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THE EMPTINESS OF MAJORITY RULE

Luis Fuentes-Rohwer*

INTRODUCTION

In a democratic society, the people are the rulers of their own collective destinies.1 Under our republican form of government, however, ruling mainly entails turning out to the local public schools and civic centers every few years to cast our electoral preferences.2 Accordingly, “[e]lections are at the core of the American political system. They are the way we choose government leaders, a source of the government’s legitimacy, and a means by which citizens try to influence public policy.”3

Unlike its Athenian democratic ancestor, which expected its demos, or citizens, to take full part in the affairs of the polis, or

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2. See infra note 31 and accompanying text. Such a narrow definition of participation, while seemingly accepted in modern political society, is not entirely accurate. See, e.g., SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 47 (1972) (positing that “there are four broad modes of political participation that are used, in ordinary circumstances, by citizens: voting, campaign activity, citizen-initiated contacts, and cooperative participation”). In a more specific sense, these activities might include:

- following accounts of public affairs in the media, engaging in political discussions,
- voting, proselytizing, taking part in campaigns, donating money to political causes and candidates, contacting public officials on either personal or community matters, joining with fellow citizens to deal with political problems, taking part in protest demonstrations, and seeking public office.


political society, American political society thrives on the notion of limited, indirect citizen participation. According to James Madison, citizens elect representatives who will in turn serve as the "proper guardians of the public weal." More importantly, he proceeded:

[a republic] refine[s] and enlarge[s] the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.  

In short, citizens depend on their representatives on matters of governance.

In light of such original understandings, this country's anemic election turnouts should not be surprising. Representative government ensures that the people do not govern directly, thus decreasing their level of political involvement while furthering their indifference to the realities of political life and matters of governance. Furthermore, this country's traditional political practices impede, rather than further, any idealistic notion of full participation. For a system that proclaims democracy to be its underlying principle of governance, American society has a rather curious way of demonstrating its democratic affection.

Yet, this is only part of the story. Full citizen participation, after all, might not be crucial to self-governance. We would not be bothered, for example, if a variety of factions took part in politics, as they

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5. Id.
7. I specifically refer here to voter registration laws. For accounts of these laws and their deleterious effect on actual voter participation, see id. at 17-21; Dayna L. Cunningham, Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States, 9 YALE L. & POL'Y REV. 370 (1991); Steven J. Rosenstone & Raymond E. Wolfinger, The Effect of Registration Laws on Voter Turnout, 72 AM. POL. SCI. REV. 22 (1978); Mark T. Quinlivan, Note, One Person, One Vote Revisited: The Impending Necessity of Judicial Intervention in the Realm of Voter Registration, 137 U. PA. L. REV. 2361 (1989). The importance of these laws is outlined by the fact that registered citizens do turn out to vote. See PIVEN & CLOWARD, supra note 6, at 19; Quinlivan, supra, at 2377 n.109. Reflecting our typical political approach to these laws, a number of bills have been introduced and, not surprisingly, rejected by Congress. Id. at 2388 n.171. Encouragingly, the National Voting Registration Act, 42 U.S.C. §§ 1973gg-1 to 1973gg-10 (Supp. V 1993), which became law in January 1, 1995 and was challenged on, inter alia, Tenth Amendment federalism grounds, was recently upheld by the Ninth Circuit. Voting Rights Coalition v. Wilson, 60 F.3d 1411 (9th Cir. 1995), cert. denied, No. 95-673, 1995 WL 642293 (Jan. 22, 1996).
would "guard against the cabals of a few." So long as a broad diversity of views and interests are represented at the political marketplace, any realistic fear of a democratic deficit seems convincingly deflated.9

Would our fears resurface, however, if specific factions within society remained systematically shunned aside, outside the political realm? For African Americans, much too tragically, such has been the course of American constitutional and political reality. Our original Constitution,10 and later the Supreme Court,11 did not accord Black persons the same degree of humanity as their White counterparts. This kept free and enslaved African Americans outside the political establishment on a de jure basis. The Civil War and the Reconstruction amendments that succeeded it12 sought to remedy these grim conditions while transforming the original understanding of the federal-state relationship.13 Shortly after, however, the

8. THE FEDERALIST No. 10, supra note 4, at 82.
9. It has also been suggested that an estoppel rule may apply, where those who do not participate are deemed to be giving up their right to have a say in the decision-making process. See James Bryce, The Nature of Public Opinion, in PUBLIC OPINION AND PROPAGANDA 10 (Daniel Katz et al. eds., 1954) ("[I]t must be taken that those who do not vote leave their will in the hands of those who do . . . ."). But see Julian Eule, Judicial Review of Direct Democracy, 99 YALE L.J. 1503, 1515 (1990) ("[T]he estoppel] argument . . . enjoys diminished force if we have built obstacles into the process that make ballot measures inaccessible to certain groups."). In any event, application of this rule might not radically affect certain electoral outcomes. See Stephen E. Bennett & David Resnick, The Implications of Nonvoting for Democracy in the United States, 34 AM. J. POL. SCI. 771, 789 (1990) ("[N]onvoting could introduce a skew into the policymaking process, although its size and direction varies from issue to issue."). But see STEVEN J. ROSENSTONE & JOHN M. HANSEN, MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA 245 (1993) ("In fact, Americans need not look very far back into their history for incontrovertible evidence that who participates matters.").
10. See, e.g., WILLIAM M. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848, at 62-105 (1977) (pointing out that the original Constitution included up to ten slave clauses, including U.S. CONST. art. I, § 2, cl. 3 (apportioning Congressional representatives among states based on population, determined by all free persons and three-fifths of the slaves); U.S. CONST. art. I, § 8, cl. 15 (vesting power in Congress to suppress insurrections, including those by slaves); U.S. CONST. art. IV, § 2, cl. 3 (prohibiting states from freeing runaway slaves); and U.S. CONST. art. IV, § 4 (obligating federal government to protect states from domestic violence, including slave insurrections)).
11. Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857) (holding, in reference to the Declaration of Independence, that "neither the class of persons who had been imported as slaves, nor their descendants . . . were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument").
12. U.S. CONST. amends. XIII, XIV, XV.
13. See THE FOURTEENTH AMENDMENT, CENTENNIAL VOLUME 31 (Bernard
Redeemers took over southern politics, and struck a compromise not at all beneficial to the interests of emancipated slaves. Within the next few decades, Jim Crow and its various disenfranchising practices relegated African Americans to second-class status.

