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## Countersupermajoritarianism

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## COUNTERSUPERMAJORITARIANISM

*Frederic Bloom\**

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ORIGINALISM AND THE GOOD CONSTITUTION. By *John O. McGinnis* and *Michael B. Rappaport*. Cambridge and London: Harvard University Press. 2013. P. 207. \$39.95.

### INTRODUCTION

Our Constitution can change. We can amend it, update it, improve it. And so we have—twenty-seven times by one count, many more by another. Everyone recognizes this.

But fewer people appreciate that the mechanics of constitutional change can change as well. A method of alteration unaddressed at the founding can grow into established practice. A procedure built into constitutional text can slip into disuse. As much as citizens can change the substance of the Constitution, they can also change the *ways* they change it.

In *Originalism and the Good Constitution*, John McGinnis<sup>1</sup> and Michael Rappaport<sup>2</sup> make an elegant and provocative case for one method of constitutional change. They argue that the Constitution should change, if at all, only through the formal, supermajoritarian processes expressly outlined in the Constitution's Article V. And they believe it follows that we should all be originalists too.

There is much to admire about McGinnis and Rappaport's project. It is crisply written and carefully argued. Yet it raises some puzzling questions as well: Would their proposal itself constitute a kind of constitutional change? And, if so, can their effort succeed only through a process they seem to reject? McGinnis and Rappaport present Article V as more than good practice. They present it as the exclusive mode of legitimate constitutional alteration. But constitutional change has never come by way of Article V alone. It

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has come through a diverse array of political, cultural, and legal mechanisms: social movements, electoral fights, media debates, legislative overhauls, and much else—including academic argument. So we wonder: Would relying exclusively on Article V itself be a constitutional change—and, if so, would that put McGinnis and Rappaport’s proposal at odds with their own preferred process?<sup>3</sup>

In this Review, we examine the complex facets of these questions. We also use *Originalism and the Good Constitution* as an occasion to ask critical questions about how the Constitution actually evolves and where supermajoritarianism truly fits in that evolution. We begin, in Part I, by outlining the relevant constitutional debate. We locate McGinnis and Rappaport’s book in its broader intellectual context, linking it to a recent migration among conservative constitutional theorists toward a kind of supermajoritarianism—and perhaps toward a kind of “law-ish” formalism.<sup>4</sup> We distinguish McGinnis and Rappaport from those progressive constitutional thinkers who have turned another way—toward simple majoritarianism, or toward less formal modes of amendment outside of Article V. And we discuss McGinnis and Rappaport’s particular brand of supermajoritarianism, detailing two of their argument’s most pressing difficulties—its elision of important problems with elevated voting thresholds and the quiet but crucial way it gives up its own game.

In Part II, we expand the analytical frame. We consider why attention to supermajoritarianism is intensifying now and why it may appeal to particular scholars. We then argue for a different, more inclusive understanding of democratic change, both constitutional and otherwise—an understanding that includes a whole panoply of institutional, social, and political dynamics: formal rules and informal ones, voting requirements and nonvoting mechanisms, supermajority thresholds and social movements, legislatures and courts. Our claim, to be clear, is not that supermajoritarianism has no place in contemporary constitutional law or politics. Our claim is that real change

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3. McGinnis and Rappaport might respond that Article V need not be invoked every time a trivial departure from the Constitution’s text requires correction. That may be true. But even if it is, their response does not address the kind of change at issue here. A revision of a long-standing method of revising the Constitution should count as a type of fundamental change—and that fundamental change triggers the concerns at the heart of their book. For a more detailed examination of this point, see *infra* Section II.B.

Some might also respond that our questions can be raised about any of the forms of originalism that feature a return to ancient constitutional meanings. But for many originalists, return does not constitute change in the relevant sense. What sets McGinnis and Rappaport’s theory apart from other brands of originalism, as we will explain, is its focus on supermajoritarian enactment. And because at least some current constitutional understandings presumably enjoy supermajoritarian support—including perhaps understandings about constitutional change—it seems reasonable to ask whether a move away from those understandings should not itself require adherence to Article V, at least for this subset of understandings. Yet notably, McGinnis and Rappaport do not propose a new constitutional amendment—something that others have done, see *infra* notes 25–26 and accompanying text—but they resort instead to academic argument and public advocacy.

4. By “law-ish” formalism, we mean a fidelity to certain fixed procedural rules for amendment.

occurs through formal supermajoritarianism and fleeting majoritarianism, through popular constitutionalism and amendment outside the law. It occurs, as it should, through a kind of multifarious “all of the above.”

## I. THE DEBATE

Originalism has a rich pedigree. The term first grew popular in the 1980s, promoted by (among others) Attorney General Edwin Meese.<sup>5</sup> But the concept reaches back much further—to the academic writings of Robert Bork,<sup>6</sup> William Rehnquist,<sup>7</sup> and Raoul Berger,<sup>8</sup> and to the judicial opinions (perhaps) of Justice George Sutherland.<sup>9</sup> Since then originalism has spread, splintered, and evolved, adding once-unlikely adherents and dividing on sometimes-subtle grounds.<sup>10</sup> In fact, the term may have grown so large and so disparate as to include both everything and nothing: it is now possible to claim that everyone is an originalist<sup>11</sup> and that no one is.<sup>12</sup>

Yet by any measure John McGinnis and Michael Rappaport rank among our most devoted originalists. They are also among the most distinctive. Like Justice Scalia, they believe that originalism can be defended “on the

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5. Edwin Meese III, U.S. Attorney Gen., Speech Before the American Bar Association (July 9, 1985), in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 1, 9 (Federalist Soc’y ed., 1986) (arguing that “a constitutional jurisprudence . . . should be a Jurisprudence of Original Intention”).

6. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

7. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693 (1976).

8. RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 402 (2d ed. 1997).

9. Justice Sutherland argued for something like originalism without using the term. See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 448–49 (1934) (Sutherland, J., dissenting) (“If the contract impairment clause, when framed and adopted, meant that the terms of a contract for the payment of money could not be altered . . . it is but to state the obvious to say that it means the same now.”). For a fuller account of contemporary originalism’s rich history, see Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *GEO. L.J.* 1113, 1134–48 (2003), and Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 462–67 (2013).

10. See Solum, *supra* note 9, at 467–68 (summarizing “the interpretation-construction distinction”).

11. At least insofar as original meaning is seen as a valuable interpretive tool, it is possible to argue that almost everyone is on board. See Lawrence B. Solum, *We Are All Originalists Now*, in *CONSTITUTIONAL ORIGINALISM: A DEBATE* 1 (Robert W. Bennett & Lawrence B. Solum eds., 2011); cf. James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 *TEX. L. REV.* 1785, 1806 (2013) (arguing that original meaning should act as one source of constitutional meaning among several).

12. At least insofar as original meaning seldom determines the law alone, free of any influence from precedent or pragmatic considerations, it can be argued that almost no one is on board. See, e.g., Randy E. Barnett, *Interpretation and Construction*, 34 *HARV. J.L. & PUB. POL’Y* 65, 65 (2011) (“[I]f originalism is a theory of interpretation, then it may be of limited utility in formulating a theory of construction, other than in requiring that original meaning not be disregarded or undermined.”).

basis of [its] consequences”—but they ask whether legal rules are good, not merely whether they are clear (p. 7). And like Professor Whittington, they aim to maintain “fidelity to the authoritative decision[s] of the people”—but they depend on supermajoritarian procedure, not on simple popular sovereignty (p. 7). But if McGinnis and Rappaport are in some ways unusual, they are not iconoclasts. Key components of their argument—the turn to supermajoritarianism, the embrace of formalism—pick up trends increasingly prominent among conservative constitutionalists today. Below, Section I.A sketches those trends in general, setting McGinnis and Rappaport’s book in its broader academic context. This Section also examines McGinnis and Rappaport’s particular location in the debate and describes their principal thesis. Section I.B then details two of their proposal’s most pressing problems.

