DOCUMENTARY HISTORY, *supra* note 62, at 398, 399 (John P. Kaminski & Gaspare J. Saladino eds., 1983) (emphasis added); *see also* 2 STORY, *supra* note 45, § 1091, at 539 (noting that repudiation of the Navigation Act proposal reflected “the general impropriety of allowing the minority in a government to control, and in effect to govern all the legislative powers of the majority”).

must guide the structuring of the Senate as well as the House.<sup>273</sup> Madison was adamant on this point, arguing that any departure from “the doctrine of proportional representation” was “evidently unjust.”<sup>274</sup>

As the Convention wore on, small-state delegates became no less insistent in arguing against a federal legislature built solely on the principle of proportionate representation. Oliver Ellsworth of Connecticut, for example, made the case for giving the states an “equality of voices” in the Senate so as “to secure the Small States [against] the large” and to make the Constitution “conformable to the federal principle” of equivalent state sovereignty then in place under the Articles of Confederation.<sup>275</sup> The large-staters responded with no less zeal by renewing their demands for proportionate representation. James Wilson framed the argument in pointedly mathematical terms when he urged that equal state representation in the Senate would permit “less than 1/3 [of the population] to overrule 2/3 whenever a question should happen to divide the States in that manner.”<sup>276</sup>

As this debate intensified, small-state delegates shocked the Convention by proposing the so-called New Jersey Plan.<sup>277</sup> In effect, this proposal recommended abandoning most of what the Convention already had achieved. Instead of moving forward with a bicameral structure, it advocated a system built around the unicameral legislature already in place under the Articles, which afforded each state one vote.<sup>278</sup> The divisiveness spawned by this game-changing gambit was nerve-rackingly intense.<sup>279</sup>

In the war of words that followed, discussions took on a new level of sophistication that is of importance to the question under consideration here. In advocating state equality in the Senate, leaders of the small-state bloc emphasized that large states would never be exposed to small-state predation because the population-based House would provide them with protection against that risk. Virginia Plan advocates responded that this argument missed the critical point. From their perspective, the problem was not that the small states could oppress the large ones by crushing them with new pro-small-state laws. Rather, the problem was that the small states

<sup>273</sup> 1 FARRAND, *supra* note 50, at 605–06 (statement of James Wilson).

<sup>274</sup> *Id.* at 151 (statement of James Madison); *see also id.* at 37. *See generally* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 167 (2d ed. 2005) (“[M]ost large state delegates arrived at the Convention determined that states would be proportionately represented in both houses of the new Congress.”).

<sup>275</sup> 1 FARRAND, *supra* note 50, at 468 (statement of Oliver Ellsworth); *see id.* at 469 (statement of Oliver Ellsworth) (“The power of self-defen[s]e was essential to the small States.”).

<sup>276</sup> *Id.* at 482–83 (statement of James Wilson).

<sup>277</sup> *See id.* at 242 (notes of James Madison).

<sup>278</sup> *Id.*

<sup>279</sup> Indeed, the escalating clash produced feelings so raw that on June 30, Delaware delegate Gunning Bedford, Jr. implied that, without equal state representation in the Senate, his state might not only abandon the Convention, but leave the union and “find some foreign ally of more honor and good faith.” 1 FARRAND, *supra* note 50, at 492 (statement of Gunning Bedford, Jr.).



could use the Senate to impede needed reforms by blocking the enactment of laws put forward by the House. The primary spokesman for the large-state cause was Wilson, who took pains to explain:

It is true that a majority of States in the [second] branch can not carry a law [against] a majority of the people in the [first]. But this removes half only of the objection. Bad [governments] are of two sorts. 1. that which does too little. 2. that which does too much: that which fails [through] weakness; and that which destroys [through] oppression. Under which of these evils do the [United] States at present groan? [U]nder the weakness and inefficiency of its [government]. To remedy this weakness we have been sent to this Convention. If the motion [for equal representation of the states in the Senate] should be agreed to, we shall leave the [United States] fettered precisely as heretofore; with the additional mortification of seeing the good purposes of ye fair representation of the people in the [first] branch, defeated in the [second].<sup>280</sup>