It was not until the 1954 decision in Brown v. Board of Education and the courageous determination of the Warren Court, that African Americans finally began to emerge from the appalling shadow of their political misery. Congress joined this movement a decade later, and sought to guarantee political equality through the Voting Rights Act of 1965. This vision, where all citizens stand alongside one another in the political realm, was soon thwarted by a number of political practices that prevented racial minorities from participating in elections or diluted their votes.

Considering these conditions, and the grim prognosis surrounding them, a few commentators have suggested various alternatives to simple majoritarian practices. Most of these alternatives, however, have met intense resistance. The most telling example is

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19. For examples, see infra part II.A.2.a.

20. These proposals have not met such resistance everywhere, as they have been put into practice in some places. For examples of certain localities that have instituted cumulative and limited voting schemes, see Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 Harv. C.R.-C.L. L. Rev. 173, 223-36 (1989), and two courts have employed the "rotation in office" mechanism to ensure that black officeholders "for a fair proportion of the time . . . will occupy positions of formal power." Id. at 241.
that of Professor Lani Guinier, whose nomination to head the Civil Rights Division of the U.S. Department of Justice was rescinded by President Clinton soon after a political furor erupted in Washington over her "profoundly anti-democratic" ideas. American political society's strong aversion to anything other than simple majoritarianism, where fifty percent of all participating voters plus one will carry the day, has led it to reject a series of promising suggestions that could help ameliorate current participatory and representational inequalities. Instead, our polity has insisted on operating under the restrictive confines of the majoritarian paradigm, disregarding this paradigm's pervasively adverse consequences for certain minority groups.

In this Note, I steer away from the current substantive debates surrounding the Voting Rights Act, its various amendments, and the "correct" way of interpreting its intended benefits and constitutionally accepted mandates. Instead, I indirectly join the many "radical" voices advocating for a departure from the majoritarian stranglehold—the decision-making process where fifty percent plus one of the voting population carry the election. I do so not by suggesting yet another mechanism by which representatives may be elected, but by critiquing the perceived underpinnings of our democratic system of government. I do not profess to delineate a definitive interpretation of American democracy, but rather to show what it is not required to be. More specifically, I directly confront the majoritarian foundation upon which America's political society arguably rests, and posit that our reliance on the simple majoritarian paradigm is unwarranted. In short, I argue that democracy entails


22. While this is, in my opinion, the overarching reason, it is not the only reason. See, e.g., Richard H. Pildes, Gimme Five: Non-Gerrymandering Racial Justice, NEW REPUBLIC, Mar. 1, 1993, at 16, 17 ("The most common concern about cumulative voting is that it is too confusing. But this reflects an instinctive fear of new voting procedures rather than informed experience.").

23. For a glimpse of some of the voices involved in this debate, see infra note 33.

24. Skepticism may surface at this stage for those who accord American democracy a more expansive definition. See WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 45-53 (2d ed. 1995) (labeling American democracy as a "constitutional democracy," a political hybrid of constitutionalism and democracy); Walter F. Murphy, Civil Law, Common Law, and Constitutional Democracy, 52 LA. L. REV. 91, 109-13 (1991) [hereinafter Murphy, Civil Law] (merging constitutionalism and democracy into a notion of constitutional democracy). I embrace such alternatives, yet argue that the Supreme Court, with its infatuation with political process theory, does not always do the same. Instead, it accords
anything from unanimous decision-making to simple, fifty-percent-plus-one majority rule.

In Part I, I delineate the basic normative understandings of democratic politics. More specifically, I address the concepts of participation and representation, notions that play a central role in democratic theory. In order to critique our present democratic conditions, a fundamental understanding of democracy's basic assumptions is necessary. In Part II, I turn to the empirical data and address how the conclusions of Part I affect racial minorities. I note that not only is voting turnout anemic, but that minority groups participate in disproportionately low numbers. Moreover, notions of representation are also adverse to the interests of racial minorities. These conditions and their implications for the normative assumptions delineated in Part I are also examined. In Part III, I present some of the proposals that seek to make the political process more responsive to electoral and representational realities. I do not intend here to provide new insights but simply seek to provide a survey of the various proposals available. In Part IV, I turn to the heart of the Note, and address the questionable position held by simple majoritarianism. I provide an overview of both our normative understandings of democratic ideals and our misunderstandings about the privileged status of majority rule. Most importantly, I explore the majoritarian terrain, and critique our increased reliance on simple majority rule as the democratic procedure of choice. I also travel the heavily charted constitutional landscape to unearth any evidence equating American democracy with simple majority rule. Upon reviewing the whole, I conclude that simple majority rule is not a democratic imperative. Thus, perceived deviations from its suffocating stranglehold should not be defeated without careful, reflective study.