### A. *The Right*

Supermajority rules date back to the juries of ancient Rome.<sup>13</sup> Back then, these rules were seen not as a response to the supposed excesses of pure majoritarianism but as “an alternative to the unyielding demands of unanimity.”<sup>14</sup> In the United States, supermajority rules were first used for that reason too: they were seen, to start, as an alternative to the unworkable mandates of the Articles of Confederation, a charter that required unanimous consent among the states for any change.<sup>15</sup> The Constitution thus provided that it could become law with the assent of nine of the first thirteen states.<sup>16</sup> Thereafter, Article V required (and still requires) “two thirds of both Houses” to propose an amendment or “two thirds of the several States” to call a “Convention”—and then “three fourths of the several States, or [their] Conventions,” to ratify any change.<sup>17</sup>

It is easy to see the allure. Supermajority rules promise a voting threshold that demands neither too little nor too much—both for constitutional change and for ordinary legislation. Simple majority thresholds, on one side, might make politics too fickle—substantively unstable, incapable of building

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13. MELISSA SCHWARTZBERG, *COUNTING THE MANY: THE ORIGINS AND LIMITS OF SUPERMAJORITY RULE* 19, 48 (2014).

14. *Id.* at 6.

15. See *THE FEDERALIST* No. 22 (Alexander Hamilton).

16. U.S. CONST. art. VII. This process may not have been as supermajoritarian as it seems. Article VII demanded a supermajority of states, but the state processes themselves required much less. Only a simple majority of state delegates (or representatives) was required to commit a state to ratification. Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 486, 487 n.112 (1994); see also Cecil L. Eubanks, *New York: Federalism and the Political Economy of Union*, in *RATIFYING THE CONSTITUTION* 300, 300 (Michael Allen Gillespie & Michael Lienesch eds., 1989) (noting that New York voted to ratify by a thin 30–27 margin). And only a simple majority of state voters was required to elect those delegates. Cf. Amar, *supra*, at 481–87 (discussing the importance of majority rule in the states at the time the Constitution was ratified).

17. U.S. CONST. art. V.

consensus, and insensitive to minorities.<sup>18</sup> Unanimity rules, on the other, might make politics impossible—stifled by holdout voters who seek private gain instead of public good. But supermajority rules could address both problems, leaving some (but not too much) space for actual governance, providing a dose of political stability, ensuring significant consensus, and protecting minorities too.<sup>19</sup>

In recent years, this supermajoritarian promise has found a new and devoted group of promoters. Conservative constitutional theorists in particular have stepped up their defense of the idea, especially with regard to constitutional change, arguing that such change should be procedurally exacting and numerically well supported. Professor Barnett, for one, advances a “Bill of Federalism,” proposing the adoption of ten new constitutional amendments—including one that mandates both originalism and strict adherence to Article V’s formal supermajoritarianism.<sup>20</sup> Professor Calabresi, for his part, advocates a new supermajoritarian override of the Supreme Court, one that would permit Congress to overturn Court decisions by a two-thirds vote.<sup>21</sup> Mark Levin, Meese’s former chief of staff, argues that three-fifths of the states should be able to “override” any federal legislation.<sup>22</sup> And Senator Hatch has lauded the Senate’s awkward but attention-grabbing supermajoritarian check: “If you didn’t have the Senate, then the large states would control everything . . . . You would not have any real representation of the people who are basically in the middle of the country.”<sup>23</sup>

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18. SCHWARTZBERG, *supra* note 13, at 9.

19. *Id.* at 106, 125.

20. “The words and phrases of this Constitution shall be interpreted according to their meaning at the time of their enactment, which meaning shall remain the same until changed pursuant to Article V . . . .” Randy E. Barnett, *A Bill of Federalism*, FORBES, May 20, 2009, <http://www.forbes.com/2009/05/20/bill-of-federalism-constitution-states-supreme-court-opinions-contributors-randy-barnett.html>.

21. See Jeffrey Toobin, *Our Broken Constitution*, NEW YORKER, Dec. 9, 2013, at 64, 68, available at <http://www.newyorker.com/magazine/2013/12/09/our-broken-constitution>; cf. Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1093 (2005) (arguing that, if the courts were meant to play a large role in the nation’s government, then a check such as a congressional override power would have emerged). Although Calabresi does not cabin his suggestion this way, we assume that he means only constitutional decisions by the Supreme Court. His idea appears in the context of a discussion of judicial review, and Congress can already override statutory decisions without a supermajority vote, though presentment to the president is required. See U.S. CONST. art. I, § 7.

22. MARK R. LEVIN, *THE LIBERTY AMENDMENTS* 169 (2013).

23. Toobin, *supra* note 21, at 70 (internal quotation marks omitted). We assume Hatch means that the Senate *with* a filibuster rule protects small states. Without a filibuster rule, nonproportional representation would also make it possible for states representing less than a majority of the population to pass legislation, not just to block it. We should also note that the scholars we discuss here have deployed supermajoritarian arguments in different ways. Barnett enlists supermajorities to encumber constitutional change, for example, while Levin uses a supermajority of states to undo federal legislation. We do not doubt that these are important distinctions, but they do not dilute our central point. Conservative thinkers have turned recently to supermajoritarianism, and McGinnis and Rappaport are a significant part of that turn.

For some, this move to supermajoritarianism has been paired with a distinctly formalist impulse. The impetus here is not simply a two-thirds or three-quarters threshold, wherever one might find it. The impetus is a strict, perhaps even rigid conception of the procedural means by which that particular level of support is determined and any subsequent legal change is brought into effect. Barnett, again, demands amendment only through Article V's particular procedures.<sup>24</sup> Justice Scalia endorses that same exclusive approach (p. 176), even as he worries that Article V's procedures are now too "hard."<sup>25</sup> To them, supermajoritarianism is not just about ensuring a high level of support for any constitutional change. It is about enforcing a *voting* rule—a process that requires voting itself and is designed to produce clear textual alterations in the document. This kind of formalism reflects a commitment to particular procedures embedded in rule-of-law values. It displays a devotion to established structures of representative government, even in the face of contrary popular will. And it is crucial to some strands of contemporary originalism—perhaps even more crucial than the concern for popular support.

McGinnis and Rappaport share the view that the Constitution should change only by way of Article V.<sup>26</sup> They argue that ours is "a supermajoritarian constitution" (p. 2), conceived and created by more than majoritarian means. But they are not just supermajoritarians, willing to acknowledge "consensus" in the courts or on the streets. They are also constitutional formalists, committed to an exclusive method of constitutional change (p. 81). They believe that supermajoritarian process generates high-quality constitutional substance—that our Constitution's "stringent supermajority rules . . . generate good constitutional provisions," whatever they may be—and that fidelity to this goodness requires originalist commitments (p. 3). It is a bold thesis, to be sure, and both of its components—supermajority support and formal process—are essential to it.

But why would this combination of formalism and supermajoritarianism generate attractive substance? McGinnis and Rappaport locate some support for their claim in the abstract arguments briefly noted above—that supermajority rules provide political stability, that supermajority rules encourage democratic consensus, and that supermajority rules protect vulnerable minorities by fending off capricious majoritarian change (pp. 12–13). They also invoke a very loose version of Rawls's veil of ignorance, speculating that supermajorities today will not target vulnerable minorities because they cannot know whether they themselves will be the vulnerable minority

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24. Barnett, *supra* note 20.