It is telling that the small-state representatives did not contest most of Wilson's reasoning. They did not challenge his premise that stasis had emerged as the primary problem under the Articles. They also did not question his belief that legislative inactivity was deeply inimical to the public good. They did, however, voice disagreement with one essential element of Wilson's critique. It was Oliver Ellsworth who offered the decisive rebuttal when he declared that, under the Articles, "[n]o salutary measure has been lost for want of a majority of the States."<sup>281</sup> To anyone familiar with pre-Convention history, the thread of this argument was easy to follow: Although "salutary measure[s] . . . had been lost" in the Confederation Congress, this result was not attributable to the states' equal representation; instead, the wishes of "a majority of the States" had been thwarted by structural problems—including (as we have seen) supermajority voting rules.<sup>282</sup> Ellsworth said, in effect: "Yes, Mr. Wilson, there are serious problems with the way the Confederation Congress operates, including because of its inability to pass needed laws. Those problems, however, do not result from equal representation of the states in that body. So let's create a Senate that retains equal state representation but gets rid of the structural defects. If we do that, even with a new constitutional requirement of bicameralism, legislative stasis will no longer be a problem."

By early July the delegates were so immobilized by this debate that they turned to the tool of last resort: They referred the matter to a

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<sup>280</sup> *Id.* at 483–84 (statement of James Wilson) (footnotes omitted); *accord 2 id.* at 10–11 (statement of James Wilson) (reiterating that, with equality in the Senate, the "small States cannot indeed act, . . . but they may [control] the [government] as they have done" in the Confederation Congress, thus producing a system "having all the weakness of the former [government]").

<sup>281</sup> *Id.* at 484 (statement of Oliver Ellsworth) (emphasis omitted).

<sup>282</sup> *See supra* notes 237–42 and accompanying text.

committee.<sup>283</sup> The committee in due course recommended that the Senate should, indeed, be constituted to provide equal state representation.<sup>284</sup> Its report, however, oozed with unease. As committee member Elbridge Gerry explained:

The Committee were of different opinions as well as the Deputations from which the [Committee] were taken, and agreed to the Report merely in order that some ground of accommodation might be proposed. Those opposed to the equality of votes have only assented conditionally; and if the other side do not generally agree will not be under any obligation to support the Report.<sup>285</sup>

On July 16, after still more debate, the Convention approved the committee recommendation. The result of that vote, however, disclosed just how divisive the subject matter of the Great Compromise remained. Five states voted aye. Four states voted nay. And the delegates of the only other then-represented state found themselves evenly divided.<sup>286</sup>

There are four key points to be gleaned from the story of the Great Compromise, each of which undermines the Any-Voting-Number Theory. First, the signature element of the bargain was its creation of a Senate in which the states would have an “equal voice.”<sup>287</sup> Supermajority voting rules threaten this desideratum, however, because they give *unequal* decisionmaking rights to no-voting and yes-voting states.<sup>288</sup> Indeed, in *The Federalist*, Madison made the critical point that true equality within the legislature results from majority voting. As he explained, under the Constitution, legislative enactments “will depend merely on the majority of votes in the Federal Legislature, and *consequently* each vote whether proceeding from a larger or a smaller State, or a State more or less wealthy or powerful, *will have an equal weight*.”<sup>289</sup> If state equality lay at the core of the Great Compromise, and state equality hinges (as Madison posits) on the fact that acts “depend . . . on the majority of votes,” then rules that cause acts not to depend on a majority of votes erode state equality in a key constitutional sense. The Any-Voting-Number Theory thus contravenes the Great Compromise—and the structure of the Senate it established—because

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<sup>283</sup> 1 FARRAND, *supra* note 50, at 516 (notes of James Madison).

<sup>284</sup> *Id.* at 526.

<sup>285</sup> *Id.* at 527 (statement of Elbridge Gerry).