I. Democratic Ideals: Some Observations of Its Normative Understandings

As a self-professed democratic polity, American society purports to place its citizens at the core of its democratic aspirations. For this reason, normative notions of participation and representation define in great measure the essence of American democracy. In this Part, I explore both concepts and delineate the essay's theoretical foundation.

A. Participation

To deserve the democratic denomination, the people must take part in political affairs. At first glance, such a definition must certainly entail citizen involvement in the affairs of their community, a fact from which American democratic understandings do not deviate. But unlike the democracy of ancient Athens, where citizens could (and were indeed expected to) step forth and take part directly in the affairs of their polis, American citizens rule indirectly, through their chosen representatives. As a result, the voting booth is elevated to great heights. The size of the populace, coupled with the complex nature of American political society, does not allow for any other approach.

25. This is a literal definition of democracy. See infra text accompanying note 136.
28. See Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (referring to "the political franchise of voting" as a "fundamental political right, because preservative of all rights"); cf. JOHN H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 7 (1980) (positing that the process of constitutional amendment has been mainly concerned with political inclusion and "increasing popular control of our government"); Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 621 (1993) ("In fact, seven of the fourteen amendments enacted since the Civil War explicitly extend the franchise or remove obstacles to its exercise.").
29. See THE FEDERALIST No. 52, supra note 4, at 320 (James Madison); HERBERT STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 15-23 (1981); see also JOHN S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 80 (1991) ("Since all can not, in a community exceeding a single small town, participate personally in any but some very minor portions of the public business, it follows that the ideal type of a perfect government must be representative."); Simon Steer, Proportional Representation, in Representation 73, 75 (Hanna F. Pitkin ed., 1969) ("For nations having an extensive territory, great variety and division of employment, and that intense competition in
Thus, in American political society, ruling is narrowly defined as casting votes for representatives and subsequently communicating with those representatives. For this reason, "[t]urning out to vote is the most common and important act of political participation in any democracy." America's strong commitment to the unhindered extension of the franchise is reflected in the 1965 Voting Rights Act, which sought "to include all Americans in the liberal, democratic electoral process."

It is important to note how this argument, developed earlier by Montesquieu, was used mainly by the Anti-Federalists, who argued for decentralized political institutions and the primacy of localized, small communities. See Storing, supra, at 15-23; Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 36 (1985); cf. John Dewey, The Public and Its Problems 149 (Swallow Press 1927) ("The clear consciousness of a communal life, in all its implications, constitutes the idea of democracy."); id. at 213 ("Democracy must begin at home, and its home is the neighborly community."). This argument was turned on its head by the Federalists, who replied that a large territory was exactly what the new American state needed, as it served as the correct antidote to factionalism. The Federalist No. 10, supra note 4, at 82-84. See generally Wilson C. McWilliams, The Anti-Federalists, Representation, and Party, 84 Nw. U. L. Rev. 12 (1989).

30. See Verba & Nie, supra note 2. The right to vote, however, is not equally understood by all. See infra note 34.

On the issue of conversation between constituent and representative, see Karlan, supra note 24, at 1716 n.48. For a discussion of its empirical quality, see Donald R. Kinder & Don Herzog, Democratic Discussion, in Reconsidering the Democratic Public 347, 348 (George E. Markus & Russell L. Hanson eds., 1993) ("Democratic discussion may be more than just a romantic dream.").


The franchise, in short, occupies a central position in American democratic society. Instrumentally, such a conclusion points to the franchise’s aggregative function. Symbolically, the act of voting carries with it powerful democratic undertones, for it is during such moments that citizens officially join the larger political community and their status as community members, as well as the community’s intrinsic democratic worth, get objective validation.

A third view of participation, however, significantly departs from the symbolic and instrumental accounts. In recent years, American political society has witnessed a “revival” of civic republicanism. The civic republican ideal revolves around civic virtue, defined as “the willingness of citizens to subordinate their accomplished—black enfranchisement—was precisely what it aimed to do.”).

34. See Lani Guinier, (Er)acing Democracy: The Voting Rights Cases, 108 HARV. L. REV. 109, 126 (1994) (“[T]he right to vote essentially consists of three different rights: the right to cast a ballot, the right to cast a ballot that ‘counts,’ and the right to cast a ballot that embodies a fair chance to influence legislative policy-making.”); Karlan, supra note 31, at 5-6 (“[T]he right to vote’s] functional importance lies in the way that voting influences government . . . .”); Karlan, supra note 24, at 1709-19 (equating voting with “aggregation,” “participation,” and “governance”). For a competing view, see Holder, 114 S. Ct. at 2592 (equating the right to vote with an individual’s ability to cast a ballot); Karlan, supra note 31, at 29-30 (“Courts have come to treat the . . . right to ‘participate in the political process’ as nothing more than the elemental ability to cast a ballot.”).