25. Marcia Coyle, *Scalia, Ginsburg Offer Amendments to the Constitution*, LEGAL TIMES, Apr. 17, 2004, available at <http://www.law.com/sites/articles/2014/04/17/scalia-ginsburg-offer-amendments-to-the-constitution> ("Scalia said he would amend the amendment provision to make amendments easier. . . . 'It ought to be hard, but not that hard,' Scalia said.").

26. See p. 81 (arguing that the Constitution should be changed through the Article V amendment process rather than by Supreme Court interpretation).

tomorrow.<sup>27</sup> And they find support in the Condorcet Jury Theorem—the idea, in short, that there is wisdom in crowds.<sup>28</sup>

The Condorcet Jury Theorem holds that juries are more likely than any individual juror to pick the “correct” of two options, assuming the voters are sufficiently independent and competent.<sup>29</sup> And it suggests that this likelihood increases as the voting group grows. In his time, the Marquis de Condorcet used this insight to argue that juries would be smarter than individual decisionmakers.<sup>30</sup> McGinnis and Rappaport now use the theorem to claim that supermajorities are better, politically and constitutionally, than majorities. Even more, they argue that rules made by these supermajorities will be substantively “good” (p. 3).

We should note, even here, that these are not straightforward arguments for formalism, originalism, or textualism. They are instead arguments only for decisions made by big groups—by big juries and perhaps by supermajorities. We should also note that it is unclear how well Condorcet works outside the jury room. In the wider world, the options available to decisionmakers may not be binary, and no choice may be plainly “correct.”<sup>31</sup> But even so, these are the central anchors for McGinnis and Rappaport’s argument—the pivot points of their supermajoritarian turn. McGinnis and

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27. P. 42; see JOHN RAWLS, *POLITICAL LIBERALISM* 277 (1993) (“[T]he veil of ignorance not only establishes fairness between equal moral persons, but by excluding information about the parties’ actual interests and abilities, it corresponds to the way in which . . . even our potential abilities cannot be known . . .”).

28. See MARQUIS DE CONDORCET, *ESSAY ON THE APPLICATION OF MATHEMATICS TO THE THEORY OF DECISION-MAKING* (1785), reprinted in *CONDORCET: SELECTED WRITINGS* 33, 48–49 (Keith M. Baker ed., 1976); Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 *HARV. L. REV.* 4, 13 (2009) (“[A] majority of the group will, given the other conditions of the Theorem, necessarily prove more competent than the average individual and perhaps even more competent than the most competent individual.”).

29. See, e.g., Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to The Law of Other States*, 59 *STAN. L. REV.* 1281, 1284 (2007).

30. *Id.* at 1298 (“From [Condorcet’s] perspective, the great advantage of a jury is that it increases the chance of a ‘correct’ decision—guilty people found guilty, liable people found liable, and so forth.”).

31. SCHWARTZBERG, *supra* note 13, at 119. Professors Lanni and Vermeule express a similar concern:

[T]he very conditions that make dispersed information most valuable to the constitution-makers also tend to undermine the applicability of the Condorcet Jury Theorem. The Theorem supposes that there is an exogenously defined correct answer, where correctness is defined according to the group’s shared fundamental preferences. Suppose that the relevant polity is large and heterogeneous, so that there are many groups with conflicting interests on a range of issues. Under such conditions, the common fundamental preferences necessary for the Theorem to apply are most likely to be lacking.

Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 *STAN. L. REV.* 907, 931 (2012); see also Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 *J. LEGAL STUD.* 327 (2002) (describing three ways that randomness enters a Condorcet model and discussing the implications each model has for legal interpretation). The jury setting is also very different as a matter of presumption and procedure. It starts with a presumption of innocence, and it involves cloistered deliberation and unanimous decisions. Contemporary politics has no clean analogy for any of these features.



Rappaport argue that the Constitution is wise, durable, and good because it was ratified under supermajority voting rules (pp. 11–14).

McGinnis and Rappaport take one additional step in their basic proposal. They argue that we should respect the Constitution's supermajoritarian origins by adhering to a strand of originalist interpretation—what they call *original methods originalism* (p. 116). Only an originalist mode of interpretation can preserve the Constitution's substantive goodness, they say, “because the drafters and ratifiers used [original] meaning in deciding [by supermajority] whether to adopt the Constitution” (p. 11). We spend little time on this remarkable claim here, but we wish to flag it for interested readers—and to note that others have addressed it at length, largely in response to the many McGinnis and Rappaport articles that prefigured their book.<sup>32</sup>

### B. *The Response*

Our focus is on supermajoritarianism, formalism, and the combination of the two. In this Section, we begin by noting that not every component of McGinnis and Rappaport's formal-supermajoritarian thesis entirely works. Two problems in particular hinder their basic claim. First, it elides crucial lessons of political science, paying too little heed to the inherent drawbacks of supermajoritarian thresholds. Second, it inconspicuously sacrifices supermajoritarianism, formalism, or both at the very moment they may matter most. We examine these two problems below, and we then contrast their approach with some markedly different constitutional preferences now prominent in the literature on legal theory.

#### 1. Neutrality and Anonymity

First, political science. There is a critical gap in McGinnis and Rappaport's supermajoritarian argument. They recount the many potential benefits of supermajorities but hardly touch on the likeliest costs. They note that supermajoritarian requirements promise a kind of social stability (p. 13), for example, but they say almost nothing about the uneven distributional consequences of supermajoritarian thresholds or the price of preserving the status quo. That omission may be a foreseeable consequence of their ambitious agenda—their attempt to weave supermajoritarianism, formalism, and

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32. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 354–56 (2011). Professor Balkin lists “four problems” with McGinnis and Rappaport's original methods originalism: first, it assumes consensus about interpretive methods among people who voted for the Constitution when, in fact, there might have been none; second, it makes “the familiar error of speaking as if the Constitution had been adopted at a single point in time rather than over the course of two centuries”; third, it misreads courts and misinterprets evidence of the ratifying public's understanding of how the Constitution would be interpreted; and, fourth, it rejects the distinction between interpretation and construction—and thus proves “unworkable.” *Id.*; see also Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 *CONST. COMMENT.* 95, 112–15 (2010).

originalism into the fabric of one argument. But it also means that they have left pertinent strands of modern political theory unexplored.

One strand is May's Theorem. May's Theorem offers a compelling and comprehensive defense of majoritarian voting rules. It holds that majority rules, and only majority rules, respect two core democratic principles: One is neutrality, the commitment to treating equally all possible outcomes (say, to recognize same-sex marriages or not); the other is anonymity, the norm that all voters should be treated equally too.<sup>33</sup> Supermajority rules fail the first of these principles<sup>34</sup> and, we believe, the second as well.

Supermajority rules fail the neutrality principle because they privilege one possible outcome over all others: the status quo.<sup>35</sup> In a supermajoritarian regime, those who benefit in the status quo will be more likely to benefit in the future—for the current state of affairs is deliberately and decidedly harder to change. Those who suffer now, in turn, will be more likely to suffer in the future as well. This no doubt promotes a kind of social and political stability. But this failure of neutrality is also a kind of lock in, a dead-hand effect at the heart of supermajority rule.<sup>36</sup>

McGinnis and Rappaport are not blind to this dead-hand worry. They even seem to concede, quickly, that some forms of originalism permit “the dead hand of the past [to rule] the present” (p. 15). But they then say that their argument is different, that under their theory the dead hand disappears because “each generation” has the same chance to change the Constitution as every other (p. 15).