<sup>286</sup> 2 *id.* at 15 (notes of James Madison). In favor were Connecticut, Delaware, Maryland, New Jersey, and North Carolina. Opposed were Georgia, Pennsylvania, South Carolina, and Virginia. Massachusetts was equally divided. No Rhode Island delegates attended the Convention, and New Hampshire’s delegates arrived only later. As for New York, only four days before this decisive action, two of its three delegates had abandoned the Convention, thus stripping the state of the requisite quorum to vote.

<sup>287</sup> THE FEDERALIST NO. 22, *supra* note 9, at 139 (Alexander Hamilton).

<sup>288</sup> See *Whitcomb v. Chavis*, 403 U.S. 124, 166 (1971) (Harlan, J., concurring) (noting that a 60%-supermajority voting rule gives opponents of a legal change “half again the voting power of proponents”).

<sup>289</sup> See THE FEDERALIST NO. 54, *supra* note 9, at 371 (James Madison) (emphasis added).

that theory countenances creation of exactly these sorts of equality-defeating rules.<sup>290</sup>

Second, the Great Compromise was premised not only on state equality in the Senate, but on majority rule itself. The question with which the Framers grappled was whether (as captured in the words of Oliver Ellsworth) a “majority of the states”—even though containing only a minority of the overall population—could block the enactment of bills, including bills already passed by the more democratically accountable House.<sup>291</sup> The world of the Any-Voting-Number Theory, however, is one in which the fate of bills can be subjected to the decision of a *minority* of the states through the Senate’s self-imposition of supermajority voting rules.<sup>292</sup> This is simply not how the Framers thought about the degree of potentially obstructive power the Constitution would give to the small states. In short, the Any-Voting-Number Theory departs from the basic majority-of-the-states reasoning in which the Great Compromise was grounded.

Third, even the argument for the Great Compromise made by the small-state contingent envisioned the rejection of decisional structures that would foster legislative inaction in the Senate. We have seen before that supermajority voting requirements were, standing alone, a key target of

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<sup>290</sup> Defenders of the Any-Voting-Number Theory have challenged this line of reasoning—and the constitutional case against supermajority voting rules more generally—by invoking *Gordon v. Lance*, 403 U.S. 1 (1971). See, e.g., Chafetz & Gerhardt, *supra* note 18, at 255–56, 266 (statement of Professor Gerhardt); Fisk & Chemerinsky, *supra* note 11, at 244. In that case, the Court upheld a state-imposed requirement of a 60% vote to pass local referenda that authorized the issuance of bonded indebtedness and resulting tax increases, in the face of a challenge based on the one-person-one-vote principle. Much can be said about *Gordon*, but the main thing to say is that it has no application here. First, as a case that involved a Fourteenth Amendment challenge to a state law—which thus implicated critical federalism interests—*Gordon* casts no light on “the structural provisions of the Constitution that uniquely govern the operations of the federal government.” Cornyn, *supra* note 167, at 196 n.49. Second, the core rationale of *Gordon* went something like this: The well-recognized greater power of states to establish individual rights, designed to limit the choices of majorities within the state, should logically carry with it the lesser power to limit majority choices with regard to “certain decisions,” through imposition of supermajority voting rules. *Gordon*, 403 U.S. at 7. This rationale is beside the point here, however, for an obvious reason: In contrast to properly designated state bodies, neither the House nor the Senate can create constitutional rights (or any other rights) under the Rules of Proceedings Clause. And so, they cannot claim the power under that Clause to impose half-a-loaf rights, of the supermajority-voting-rule sort, under *Gordon*’s greater-state-power-includes-the-lesser-state-power theory.

<sup>291</sup> See *supra* note 281 and accompanying text.