37. See Gey, supra note 36, at 806 (“[C]ivic virtue is certainly the centerpiece of the republican conception of government.”); Frank I. Michelman, The Supreme Court, 1985 Term—Foreword: Traces of Self-Government, 100 HARV. L. REV. 4, 18 (1986) (“Republicanism’s ‘animating principle’ is said to be civic virtue.”); Suzanna Sherry, Civic Virtue and the Feminine Voice in Constitutional Adjudication, 72 VA. L. REV. 543, 552 (1986) (“The good of the commonwealth requires that citizens subordinate their private interests, and the fostering of civic virtue is the mechanism by which they may be expected to do so.”); Sunstein, supra note 29, at 31 (defining the country’s first
private interests to the general good."38

According to this democratic conception, political institutions should be designed in ways that encourage discussion and debate among the polity, for it is through discussion that "people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good."38 Moreover, civic republicanism demands equal access to the political process and does not simply limit political participation to the act of voting.40 That the republican vision is "highly participatory and inclusionary"41 attests to the high premium it places "on political participation as an independent good."42 Not only does society benefit under the republican conception of government, but so does each individual citizen. Participation, by its very nature, enriches the lives of all.43

B. Representation

The Founders relied on representation as the basis of their emerging political society. This was so, they concluded, because the ancient Athenian practice of direct participation was not possible, as it "admit[s] of no cure for the mischiefs of faction."44 In order to control these factional spirits we must elect representatives whose acumen and intelligence will guide us all to the attainment of the common good.45

conception as republican and its animating principle as civic virtue).
38. Sunstein, supra note 29, at 31.
39. Id. It follows not only that "debate and discussion help to reveal that some values are superior to others," id. at 32, but also that "through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good," id. at 31; cf. Dewey, supra note 29, at 208 ("The essential need . . . is the improvement of the methods and conditions of debate, discussion and persuasion."); Carl Schmitt, The Crisis of Parliamentary Democracy 3 (Ellen Kennedy trans., MIT Press 1988) (1923) (describing the important role played by discussion and openness in "parliamentary arrangements.").
40. Sunstein, supra note 29, at 31.
41. Michelman, supra note 37, at 20.
43. Cf. Mill, supra note 29, at 171 ("[P]olitical life is indeed in America a most valuable school . . . .").
44. THE FEDERALIST No. 10, supra note 4, at 81.
45. See Madison's view in Federalist No. 57, where he argues that:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.

The Federalist No. 57, supra note 4, at 350 (James Madison). Such a conception of representatives as elites able to overcome the self-interested masses is seen throughout The Federalist Papers. See, e.g., THE FEDERALIST No. 68, supra note 4, at 412
In order to analyze American political society, and its democratic character, it is first necessary to define the term "representation." At first glance, most of us would readily agree that the term has a definitive meaning. Upon careful thought, however, definitive answers are not readily available. Professor Harold Foote Gosnell, for example, in an attempt to define the term precisely, reviews the definitions of a number of influential political theorists, and finding them inadequate submits his own: "Representation of an individual in a society is a condition which exists when the characteristics and acts of a person in a position of power in the society are in accord with the desires, expressed and unexpressed, of the individual."

Professor Hanna Pitkin, in The Concept of Representation, identifies four competing views on the representation question. She first presents an "authorization" view of representation, originally developed into a theoretical system by Hobbes, which "defines representing in terms of a transaction that takes place at the outset, before the actual representing begins. To the extent that he has been authorized, within the limits of his authority, anything that a man does is representing." This view holds a narrow conception of representation and stresses "only the representative's capacity to bind others, not his obligation to conform to some external standard or act in accord with special considerations."

(Alexander Hamilton) (speaking of Article II's electoral system and explaining that "the immediate election should be made by men most capable of analyzing the qualities adapted to the station").

46. This difficulty emanates from the fact that it is impossible for an individual to be entirely satisfied with the views of his or her chosen candidate. See, e.g., HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 220 (2d ed. 1972) ("[T]he political representative has a constituency and constituents, not a principal. He is chosen by a great number of people; and, while it may be difficult to determine the interests or wishes of a single individual, it is infinitely more difficult to do so for a constituency of thousands."); ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM 33 (1970) ("If a citizen cannot even find a candidate whose views coincide with his own, then there is no possibility at all that he will send to the [governing body] a genuine representative. In practice, voters . . . must make compromises with their beliefs before they ever get to the polls."); Richard F. Fenno, Jr., U.S. House Members in Their Constituencies: An Exploration, 71 AM. POL. SCI. REV. 883 (1977) (identifying the complex nature of constituencies, as perceived by members of Congress themselves).

47. Harold F. Gosnell, Pleasing the Constituents: Representative Democracy, in REPRESENTATION, supra note 29, at 98, 99-104 (providing the definitions given by the likes of Sir Thomas Hobbes, James Wilson, Lord Brougham, Thomas Hare, Robert von Mohl, Edward McChesney Sait, Charles Beard and John D. Lewis, and Rousseau).

48. Id. at 104 (emphasis omitted).

49. PITKIN, supra note 46, at 38.

50. Id. at 14-37.

51. Id. at 39.

52. Id. at 49.
Pitkin then contrasts this formalistic view with the “accountability view,” a view she finds “diametrically opposed to that of the authorization theorist.” As its name suggests, this view renders the representative more answerable to his or her constituents. The constituents are free to choose a different representative if dissatisfied by the representative’s actions.

A third view of representation focuses on what the representative body should look like, and specifically on the representatives themselves. One subset of this view stipulates that to be representative, a legislature’s composition must be an accurate map of the nation, a portrait of the people, an accurate reflection of the various public interests. Another subset focuses on the symbolic nature of representation. In this sense, “[t]he crucial test of political representation will be the existential one: Is the representative believed in?” Political representation thus becomes a “state of affairs, not an acting for others but a ‘standing for’; so long as people accept or believe, the political leader represents them, by definition.” Ultimately, it is crucial for the people to believe in the symbol, not the activities undertaken by the representative.