And perhaps this is true in some purely abstract, technical sense. Article V certainly reads today the same way it did in 1789. But this response still seems to us doubly inadequate. For one, it ignores political reality. Changing the Constitution has always been hard, and changing it by McGinnis and Rappaport's means is “effectively impossible” now<sup>37</sup>—too “hard,” as we noted, even by Justice Scalia's exacting standards.<sup>38</sup> For another, it disregards a stern social truth. Asserting that anyone can change our Constitution is one thing. Acknowledging existing distributions and imbalances of cultural power is quite another. To put it bluntly, “To say that anyone can take advantage of supermajority rule” like Article V “is, in reality, often akin to

33. See SCHWARTZBERG, *supra* note 13, at 121.

34. See Melissa Schwartzberg, *Should Progressive Constitutionalism Embrace Popular Constitutionalism?*, 72 OHIO ST. L.J. 1295, 1305 (2011) (“[S]upermajority rules are in important ways antithetical to the values to which they are committed . . .”).

35. *Id.*

36. See Adrian Vermeule, *Social Choice in the Wild*, NEW REPUBLIC, Feb. 3, 2014, at 52, 53, available at <http://www.newrepublic.com/article/116172/against-filibusters-super-majorities-melissa-schwartzberg-reviewed> (stating that “Arrow's Impossibility Theorem . . . (very roughly) showed that under certain conditions collective choice rules could not be both democratic and coherent or stable”).

37. See Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), [http://www.slate.com/articles/news\\_and\\_politics/view\\_from\\_chicago/2014/05/amending\\_the\\_constitution\\_is\\_much\\_too\\_hard\\_blame\\_the\\_founders.html](http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_blame_the_founders.html).

38. Coyle, *supra* note 25.

saying that the rich and the poor have an equal right to sleep under the bridges of Paris.”<sup>39</sup>

There is a related problem here too. Supermajority rules do not necessarily protect minority groups, nobly insulating them from the whims of majority will. They may in fact harm vulnerable minorities in one (or both) of two ways. Rules that require more than a majority vote may allow the adoption of policies that are truly harmful in a net-utility sense, so long as the harms are sufficiently concentrated on a particular out-group.<sup>40</sup> And they may thwart any real momentum for progress, since supermajority rules may make it impossible for out-groups to build coalitions capable of transforming the status quo.<sup>41</sup> It is still true that our polity is dynamic and our demographics fluid—so our political minorities will surely change over time. Outsiders may become insiders. Dominant groups may fade as our nation grows.<sup>42</sup> But it is too quick to say that supermajority rules will protect minorities, new or old. Such rules may instead allow concentrated exploitation of them, and they may simply entrench existing distributions and arrangements, violating the neutrality principle and preserving the status quo.<sup>43</sup>

Supermajority rules may also fail the anonymity principle. They may not treat all voters equally, regardless of their positions on particular issues. Instead, the rules may overcount some votes and largely disregard many others.<sup>44</sup> Consider the modern Senate. Senate filibuster rules now effect a form of supermajoritarianism on the legislative level, even after the recent “nuclear” detonation: they require sixty votes to get much done.<sup>45</sup> But if these rules reflect a kind of simple numerical supermajoritarianism—sixty is more than fifty-one—they still work in a way that defeats popular, even overwhelmingly popular, sentiment. Far from securing true political “consensus,” in fact, they may do just the opposite—divesting certain votes of

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39. Vermeule, *supra* note 36, at 55.

40. David S. Law & David McGowan, *There Is Nothing Pragmatic About Originalism*, 102 NW. U. L. REV. COLLOQUY 86, 91 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/27/LRColl2007n27Law.pdf> (“Nothing prevents a supermajority from adopting policies that reduce net welfare as long as the costs of such policies are sufficiently concentrated.”).

41. See Vermeule, *supra* note 36, at 54.

42. We should emphasize that not all numerical minorities are necessarily disadvantaged out-groups. Some numerical minorities may in fact be privileged by supermajority voting thresholds, entrenched in their power inasmuch as they hold an effective veto over pure majoritarian change. We discuss this very possibility in the context of the Senate. See *infra* text accompanying notes 44–47.

43. See SCHWARTZBERG, *supra* note 13, at 128 (noting that the “first-order” question is not whether we should entrench particular substantive rules but whether those rules are of such “quality” that we should want to entrench them).

44. See Schwartzberg, *supra* note 34, at 1305–06.

45. Burt Neuborne, *One-State/Two-Votes: Do Supermajority Senate Voting Rules Violate the Article V Guaranty of Equal State Suffrage?*, 10 STAN. J. C.R. & C.L. 27, 27–28 (2014).

meaning, allowing as little as one-tenth of the population to thwart overwhelming democratic will.<sup>46</sup> This is not the kind of shared agreement McGinnis and Rappaport seem to envision. Nor is it equal treatment of votes or voters. It is instead something much more troubling—a lurking failure of the anonymity principle and precisely “the sort of deliberate and flagrant offense to equal political dignity that supermajority rule creates.”<sup>47</sup> It is also the sort of political science problem McGinnis and Rappaport might have more fully engaged.

## 2. Supermajoritarianism and Formalism, Traded Away

But maybe this is a quibble. Maybe we overstate the lessons of political science. And maybe McGinnis and Rappaport would accept the failures of neutrality and anonymity as costs that any committed supermajoritarian must be willing to bear.

But even if this is true, there is a second problem with their argument, and this one strikes right at its core: their book quietly gives up its own game. McGinnis and Rappaport are supermajoritarians, and they are formalists. But at the moment most crucial to their narrative—at Reconstruction—they trade both of those commitments away.

To show that McGinnis and Rappaport do this—and how—we should begin where they do: at the founding. A supermajority back then, they say, framed and forged the Constitution. Even more, this supermajoritarian participation made the Constitution good—not just durable or detailed but substantively beneficent (p. 13).

There are many reasons to question this exalted conception of the founding.<sup>48</sup> McGinnis and Rappaport candidly recognize one: a supermajority may have ratified the Constitution, but it was a supermajority of a distinctly homogenous electorate. Only white property-holding men could participate. Women, non-property owners, and African Americans were excluded from the start.<sup>49</sup>

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46. See *id.* at 41; Toobin, *supra* note 21, at 71 (“It’s not the tyranny of the majority—it’s the tyranny of the minority.” (quoting Sen. Tom Udall) (internal quotation marks omitted)); *cf. id.* at 72 (“You have a situation where legislators representing less than one-tenth of the population of the country can stop any amendment.” (quoting Professor Sanford Levinson, discussing constitutional change) (internal quotation marks omitted)).

47. Vermeule, *supra* note 36, at 55.

48. See, e.g., Amar, *supra* note 16, at 481–87; see also SCHWARTZBERG, *supra* note 13, at 156 (“In the case of the U.S. Constitution’s supermajority rule governing constitutional amendments, we lack evidence either of reason giving or of sustained negotiations.”).

49. P. 101; see also David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1499 (2001). Independent of this skewed electorate, there is also the matter of size. Put simply, American society is much larger now than at the founding, so perhaps there is more “wisdom” in the crowd today than there was before. That is, if Condorcet supports the view that large groups are more likely than small ones to reach good outcomes—a view we address, *supra* text accompanying notes 28–30—then the framing generation should not be privileged but in fact disfavored, at least relative to the much larger groups that ratified other more modern provisions.

McGinnis and Rappaport admit this is a problem. They deem it a “defect” at the heart of the original Constitution (p. 11) and a “failure” of constitutional design (p. 101). But they say we have long since cured this defect by amending our Constitution under Article V: the Reconstruction Amendments cured the exclusion of African Americans (p. 107), and the Nineteenth Amendment cured the exclusion of women (p. 111). (As it happens, the exclusion of non-property owners was also cured, although *without* formal constitutional amendment<sup>50</sup>—a fact McGinnis and Rappaport somewhat curiously elide.)