<sup>292</sup> It bears emphasis that it does not solve this problem to say that a majority of states have the “ultimate” authority to make and repeal supermajority voting rules. This is so because those rules can be put in place by blocs of states (such as the small states of 1789) in an effort to disadvantage another bloc of states (such as the large states in 1789) over time on a continuing basis. See *infra* note 295. To be systematically disadvantaged in this way is not to be accorded equality in the meaningful sense envisioned by the Great Compromise. To put the point another way, if a coalition of small states implements a supermajority voting rule designed to systematically disadvantage the large states, it will come as cold comfort for those large states to learn that they have “ultimate power” to try to form a rule-repealing coalition with other states that, acting from self-interest, helped to put that very rule in place.

expungement by the Framers.<sup>293</sup> What we see here is that elimination of those requirements was also an important ingredient of the Great Compromise. Oliver Ellsworth's defense of that compromise rested on the idea that the new Senate would not labor under the impediments that had confounded enactment of federal laws under the Articles, including supermajority voting rules.<sup>294</sup> This, then, was part of the trade-off the small states offered as part of the Great Compromise itself. As a result, recognition of a power to install supermajority voting rules in the Senate—especially without approval of the far more representative House—would breach the essential bargain that brought the Constitution into being.<sup>295</sup>

Finally, whatever else might be said about the Great Compromise, it was a compromise, and one that came into existence only (1) by the most razor-thin of margins, (2) in the face of fierce resistance, and (3) amid an atmosphere of agonizing skepticism in those delegations that represented a large majority of the people of the nation.<sup>296</sup> The arguments that drove opposition to the Great Compromise were weighty; equal state representation in the Senate *did* stand at odds with both the all-men-are-equal ideals of the Revolution and the rightness of taking at least some account of the distinct interests of the large and the growing states. To be sure, the representatives of those states agreed to sacrifice those values in an effort to form a more perfect union. But, fighting tooth and nail all the way, they sacrificed those values only as far as the Great Compromise reached. They neither did nor were expected by their fellow delegates to go one millimeter farther.<sup>297</sup>

So what did they agree to? They agreed to a system under which, as James Wilson had explained it, representatives of only some 30% of the population could obstruct the legislative efforts of the remaining 70%.<sup>298</sup> And what did they not agree to? They never endorsed, nor would have endorsed, a system under which those same representatives of only 30% of the population could transfer controlling, lawmaking authority to

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<sup>293</sup> See *supra* notes 234–62 and accompanying text.

<sup>294</sup> See *supra* notes 280–81 and accompanying text.

<sup>295</sup> Nor was the danger of small-state power grabs a minor concern in 1787 and 1788. William Paterson, for example, saw Virginia, Massachusetts, and Pennsylvania “as the three large States, and the other ten as small ones.” 1 FARRAND, *supra* note 50, at 178 (statement of William Paterson). It is no stretch, then, to believe that—if the Rules of Proceedings Clause let them—these ten states (or even seven of them) could have joined together to impose supermajority voting rules in the Senate, so as to safeguard their own interests over time against large-state dominance. See THE FEDERALIST NO. 58, *supra* note 9, at 392 (James Madison) (noting that in the Senate “the advantage will be in favor of the smaller states”); 2 STORY, *supra* note 45, § 887, at 354 (recognizing the Framers’ concerns about “inducements to improper combinations, either of the great states, or the small states, to accomplish particular objects”).

<sup>296</sup> See *supra* notes 273–80, 283–86 and accompanying text.

<sup>297</sup> See Roberts, *supra* note 11, at 546 (“The balance [the Framers] struck was hard-fought and specific, certainly not an open-ended invitation to continue to expand the power of small states.”).

<sup>298</sup> See *supra* note 276 and accompanying text.

representatives of only 20% or 10% of the population. The small-state delegates, in the end, were able to create a Senate based on a “majority of the states” voting system, despite nearly intractable opposition.<sup>299</sup> With this point in view, the only fair inference is that the sort of double-dipping, deeply republicanism-diminishing, *minority-of-the-states* approach to Senate voting that the Any-Voting-Number Theory imagines would never have had the blessing of those who framed the Convention’s Great Compromise.<sup>300</sup>