A final view of representation centers on “representation as an acting for others, an activity in behalf of, in the interest of, as the agent of, someone else.” A vast array of analogies have been suggested for the representational role:

The representative has been variously likened to or defined as an actor, an agent, an ambassador, an attorney, a commissioner, a delegate, a deputy, an emissary, an envoy, a factor, a guardian, a lieutenant, a proctor, a prosecutor, a proxy, a steward, a substitute, a trustee, a tutor, and a vicar.

This view, unlike the authorization account, refers to limits on the representative and to standards that require adherence.

In sum, issues of representation are thorny and complicated, and raise vexing questions of political philosophy. Among all the complexities, however, a minimal democratic requirement must be met. This is John Stuart Mill’s view, as expressed in Considerations on Representative Government: “It is an essential part of democracy that minorities should be adequately represented. No real democracy,
nothing but a false show of democracy, is possible without it.” If democracy means anything, Mill explains, it means rule by all the people, not just a select, biased sample of them. Whether American practices empirically conform to Mill’s understanding is one of the questions explored in the next section.

II. AMERICAN DEMOCRACY, RACIAL MINORITIES, AND EMPirical REALITIES

As a direct response to blatant franchise restrictions and impediments against racial minorities, Congress enacted the Voting Rights Act of 1965. The Act’s optimistic stance soon proved unattainable, for Southern conservative forces resisted the Act’s “broad vision” and continued to restrict racial minorities from accessing the ballot box. This was done not in a “frontal and obviously impermissible manner but with... ‘legal dodges and subterfuges...’” In response, voting rights jurisprudence shifted away from the underlying purposes and vast potentialities of the Act itself, trading the “genuine protection of minority rights for a claim of fairness based on electing a few minorities simply to promote an ideal of descriptive representation.”

In this Part, I discuss the overt state practices that have served to restrict minority access to the ballot box. These practices were carried on before 1965 under the constitutional rubric of “political questions,” an area that the Court deemed to be outside the judicial realm. The Court did intervene in some areas before 1965. However, it was not until the passage of the Voting Rights Act of 1965 that overt state activities came to a federally mandated end. After the Act’s passage, state political actors feigned adherence while subverting the Act’s letter and intent through serious covert practices. Moreover, political attitudes concerning participation have

59. MILL, supra note 29, at 151.
60. Lani Guinier, Voting Rights and Democratic Theory: Where Do We Go from Here?, in CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 283, 284 (Bernard Grofman & Chandler Davidson eds., 1992). The vision upon which the Act is premised, Professor Guinier asserts, encompasses both “political equality and empowerment.” Id. at 284-85.
61. Chandler Davidson, The Voting Rights Act: A Brief History, in CONTROVERSIES IN MINORITY VOTING, supra note 60, at 22 (quoting Congressman Emanuel Celler, Chair of the House Judiciary Committee as well as floor manager of the Act). For concrete examples of the various circumventive practices that developed as a response to the Act, see infra part II.A.2.a.
62. Guinier, supra note 60, at 283. For a fuller description of this position, which Professor Guinier labels “the theory of black electoral success,” see Guinier, supra note 33.
63. See infra notes 71-72 and accompanying text.
also affected the voting turnouts of particular social groups. I address these aspects of political participation in turn.

A. The Quest for Minority Participation

1. Pre-1965: Overt Devices

During the tumultuous 1860s, a trio of transformative amendments made their way into the constitutional text and struck at the heart of Southern racial politics. These Reconstruction amendments not only included recently emancipated slaves into the constitutional community, but also sought to extend the franchise to all its citizens. However, a few years after the passage of the Fifteenth Amendment, the Compromise of 1877 was struck, and Black Americans were once again left at the mercy of their southern White neighbors. That the Voting Rights Act was deemed necessary "[t]o enforce the Fifteenth Amendment to the Constitution of the United States" illustrates the extent to which the Fifteenth Amendment's promising language went largely unfulfilled a century after its passage.

Among the various disenfranchising practices defiantly enacted by those unwilling to accord the Fifteenth Amendment its due def-

64. U.S. CONST. amends. XIII, XIV, XV.
65. U.S. CONST. amend. XIV.
66. U.S. CONST. amend. XV.
67. See supra note 14.
68. See ROSENSTONE & HANSEN, supra note 9, at 197-205. Jim Crow legislation, which reared its ugly head fifteen years later and lasted for well over half a century, illuminates the extent to which southern society relegated its black counterparts to second-class citizenship. J. Morgan Kousser, The Voting Rights and the Two Reconstructions, in CONTROVERSIES IN MINORITY VOTING, supra note 60, at 139-41.
69. Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973 bb-1 (1988). For further evidence, see South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) ("The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting."); see also Richard H. Pildes, The Politics of Race, 108 HARV. L. REV. 1359, 1360 (1995) (reviewing QUIET REVOLUTION IN THE SOUTH (Chandler Davidson & Bernard Grofman eds., 1994)) ("[The Act was] [f]irst enacted in 1965 as a response to the ingenious and successful array of tools Southern jurisdictions forged to deny Blacks political participation for nearly 100 years after the Fifteenth Amendment . . . ."). One should not be surprised if political purposes prompted this piece of legislation. According to Carmines and Stimson, for example, the Act's underlying intention was "to add large numbers of likely Democratic voters to the voting population, trying to offset defections among white voters . . . ." EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS 49 (1989). In their view, this developed as a result of Goldwater's "calculated use" of race as a new issue cleavage, which in fact upset the long established Democratic southern majority. Id. at 187-88.
erence were poll taxes, \(^{70}\) grandfather clauses, \(^{71}\) white primaries, \(^{72}\) the ever-present threats of violence and economic reprisal, \(^{73}\) and literacy tests, which by 1944 were "still operative in all states of the former Confederacy except Arkansas and Texas." \(^{74}\) While some of these practices displayed more ingenuity than others, the end results were substantially the same: the Fifteenth Amendment's voting guarantee was unavailable to a considerable segment of the American public.