We agree with McGinnis and Rappaport that these amendments addressed deep constitutional failures. But their proffered solution (p. 115) still falls short. In part that is because they ask a skewed question. The pivotal question for their argument is not whether, say, the Reconstruction Amendments addressed a constitutional defect—something they clearly, if imperfectly, did. Instead, the pivotal question is whether those amendments speak to a kind of retroactive ratification, a post-hoc supermajoritarian commitment to the original Constitution. They plainly do not. At no point were African Americans or women (or non-property owners) asked if they would ratify the Constitution retroactively, and there is no evidence that they would have done so if asked.<sup>51</sup> So while we do not doubt that the Reconstruction Amendments did and still do something important, we do not think they do what McGinnis and Rappaport ask them to do. The amendments did and still do nothing to suggest that there was a true supermajority in favor of ratification, either at the founding or after it.

Yet there is another, perhaps deeper reason that McGinnis and Rappaport’s solution does not work. This reason has to do with the Reconstruction Amendments’ curious history: these provisions were not ratified in the cleanest or clearest of ways. Some say, in fact, that they were hardly ratified at all—that Southern states, ravaged by the Civil War and represented by carpet-bagging legislatures, were “coerced into ratifying them.”<sup>52</sup> Others say that these amendments were more like a “treaty” than any formal amendment, a kind of postwar accord struck between the victorious Union and the defeated South.<sup>53</sup>

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50. Strauss, *supra* note 49, at 1499–1500.

51. Cf. Thurgood Marshall, Commentary, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 4 (1987) (“While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the fourteenth amendment . . . . And yet almost another century would pass before any significant recognition was obtained of the rights of black Americans . . . .”). That is not to say that the Reconstruction Amendments did not become central to African American politics. They did. Eric Foner, *Rights and the Constitution in Black Life During the Civil War and Reconstruction*, 74 J. AM. HIST. 863, 880 (1987) (“As Reconstruction progressed, the national Constitution took its place alongside the Declaration of Independence as a central reference point in black political discourse.”).

52. Posner, *supra* note 37.

53. Strauss, *supra* note 49, at 1479.

McGinnis and Rappaport acknowledge this procedural abnormality, but they accept the amendments all the same. Even if these amendments were adopted inappropriately, they say, they are a necessary and “timely” part of our constitutional framework, an essential cure for a defect in the original document’s design (pp. 71, 224 n.31). And even if certain precedents are compromised by their connection to these dubiously ratified amendments, such precedents should also be preserved because they now claim a kind of social supermajority support (p. 224 n.31).

We appreciate that this careful analysis introduces a measure of pragmatism to an argument that might otherwise be implausible—implausible because it ignores the actual difficulty of formal constitutional amendment (what Professor Posner calls passing a pig “through *two* pythons”<sup>54</sup>), and implausible because it disregards supermajorities that speak outside of Article V. But this is not just a thoughtful nod to political reality. It is a tremendous, if discreet, concession of both parts of McGinnis and Rappaport’s argument. In this important passage, they compromise their supermajoritarianism and their formalism. They say, on the first, that the Reconstruction Amendments are valid even without contemporaneous supermajoritarian buy in because they cured a “defect” that needed curing (p. 224 n.31). And they say, on the second, that particular precedents should remain in force, even if the amendments behind them are invalid, because these precedents now boast supermajoritarian support (p. 224 n.31). This move may be shrewd and, from many perspectives, entirely accurate. But here, in this crucial setting, it sells off McGinnis and Rappaport’s two core commitments: supermajoritarianism is exchanged for a defect’s cure; formal process is exchanged for validation after the fact. *Originalism and the Good Constitution* is premised on the notion that constitutional “goodness” grows out of a combination of supermajority support and formal process. But here, during a crucial test of their theory, McGinnis and Rappaport sacrifice both tenets.

### 3. Formalism and Precedent

Two brief follow-on points. The first concerns McGinnis and Rappaport’s allegiance to formal process. This allegiance seems to us odd and undertheorized. Compare their devotion to supermajoritarianism, a devotion they defend at length—by reference to stability, to Rawls, and to Condorcet. We have questioned the type of stability they privilege, the kind of veil of ignorance they imagine, and the value of Condorcet outside the jury room.<sup>55</sup> But at least these arguments anchor McGinnis and Rappaport’s supermajoritarian sentiments. By contrast, nothing really anchors their law-ish formalism. They make no significant argument about why formal process is itself so significant—or why, more particularly, we should disregard

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54. Posner, *supra* note 37.

55. See, e.g., SCHWARTZBERG, *supra* note 13, at 119 (“In general, the Condorcet Jury Theorem cannot constitute a justification for majority decision making in normal political life.”).

supermajoritarian preferences simply because they emerge outside of Article V.

But there may of course be a reason. McGinnis and Rappaport's commitment to formal process may be a way to disempower the Supreme Court. That potential consequence does not seem entirely accidental, for McGinnis and Rappaport dislike the Court as an engine of constitutional change. In their telling, in fact, the problem is not just that the Court sometimes overreaches or interrupts electoral politics (p. 72). Nor is it just that the Court is, from time to time, countermajoritarian—an unelected impediment to expressions of majority will in and through legislatures.<sup>56</sup> The problem is that the Court is occasionally *countersupermajoritarian*—an elitist obstacle to supermajoritarian sentiment enshrined in the written Constitution and thus an institution that prevents the Constitution from being good.<sup>57</sup> To the authors, what makes the Constitution beneficent is supermajoritarian process, not the erratic intrusions of a self-indulgent Court. Exclusive use of Article V would thus keep judges sidelined. And keeping judges sidelined would only make our Constitution better—more faithful to formal process, less countersupermajoritarian.

This makes some sense as a strategy. But it is still a strategy with significant faults. One is that the tactic is overinclusive. McGinnis and Rappaport may aim to strip the Court of its power, but they end up doing much more than that: prescribing a process that is presently implausible, understating the history of amendment outside of Article V, and excluding other things (like social movements) that inform constitutional meaning and generate supermajorities as well. McGinnis and Rappaport also undersell the Court. They may believe the Court to be elitist and aloof, entirely indifferent to democratic will. But good evidence suggests that they are at least partly wrong. As a matter of historical fact, the Court has rarely bucked popular sentiment at any point.<sup>58</sup> By some measures, the Court may be even more reflective of popular sentiment than Congress or the executive—not less.<sup>59</sup> Far from a countermajoritarian or countersupermajoritarian body, in fact,

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56. See p. 88 (arguing that simple Supreme Court deference to majoritarian legislative acts would not maintain a good Constitution over time).

57. See p. 89 (arguing that Supreme Court interpretations that change the Constitution undermine the supermajoritarian amendment process).

58. See, e.g., Michael J. Klarman, *Bush v. Gore Through the Lens of Constitutional History*, 89 CALIF. L. REV. 1721, 1750 (2001) (“On only a relative handful of occasions has the Court interpreted the Constitution in ways opposed by a clear majority of the nation.”); Thomas R. Marshall, *Public Opinion, Representation, and the Modern Supreme Court*, 16 AM. POL. RES. 296, 297–98 (1988); see also Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 117 (2012) (“[T]he Court can, at times, effectuate majoritarian change *better* than the representative branches designed for that very purpose.”).

59. Compare THOMAS R. MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* 78–91 (1989) (noting that the Court's constitutional decisions accord with public opinion about 60% of the time), with Alan D. Monroe, *Public Opinion and Public Policy, 1980–1993*, 62 PUB. OPINION Q. 6, 12–13 & 13 tbl.1 (1998) (showing that overall federal policy accords with majority preference only about 55% of the time). See also Law & McGowan, *supra* note 40, at 100 n.67 (citing these studies).

the Court is an institution at least as supermajoritarian as anything else<sup>60</sup>—including, perhaps, Article V at moments like the founding or Reconstruction.