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For all of the reasons marshaled in Part III, the Any-Voting-Number Theory stands at odds with our constitutional history. The Framers were legalists. They were philosophers. They were problem solvers. And they were politicians thrown into a hornets’ nest of controversy that proved escapable only by way of hard-won compromises. What is determinative—and, indeed, remarkable—is that, in each of these four separate roles, the Framers embraced as a constitutional requisite a fixed norm of legislative majoritarianism with regard to the ordinary enactment of laws. Proponents of the Any-Voting-Number Theory ask this question: If the Framers were so committed to legislative majoritarianism, why did they not write into the Constitution that neither the House nor the Senate possesses power under the Rules of Proceedings Clause to reject majority voting as the means of acting on bills? The history recounted here offers the most plausible answer: The Framers so incontrovertibly embraced an unbridgeable principle of majority voting that this question did not occur to them as even meriting serious attention.<sup>301</sup>

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<sup>299</sup> See *supra* note 281 and accompanying text.

<sup>300</sup> The same conclusion is supported by Bondurant, *supra* note 45, at 484 (claiming that “[t]hrough the Great Compromise, the Framers intended to vest Senate decisionmaking power in a majority of states, whose legislatures elected a majority of senators,” but that supermajority voting “shifts political power in the Senate in favor of a minority of states by reducing from twenty-five to twenty-one the number of states whose senators can block a bill”).

<sup>301</sup> See *Balanced Budget Amendment: Hearing on S.J. Res. 41 Before the S. Comm. on Appropriations*, 103d Cong. 87 (1994) (statement of Professor Charles Fried, Harvard Law School) (“Majority rule is so basic a principle of our Constitution that it is nowhere stated explicitly, but pervades the whole document.”); see also Roberts, *supra* note 11, at 527 (acknowledging, after a review of relevant history, that the “Framers may well have thought that such a majority voting rule was perfectly obvious and did not merit specific mention”). Indeed, Professors McGinnis and Rappaport themselves rely on a closely related idea in their own analysis, claiming that the chambers’ ultimate power to change rules (including supermajority voting rules) by majority vote “was not made explicit” in the constitutional text “because the Framers did not appear to consider it an open question.” McGinnis & Rappaport I, *supra* note 6, at 487 n.17. Professors McGinnis and Rappaport are right to recognize that, for the Framers, some voting rules did not present “an open question.” Contrary to their claim, however, one such rule is the one defended in this article—namely, that laws are to be passed according to majority vote.

## CONCLUSION

There is an inherent difficulty in making the case for a single constitutional rule in a sixty-two-page article, especially one that advances no fewer than three textual arguments, four historical arguments, and a multi-pronged structural argument that (among other things) asserts the inapplicability of the key constitutional clause invoked on behalf of the opposing position. The difficulty is that one's critics are sure to say: Thou "doth protest too much."<sup>302</sup>

Readers can and will reach their own conclusions as to whether the elaborateness of the argument offered here reveals it to be comprehensive and forceful or strained and overreaching. Either way, this treatment may serve the useful end of laying bare what originalist arguments there are in support of a binding norm of legislative majoritarianism. At the least, this paper reflects a long-overdue effort to take up the challenge laid down by Any-Voting-Number Theory proponents for others to address their originalist arguments in a full-blown way.<sup>303</sup>

Even so, the "doth protest too much" suggestion rightly reminds us to be careful about losing the forest for the trees. The large questions addressed here are these: What is more important? To give our legislative chambers, under the once-little-noticed Rules of Proceedings Clause, sweeping powers to depart from more than 200 years of uninterrupted practice by adopting all manner of submajority and supermajority voting rules? Or to honor those foundational principles—rooted in text, structure, parliamentary practice, republican governance, practical problem solving, and hard-won compromise—on which the entire legislative edifice was built? To ask these questions is to answer them, and to show why the Any-Voting-Number Theory departs from the command of our Constitution. That command is simple and strong: A bill is passed by a house of Congress if, and only if, it receives a majority vote.

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<sup>302</sup> WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

<sup>303</sup> See McGinnis & Rappaport II, *supra* note 6, at 349.