Passage of the Voting Rights Act signaled a new dawn in American political society. According to the Act's explicit text, for example, no longer could a state or political subdivision establish a "qualification or prerequisite to voting or standard, practice, or procedure . . . in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . ." \(^{75}\) Unsurprisingly, the optimism surrounding the Act soon gave way to the grim realities of southern politics as states

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70. This practice was declared unconstitutional with regard to federal elections by the U.S. CONST. amend. XXIV. The state counterpart was deemed unconstitutional by the Supreme Court soon after. See Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

71. Somewhat surprisingly, this practice was held to violate the Constitution, fifty years before passage of the Act, in Guinn v. United States, 238 U.S. 347 (1915).

72. This practice was held impermissible by the Supreme Court in Smith v. Allwright, 321 U.S. 649 (1944), as were preprimary selections, in Terry v. Adams, 345 U.S. 461 (1953).

73. ROSENSTONE & HANSEN, supra note 9, at 204; Kousser, supra note 68, at 141-42.

74. Davidson, supra note 61, at 13. During the hearings on the Voting Rights Act, Congressman Celler catalogued a number of disenfranchisement practices implemented by white majorities including the following:

- withholding information about registration, voting procedures or party activities from black voters; giving inadequate or erroneous information to black voters, or failing to provide assistance to illiterate voters; omitting the names of registered voters from the lists; maintaining racially segregated voting lists or facilities; conducting reregistration or purging the rolls; allowing improper challenges of black voters disqualifying black voters on technical grounds; requiring separate registration for different types of elections; failing to provide the same opportunities for absentee ballots to blacks as to whites; moving polling places or establishing them in inconvenient or intimidating locations; setting elections at inconvenient times; failing to provide adequate voting facilities in areas of greatly increased black registration; and causing or taking advantage of election day irregularities.


easily circumvented the Act's explicit mandates. However, the states were not the sole culprits in the ultimate disenfranchisement of racial minorities; social and psychological factors also played an important role. This section explores both occurrences.

a. State Practices

Lest Black voters assume that the Voting Rights Act would serve to further their political interests, politicians quickly developed a number of practices intended to circumvent the legislation's letter and spirit. "Candidate diminution," as an example, involved the abolition of political offices, the extension of terms for White incumbents, and the imposition of "stiff formal requirements for qualifying to run in primaries or general elections, e.g., high filing fees, numerous nominating petitions or complex oaths."76

Another such practice, that of vote dilution, was just as perverse. Some of its manifestations included:

- racial gerrymandering; decreasing the black proportion in a town or county by annexation, deannexation, or consolidation; imposing a majority runoff requirement, which can enable white voters to mobilize behind a single white candidate in the runoff after having split their votes among several whites in the first election; holding at-large rather than district elections, which allows white voters to overwhelm black ones when the latter are in the minority; enacting such devices as full-slate laws, numbered-place laws, and staggered terms, all of which can, under some circumstances, preclude the use of "single shot" voting by blacks, a strategy that can help them in at-large systems to elect black candidates; and "splitting the vote for a strong black candidate by nominating additional blacks as 'straw' candidates for the same office."77

The implementation of these practices led to what Professor Guinier has labeled the "second generation" of voting rights claims: "qualitative complaint[s] about the weight of the voter's vote."78 Lawsuits addressing these practices "sought to empower blacks by

76. Derfner, supra note 74, at 555-56.
77. Davidson, supra note 61, at 23 (paraphrasing and quoting Derfner, supra note 74, at 553-55).
providing them with an opportunity to elect officials who would champion the needs of the black community." In response to these "second generation" claims, Congress amended section 2 of the Voting Rights Act to ensure that "the political processes leading to nomination or election [for public office would be] equally open to participation by members of [all] class[es] of citizens" protected by the Act.80

Currently, any gains attained from the 1982 amendments are "coming under serious attack."81 We have now entered the "third generation" of voting rights litigation, where "issues connected with questions of postelectoral representation and power within elective bodies" dominate the agenda.82 It is here where voting rights jurisprudence finds itself grappling with difficult and important issues of political sovereignty and representation.83 Based on our past history, however, this troubled and vastly critical area of the law will not be resolved in the near future. The struggle for political participation and democratic rights has only begun.

b. Social and Psychological Factors

The South does not stand alone regarding problems relating to political participation. In all geographic regions, lack of electoral participation is a political reality that disproportionately affects racial minorities and those in the lower socioeconomic strata, both at the level of interest group formation and maintenance,84 and at the level of individual voting behavior.85

i) Interest Group Formation and Maintenance


81. Karlan, supra note 79, at 1276.

82. Id.

83. See id.


85. See, e.g., Piven & Cloward, supra note 6; Rosenstone & Hansen, supra note 9; Verba & Nie, supra note 2; Aldrich, supra note 31; G. Bingham Powell, Jr., American Voter Turnout in Comparative Perspective, 80 Am. Pol. Sci. Rev. 17 (1986).
In *Federalist No.10*, James Madison expounded on his theory of how to protect society from factional politics. "Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens ...."86 The more, he tells us, the merrier. Bring groups to the bargaining table, and the various interests will counterbalance one another, ultimately permitting the common good to rise out of the political ashes.