This leads to a second point—a related concern with the strategy of using formalism to limit the Supreme Court. McGinnis and Rappaport actually allow significant room for precedent, but they do so in a way that is strange, strained, and contrary to much they say elsewhere. McGinnis and Rappaport question lots of nonoriginalist doctrine—as original methods originalists (pp. 14–15) understandably would. In their estimation, nonoriginalist cases like *Furman v. Georgia*<sup>61</sup> and *Roe v. Wade*<sup>62</sup> can and should be overruled (pp. 194–95). But other canonical decisions—like *Griswold v. Connecticut*<sup>63</sup> and *Loving v. Virginia*<sup>64</sup>—should stay in place. For these decisions, wherever they started, now “enjoy[ a] kind of consensus support equivalent to a constitutional amendment” (p. 195), and so these opinions now merit a presumption of beneficence.

We have no quarrel with that sort of presumption generally or with stare decisis overall. But the presumption here seems curiously deployed. It makes us wonder, again, how much formal process actually matters to McGinnis and Rappaport—especially where it seems to make the most difference.<sup>65</sup> And it leads us to question why these particular ends justify this specific compromise of means. If *Loving* is indeed a nonoriginalist precedent, for example, it is not clear why we should preserve it simply because overturning it would spur a constitutional amendment. Preserving *Loving* may well be efficient in some sense—and doing so is certainly compatible with our own normative preferences. But McGinnis and Rappaport do not build their argument on the back of efficiency. They build their argument on the idea that originalism is mandated by the Constitution’s supermajoritarian character—that supermajoritarian deliberation, discussion, and acceptance both make our Constitution good and prove originalism the necessary choice (p. 152). It is more than difficult to square that argument with this treatment of “entrenched” nonoriginalist precedent.<sup>66</sup>

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60. Cf. Jeremy Waldron, Essay, *Five to Four: Why Do Bare Majorities Rule on Courts?*, 123 *YALE L.J.* 1692, 1694 (2014) (asking “why . . . bare majority decision . . . [is] an appropriate principle to use in an institution that is supposed to be curing or mitigating the defects of majoritarianism”).

61. 408 U.S. 238 (1972).

62. 410 U.S. 113 (1973).

63. 381 U.S. 479 (1965).

64. 388 U.S. 1 (1967).

65. Even more, it is not clear how McGinnis and Rappaport anchor that presumption in their version of original methods originalism, pp. 14–15, particularly if these methods differ from the methods we use today. See Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 *CONST. COMMENT.* 427, 471 (2007).

66. Balkin, *supra* note 65, at 475. *Contra* p. 196 (contending that their theory provides justification for entrenched nonoriginalist precedent and other precedent that would result in enormous costs if overruled).



Yet this is but a narrow concern. It questions a nuanced piece of McGinnis and Rappaport's project, not its broader thrust. We hinted above that we also have that broader kind of question—and we elaborate on those hints below. But we should also outline here another piece of McGinnis and Rappaport's intellectual frame. They are not just writing within an older tradition of originalism and a newer trend of (formal) supermajoritarianism. They are writing against a number of progressive constitutionalists with contrasting predilections and priorities. Some in this camp, like Professor Levinson, favor a mode of constitutional lawmaking that is majoritarian, not supermajoritarian—and thus at odds with McGinnis and Rappaport's threshold commitment.<sup>67</sup> Others, like Professor Strauss, doubt that Article V was ever a critical lever of constitutional change.<sup>68</sup> Some, like Professor Ackerman, search out supermajoritarian commitments not through Article V's prescribed processes but in extraordinary constitutional “moments.”<sup>69</sup> And some, like Professors Balkin,<sup>70</sup> Tushnet,<sup>71</sup> Kramer,<sup>72</sup> Post, and Siegel,<sup>73</sup> find constitutional authority in social movements and in the voice of the “People”—on the streets and in the courts as well as in legislative halls. All of these theorists outline constitutional visions decidedly different from the one McGinnis and Rappaport advocate—both in what the Constitution says and in how it can change. And still others, like Professor Solum, offer strikingly different understandings of how that document should be read.<sup>74</sup> But all help to situate McGinnis and Rappaport's impressive argument in its academic context. And all prompt bigger—even *meta*—questions about the purpose of the conservative project and the real mechanics of constitutional change.

## II. COUNTERSUPERMAJORITY AND CONSTITUTIONAL CHANGE

These metaquestions are not only about law. They are about the structure of our democratic institutions and the mechanisms of cultural change—about the need for “responsive” constitutional politics and the importance of demography.<sup>75</sup> This Part takes on two of those important questions. The first is short but speculative: Why now? Why have some prominent conservative constitutional actors (theorists and otherwise)

67. See, e.g., Toobin, *supra* note 21, at 69 (“Sandy and his group . . . are majoritarians.” (quoting Barnett) (internal quotation marks omitted)).

68. Strauss, *supra* note 49, at 1459.

69. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 5 (1998); see also BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

70. See BALKIN, *supra* note 32.

71. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

72. LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004).

73. Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in *THE CONSTITUTION IN 2020*, at 25 (Jack M. Balkin & Reva B. Siegel eds., 2009).

74. Solum, *supra* note 9; Solum, *supra* note 32.

75. See Post & Siegel, *supra* note 73, at 26.

turned to supermajoritarianism today? The second is bigger and more normative: How can, does, and should our Constitution actually change?

#### A. *Why Now?*

So why now? Why have some originalists decided to embrace supermajoritarianism today?

We do not know for sure. But we can hazard an informed if partial guess: demographics. Our society is shifting, evolving in its political preferences and transforming in its racial complexion. Yesterday's majorities are tomorrow's minorities. American society is changing in what its citizens look like, in where they live, in what they vote for, and in what they think.<sup>76</sup> Demographics may thus be destiny—and their trajectory is often easy to see.

For some, that trajectory may stir a kind of selective nostalgia. It may spur a longing for particular periods of American consensus—the postwar stability, say, of President Eisenhower's 1950s.<sup>77</sup> Demographic reality may also implant a sense that majorities of those eras will be minorities in the next, and soon.

That inversion may bring some uneasiness. New majorities may hold different commitments than older ones—constitutional and otherwise—and they may be able to pursue those commitments more easily if subject only to majority voting rules. But supermajoritarianism would restrain that pursuit. It would make implementing new legal and cultural preferences more difficult, and so it would provide a kind of stability in the face of cultural transformation—at least as a matter of constitutional law, even if the Court is (as we believe) likely to be responsive to shifting preferences.

But we admit this is speculation. And we emphasize that this hypothesis is not personal to any particular theorist. Yet the demographic trends are too strong not to notice, and their effects are too plain not to see. A move to

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76. For example, the Gallup polling organization has connected the expected racial diversification of the American population with the fates of the two political parties. Based on survey data, Gallup reports that Democrats are more racially diverse than Republicans. One factor that will affect the future of political parties, then, is whether Republicans can make inroads among nonwhites. But another factor is what Gallup calls “straightforward demographics”: “Projections show that the nonwhite proportion of the American adult population will grow in the years ahead. This means that if current partisan allegiance patterns prevail, the size of the Democratic base will be in a better position to grow than will the Republican base.” Frank Newport, *Democrats Racially Diverse; Republicans Mostly White*, GALLUP (Feb. 8, 2013), <http://www.gallup.com/poll/160373/democrats-racially-diverse-republicans-mostly-white.aspx>; see also Nate Cohn, *G.O.P.'s Path to Presidency, Tight but Real*, N.Y. TIMES, Nov. 10, 2014, at A1, available at [http://www.nytimes.com/2014/11/10/us/politics/gops-path-to-presidency-tight-but-real.html?\\_r=0](http://www.nytimes.com/2014/11/10/us/politics/gops-path-to-presidency-tight-but-real.html?_r=0) (reporting that some Republican candidates in the midterms “made inroads among young and Hispanic voters” and that “Republicans made progress this year toward solving their demographic problems, but not enough”).

77. See Sam Tanenhaus, *Old Habits*, N.Y. TIMES, Oct. 24, 2010, at BR 31, available at [http://www.nytimes.com/2010/10/24/books/review/Tanenhaus-t.html?\\_r=0](http://www.nytimes.com/2010/10/24/books/review/Tanenhaus-t.html?_r=0) (referring to scholarly works and concluding that, although “the Eisenhower years are remembered . . . as an oasis of responsible governance and nonideological, bipartisan calm,” in fact “[f]or most of the past century, consensus in American politics has been more phantom than fact”).

pure supermajoritarian process will have real losers and real winners. And those winners will likely be the people who hold power today. “In real-world settings, it is usually clear which group or interest will be empowered by supermajority rule, and in real-world settings, it is often those advantaged by the status quo ante who desire the most constraints on majority rule.”<sup>78</sup> This may help explain *why now*.

### B. Democratic Change

But there is still another question, a puzzle we noted at the very outset: Do McGinnis and Rappaport participate in a process that they themselves deem invalid? Like other originalists, they argue that constitutional change should occur in only one way—through Article V’s formal supermajoritarian procedures (p. 202). But should this move toward Article V exclusivity *itself* count as a change? If it does, then McGinnis and Rappaport are promoting constitutional alteration outside the very mechanism they endorse—through legal scholarship and advocacy aimed at people who are neither framers nor ratifiers. That would be ironic, even if it would be inevitable. But it would follow from the ways that constitutional law can, does, and should actually change.

In the pages remaining we briefly explore the contours of this puzzle. We catalogue what the contest for constitutional meaning can include and offer two sharp examples of that contest in action.

But before that we should highlight two points. First, McGinnis, Rappaport, and originalists like them are, we believe, arguing for a kind of constitutional change. It is not change of a familiar, discrete sort—an update of the Cruel and Unusual Punishments Clause, say, or a revamp of the Commerce Clause. It is instead a kind of change about change—a meta claim about how the Constitution should change, if and when it does.

McGinnis and Rappaport say that change should happen in only one way and that nothing else will do (p. 202). And as a constitutional prescription their argument has a predictable force. But that is not how constitutional practice has traditionally worked. From the start,<sup>79</sup> formal Article V

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78. Vermeule, *supra* note 36, at 55.

79. Professor Daryl Levinson and Professor Pildes chronicle one early, dramatic, non—Article V alteration to the constitutional landscape: the rise of political parties. Levinson and Pildes write:

The idea of political parties, representing institutionalized divisions of interest, was famously anathema to the Framers, as it had long been in Western political thought. Equating parties with nefarious “factions,” the Framers had attempted to design a “Constitution Against Parties.” But the futility of this effort quickly became apparent. By the end of the first Congress, it had become clear that political competition organized around issues and programs had the potential to divide coalitions of officeholders and cut through the constitutional boundaries between the branches. . . . By the 1796 elections, Federalists and Republicans had coalesced into competing groupings . . . . [and] [w]hen Congress convened in 1797, its members were clearly identified as Federalist or Republican and regularly voted along those lines. The precursors of the modern political parties had taken root, planted by the very Framers who had authored a Constitution

amendment has represented just one means of constitutional revision—one that not only is *not* exclusive but that has been called “peripheral.”<sup>80</sup> The Constitution has been altered without amendment, or before amendment, or even despite rejected amendment<sup>81</sup>—but not only or always because of amendment under Article V. McGinnis and Rappaport may thus be seeking a kind of constitutional restoration, a pointed reiteration of Article V’s own terms. But that would, we think, still amount to constitutional change on the ground.

Second, we are not suggesting that constitutional alteration should be easy. It should be difficult, for reasons of stability and predictability at least. But Article V is and should be just one part of a more eclectic, pluralist phenomenon of constitutional evolution—one entry in a rich and varied catalogue of mechanisms and dynamics that can transform legal meaning and affect constitutional politics. Even more, the persistent focus on constitutional text is, we think, too narrow—too constrained to capture all of the ways in which basic principles can become law and change over time. At the least, the discussion should include certain statutes too—not just the Fourteenth Amendment, for example, but also the Judiciary Act of 1789 and the Civil Rights Act of 1964. Some may believe that this kind of legal pluralism is destined to frustrate democracy and erode the rule of law. But we think it is “characteristic of a mature liberal society.”<sup>82</sup> In fact, we think it is characteristic of American constitutional democracy in particular.

So what does this pluralism include? Most notably, our pluralist account includes formal voting measures outside of Article V’s amendment process—some more demanding than supermajority rule, some less. It incorporates, for example, unanimity rules—like the entrenchment provision for representation in the Senate.<sup>83</sup> We believe there is a place for such demanding requirements, particularly where an especially rigorous form of entrenchment is necessary. And our account incorporates submajority thresholds—like the “rule of four” used by the Supreme Court in granting writs of certiorari.<sup>84</sup> No one doubts that the Supreme Court’s caseload can have—and often does have—real constitutional significance.

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against them. . . . At the very least, the rise of partisan politics worked a revolution in the American system of separation of powers . . . .

Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2320–21 (2006) (footnotes omitted); see also John J. Janssen, *Dualist Constitutional Theory and the Republican Revolution of 1800*, 12 CONST. COMMENT. 381, 389 (1995).

80. Strauss, *supra* note 49, at 1460.

81. *Id.* at 1460–63.

82. *Id.* at 1462. For an analysis of the ways a constitution may change through amendment, see Richard Albert, *The Structure of Constitutional Amendment Rules*, 49 WAKE FOREST L. REV. 913 (2014).

83. U.S. CONST. art. V (“[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate.”).

84. Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. PA. L. REV. 1067, 1068–80 (1988); see also Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74, 75 (2005) (“[The] principal benefit [of

There are informal elements to this pluralism as well. Our account therefore includes processes of acclamation, whether they occur in relatively controlled settings (like the Senate's chamber<sup>85</sup>) or in more unstructured contexts (like the town square). It includes social movements—those critical, often-dynamic platforms of “norm contestation”<sup>86</sup> that can help shift public conceptions of law over time. Our account includes popular constitutionalism—those constitutional understandings of what Kramer calls “the people themselves.”<sup>87</sup> It includes the media, popular and otherwise. It includes political parties, labor unions, professional associations, and other organizations regularly engaged in legal politics. It includes advances in science and technology when those advances inform constitutional meaning. And it includes academics, both in the pages of law journals and in the practical crafting of legal strategy.<sup>88</sup>

This list is not exhaustive. Nor are its many pieces entirely separate. Academics can participate in social movements; popular constitutionalism can shape the agendas of Congress and the Court. The processes are variable, dynamic, and plural. And they are not just wishful thinking. We do not simply *want* democratic change to occur by way of these various means and mechanisms—by way of social movements combining with litigation strategy, say, or presidential politics intersecting with popular constitutionalism. This is how things actually work.

Two brief examples confirm as much. *District of Columbia v. Heller* is the first.<sup>89</sup> Decided in 2008, *Heller* considered the constitutionality of particular limits on handgun ownership—and it found those limits unsound.<sup>90</sup> According to the Court's majority, the District's limits fell not because they were irrational but because they were blind to pertinent history: they were incompatible with an “original understanding of the Second Amendment.”<sup>91</sup> By some measures, then, *Heller* looks like a “Triumph of Originalism”—and the Court like a detached and “disinterested” historical arbiter, an umpire “merely executing the commands of Americans long deceased.”<sup>92</sup>

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submajority rules] is to enable a minority to force public accountability and transparency upon the majority . . .”).

85. See, e.g., *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17 (1987) (“The Haskell Amendment was then passed by voice vote in the Senate . . .”).