We know today, however, that Madison's optimism was unjustified. Not all social groups have the same success in coalescing into winning political blocs.87 Racial minorities and those in the lower socioeconomic levels are particularly unsuccessful here.88 These realities question the fairness and legitimacy of traditional democratic ideals and may justify a departure from formalistic, narrow definitions of democracy.

ii) Turnout

"[F]or most Americans, voting is the only form of political participation."99 However, it is a well known fact that many Americans simply do not vote.90 Consistent with the previous findings, racial minorities and those in the lower socioeconomic and educational strata vote at lower rates than do other groups.91

John Dewey hypothesized that "[p]erhaps the apathy of the electorate is due to the irrelevant artificiality of the issues with which it is attempted to work up factitious excitement."99 While he

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87. Compare *Dewey*, *supra* note 29, at 110-42 (arguing that the barriers impeding the public from organizing into a cohesive self are vast and difficult to overcome) and MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (asserting that large groups have an especially difficult time forming coalitions to pursue goals) with DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT (1991) (explaining how the Civil Rights Movement was able to overcome collective action problems). See generally Terry M. Moe, *Towards a Broader View of Interest Groups*, 43 J. OF POL. 531 (1981) (discussing different theoretical perspectives on the nature of interest groups).
88. See sources cited *supra* note 84. Among the various socioeconomic dimensions—educational attainment, occupation, and income—scholars disagree on which one has the most profound effect on participation. See Bennett & Bennett, *supra* note 2, at 185.
90. See, e.g., *Piven & Cloward*, *supra* note 6. For the implications of such practices, see Bennett & Resnick, *supra* note 9.
91. See sources cited *supra* notes 84-85.
spoke of politics in the 1920s, his point may be relevant to our present conditions. Psychological factors, after all, do play a vital role.\textsuperscript{93} For example, some citizens fail to vote out of some sense that their vote is irrelevant to their real concerns.\textsuperscript{94} Also, a perception of one's lack of influence and efficacy plays a substantial role in low voter turnout.\textsuperscript{95} Absence of a sense of civic duty and political trust,\textsuperscript{96} lack of political socialization,\textsuperscript{97} and political alienation or cynicism\textsuperscript{98} play a part as well. Moreover, institutional barriers, such as voter registration laws,\textsuperscript{99} play a crucial role. Finally, among other things, social networks and political mobilizers play a vital role in determining who votes.\textsuperscript{100} In short, "[people participate in politics when they get valuable benefits that are worth the costs of taking part... [and] when political leaders coax them into taking part in the game. Both sides are necessary."\textsuperscript{101}

That the American people do not participate in politics is certainly a phenomenon almost unrivaled in western democratic societies.\textsuperscript{102} We must call majoritarianism into question when, in fact, electoral decisions are made by a "majority" of a relatively small proportion of Americans. However, participatory concerns might evanesce, or at least diminish a little, if representative politics were attuned to the nonparticipating groups' needs and interests. To the realities behind these representational possibilities and their applicability to the concerns of racial minorities, I now turn.

\section*{B. Representational Realities in American Political Society}

In \textit{Shaw v. Reno}\textsuperscript{103} the United States Supreme Court held that

\begin{enumerate}
\item See Bennett & Bennett, \textit{supra} note 2, at 191-95.
\item See ROSENSTONE & HANSEN, \textit{supra} note 9, at 18-19; Paul Abramson & John Aldrich, \textit{The Decline of Electoral Participation in America}, 76 AM. POL. SCI. REV. 502, 518-20 (1982); Bennett & Bennett, \textit{supra} note 2, at 192.
\item See ROSENSTONE & HANSEN, \textit{supra} note 9, at 15-16; Bennett & Bennett, \textit{supra} note 2, at 193-95.
\item See Bennett & Bennett, \textit{supra} note 2, at 193, 195.
\item Paul A. Beck & M. Kent Jennings, \textit{Pathways to Participation}, 76 AM. POL. SCI. REV. 94 (1982).
\item See \textit{id. at} 95.
\item See \textit{supra} note 7; HANES WALTON, JR., \textit{INVISIBLE POLITICS: BLACK POLITICAL BEHAVIOR} 124-29 (1985).
\item ROSENSTONE & HANSEN, \textit{supra} note 9, at 23-37.
\item \textit{Id. at} 10.
\item See David Glass et al., \textit{Voter Turnout: An International Comparison}, 6 PUB. OPINION 49 (1984); Powell, \textit{supra} note 85.
\item 113 S. Ct. 2816 (1993).
\end{enumerate}
North Carolina’s twelfth district seat, held at the time by Representative Mel Watt, might be unconstitutional because the district’s unusual shape left little doubt that race had played a role in the drawing of its boundaries. The Court saw in the districting plan the message “that [a representative’s] primary obligation is to represent only the members of [one] group, rather than their constituency as a whole [which is] altogether antithetical to our system of representative democracy.”

The Court appears to believe in the concept of homogeneous and cohesive constituencies, for which a representative can speak as a whole. This approach comports with the “accountability view” of representation discussed in the previous section. However, a number of studies tell us that such constituencies simply do not exist. Constituencies are complex mixtures of groups and interests, and while the various interests may sometimes be fully represented, it is unrealistic to believe that they always will be. The Court’s position, then, simply lacks an empirical basis.