86. Post & Siegel, *supra* note 73, at 28.

87. KRAMER, *supra* note 72, at 8.

88. See, e.g., Ernest A. Young, *Just Blowing Smoke? Politics, Doctrine, and the Federalist Revival After Gonzales v. Raich*, 2005 SUP. CT. REV. 1, 38 (quoting Barnett, Angel Raich's attorney in the case, who predicted after the argument that a holding in favor of the government would render unsuccessful any future challenge in the courts of appeals to a federal statute on Commerce Clause grounds).

89. 554 U.S. 570 (2008).

90. *Heller*, 554 U.S. at 635.

91. *Id.* at 625.

92. Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 191–92 (2008) (citation omitted) (internal quotation marks omitted).

But looks can be deceiving, and they are here in at least two ways. One concerns the politics of presidential appointments: it took significant political energy to put together *Heller*'s originalist Court. That is, it took time, money, and political will—all outside of Article V—to assemble a Court that would decide *Heller* the way it was decided. So even if *Heller*'s decision was disinterestedly originalist—a matter very much open to dispute<sup>93</sup>—it was still a function of a more pluralistic political project.

*Heller* confirms our pluralist account in another way too: the decision is, in its way, a direct product of a “culture war.”<sup>94</sup> Very little in the case happened at random—not the timing, not the advocates, not the strategy. *Heller* was instead the culmination of an intense twentieth-century mobilization—a combination of social movements focused on gun ownership, of intense lobbying by the gun industry, of coalitions devoted to law and order, of libertarian-bred enthusiasm for individual rights, and of a public reoriented to (and reinvigorated about) matters of firearms, self-defense, and the Second Amendment itself.<sup>95</sup> That mobilization does not make *Heller* lawless or invalid. Far from it. It makes *Heller* an illustrative part of a “responsive” democratic constitutionalism<sup>96</sup>—a telling example of what might be called democratic “all of the above.”

Our other example—the move to legalize same-sex marriage—reveals similar dynamics of constitutional change, though here on the political left instead of the political right. And if anything, this illustration involves even more of the varied pieces we described above: social movements as well as legal challenges, shifting demographics as well as political referenda, national strategy as well as state-by-state change. Here as elsewhere, those pieces sometimes pulled in very different directions. Not long ago, for example, some gay-rights advocates argued against active litigation, believing that the right to marry would and should be won at the ballot box.<sup>97</sup> Some litigators, in turn, believed it a “strategic and moral mistake” to rely only on politics—even as public sentiments toward gay rights changed.<sup>98</sup> And even now the issue remains contentious, the subject of vigorous disagreement on the ballot, in the courtroom, and in the press. We imagine this disagreement will continue, though we believe both the law and the public will keep trending toward marriage equality. More important, we recognize this trend as a kind

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93. See, e.g., Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1368 (2009) (“Perhaps the Court will someday provide an originalist rationale for *Heller*'s invalidation of the D.C. handgun ban—a rationale that *Heller* promised but did not deliver. Meanwhile, this case will stand as a monument to a peculiar kind of jurisprudence, which might charitably be called half-hearted originalism.”).

94. Siegel, *supra* note 92, at 192 (quoting *Lawrence v. Texas*, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting)) (internal quotation marks omitted).

95. See *id.* at 194, 201–36.

96. See Post & Siegel, *supra* note 73, at 28.

97. See Margaret Talbot, *A Risky Proposal*, NEW YORKER, Jan. 18, 2010, at 40, available at <http://www.newyorker.com/magazine/2010/01/18/a-risky-proposal>.

98. See *id.* at 43.

of legal change—a shift in constitutional meaning, perhaps even with supermajoritarian support, outside of Article V.

One lesson of these examples is just that: the Constitution can and does change exclusive of Article V. It changes not just through supermajoritarian votes, or voting mechanisms of any stripe, but through social advocacy and strategic litigation, through successful propaganda and rhetorical prowess. By some accounts, in fact, this is where legal change in any meaningful sense almost always occurs.<sup>99</sup>

Another lesson is that this pluralist reality is attractive. Laws are not somehow delegitimized for being subject to non–Article V revision or for being responsive to a range of influences. If anything, they are legitimized as “our law.”<sup>100</sup> If anything, that is, the democratic diversity we describe strengthens the bond between American culture and its laws, making the Constitution “ours” precisely because it can change—because it allows for the possibility of persuasion, discourse, and amendment. And although that discourse may bring transformation, it does not necessarily bring disabling confusion or uncertainty. People still know what that “law” is. They knew Second Amendment doctrine sufficiently well before *Heller*, for example, and they know it after *Heller* too. They simply understood it, and still understand it, to be both law and theirs—theirs to abide, theirs to amend. This, then, is countersupermajoritarianism in a second sense: not in the sense that it bucks supermajority preference but in the sense that it involves far more than just formal supermajoritarian thresholds—as it should.

We thus disagree with originalists like McGinnis and Rappaport on both theory and practice. We do not believe the Constitution changes only in the way they argue. Nor do we think it should. And we wonder whether McGinnis and Rappaport argue for a kind of constitutional alteration—for a metachange about the mechanics of change—in a manner they disavow. They seem to argue by way of our pluralist approach, not by way of their own exclusive one. Instead of drafting a constitutional amendment—as Barnett did<sup>101</sup>—they have opted to participate in a kind of academic movement. Instead of confining themselves to formal Article V process, that is, they have engaged in precisely the kind of messy and multifarious mode of argumentation that led to *Heller* and cases like *Hollingsworth v. Perry*.<sup>102</sup> In doing so, they join a variegated effort that resembles the originalist social movements of the 1980s more than the questionable ratification processes of Reconstruction. They call for formal supermajoritarianism, ironically, by nonformal means.

We recognize that McGinnis and Rappaport would answer that they are doing something different, something that could be a precursor to Article V amendment—or something that requires no amendment at all. Far from

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99. See Strauss, *supra* note 49, at 1459.

100. See BALKIN, *supra* note 32, at 59.

101. Barnett, *supra* note 20.

102. 133 S. Ct. 2652 (2013).

arguing for change, they may say, they are advocating a restoration of the formal mechanics that the Constitution already mandates.

Perhaps. But this still would mean a change, and that matters. In fact, it would seem to matter more for McGinnis and Rappaport than for other originalists, because McGinnis and Rappaport emphasize not just original meanings but a formal, supermajoritarian method of constitutional change. Exclusive adherence to that single method would entail an understanding of constitutionalism that differs greatly from our legal and constitutional politics now. Even more, for their desired change to happen, it might well demand something more than the pure Article V process they promote. It would require the contributions of skillful academics (like McGinnis and Rappaport), invested judges (even on the Supreme Court), attentive politicians, and attuned voters—as well as industrious advocacy and enduring rhetoric. It would likely take, in short, precisely the kind of pluralistic participation and responsiveness that we outline here—and precisely the kind of democratic “all of the above” that makes the Constitution our law.

#### CONCLUSION

And the Constitution is indeed our law. All of ours. “If there is a single point of consensus in this heated political moment,” in fact, “it’s that everyone loves the Constitution.”<sup>103</sup> Originalists surely do, and so do their opponents. But perhaps there is a subtle oddity to this shared affection: it does not seem to cover Article V. Americans all love the Constitution and think it is good, even special—the people on the bench, the people at the Capitol, the people on the streets. And they all, at times, seek to change it too. But almost no one seems to extend that reverence to Article V, a supermajoritarian provision that has been ignored or elided from the start. We are grateful that McGinnis and Rappaport have revived Article V so carefully. But we have real questions about where its supermajoritarianism fits, why it matters, and what it should mean today.

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103. Toobin, *supra* note 21, at 64; see also Aziz Rana, *Constitutionalism and the Foundations of the Security State*, 103 CALIF. L. REV. (forthcoming 2015).