The Court’s general understanding of democratic theory, of which Shaw is but an example, is vastly formalistic. Another such example is found in Davis v. Bandemer, a political gerrymander case, where the Court explained that:

the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters.

104. Id.; see also Miller v. Johnson, 115 S. Ct. 2475, 2486 (1995) (observing that bizarreness is not a necessary element of the constitutional wrong or a threshold requirement of proof under Shaw, but that it may be persuasive circumstantial evidence that “race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines”).

105. Shaw, 113 S. Ct. at 2827.

106. See, e.g., Morris P. Fiorina, Representatives, Roll Calls, and Constituencies (1974) (asserting that representatives respond to the most powerful segments of their constituencies); John W. Kingdon, Congressmen’s Voting Decisions (3d ed. 1989) (determining the complexity of constituencies through interviews of congresspersons); Fenno, supra note 46, at 884-86 (identifying the complex nature of constituencies, as perceived by members of Congress themselves).


108. Id. at 132. For a competing rendition, see Whitcomb v. Chavis, 403 U.S. 124, 153 (1971) (“Arguably the losing candidates’ supporters are without representation
Attaining effective representation, under the Court’s analysis, does not simply entail electing one’s representative of choice, but having the ability to apply pressure on the elected representative, perhaps with as simple a reminder as that one lives and votes in the representative’s jurisdiction. The Court seems to believe that even an individual voter without the power to affect the electoral outcome nevertheless can exert such pressure.

However, empirical realities counsel against such a formalistic approach to representation. Following the premise that representatives are single-minded seekers of reelection, it is likely that a representative will respond to those constituencies “perceived as having the greatest potential to affect his reelection probability.” As a result, nonvoting groups, such as racial minorities, are at a representational disadvantage vis-à-vis other social groups. The Court

since the men they voted for have been defeated . . . . But we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates . . . .”).

109. See Davis, 478 U.S. at 132. The Court refers here to what Professor Fenno labels “geographical constituencies.” See Fenno, supra note 46, at 884-86. This idea of geographical constituencies represents, according to Fenno, the “congressman’s broadest view of his constituency . . . . It is the entity to which, from which, and in which he travels . . . . [It] is a legally bounded space . . . located in a particular place.” Id. at 884.


111. FIORINA, supra note 106, at 122. On this account, Professors Rosenstone and Hansen provide a similar assessment:

[T]he simple fact is that democratic government provides few incentives for leaders to attend to the needs of people who neither affect the achievement of their policy goals nor influence the perpetuation of their tenure in office. Politicians can serve either the active or the inactive. The active contribute directly to their goals: They pressure, they contribute, they vote. The inactive offer only potential, the possibility that they might someday rise up against rulers who neglect them. Only the rare politician would pass up the blandishments of the active to champion the cause of those who never take part.

ROSENSTONE & HANSEN, supra note 9, at 247.

112. One may still argue, however, that virtual representation takes place or that the interests of racial minorities are represented by one of the many national lobbying groups. See CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS (1993) (arguing that in the U.S. Congress all interests have an adequate chance to be represented). In a nation as heterogeneous as the United States, with intricate constituency arrangements, and with the notion of Black interests being complex, these arguments lose their appeal. See id.; WALTON, supra note 99. But compare this view with Professor Ackerman’s conclusion:

Carolene is utterly wrongheaded in its diagnosis. Other things being equal, “discreteness and insularity” will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie Carolene should lead judges to protect groups that possess the opposite characteristics from the ones Carolene emphasizes—groups that are “anonymous and diffuse” rather than “discrete and
has consistently refused to acknowledge this reality.

III. PROMOTING PARTICIPATION AND REPRESENTATIONAL FAIRNESS: SOME PROPOSALS

This section delineates a number of theoretical proposals intended to ameliorate our current participatory and representational quagmire. The proposals are divided into those practices that seek to include minority interests into the political discussion and those attempting to afford these minority interests a qualitative influence in the legislative outcome. As these proposals are extensively documented elsewhere, this section simply seeks to delineate their existential contours.\textsuperscript{113} Taken as a whole, these ideas are but a few ways in which the political process may be forced to reflect America's vastly diverse populace in a truly democratic way.

A. Inclusionary Practices

As a direct result of our sad history with respect to the inclusion of minorities into the legislative arena, it is often the case that simply introducing a mechanism for electing more proponents of minority interests to local and national legislatures means a great deal. In this section, I present a number of prospective mechanisms proposed by various commentators that would allow for a better reflection of minority interests.

1. Proportional [Interest] Representation

Under a winner-take-all approach, a party accumulating fifty-one percent of the vote gets one hundred percent of the power. What if, instead, the outvoted minority population was also allowed an opportunity to have its views represented in the legislative arena in proportion to its electoral showing? This procedure, aptly enough, has been labeled "proportional representation."\textsuperscript{114}
Proportional representation provides an attempt to guarantee a process where one's vote plays a crucial role even in defeat. Proportional representation tries to accurately reflect a range of interests, thus increasing the probability that representative decisions will be similar to, or perhaps even in accord with, those of the population as a whole.\(^{115}\)

2. Cumulative Voting

John Stuart Mill put forth a number of proposals that sought to mitigate what he perceived as a majoritarian bias inherent in political society. According to one of his ideas, a voter would receive as many votes as there were available seats in the election.\(^ {116}\) These votes would then be used by the voter in any way chosen: she could divide them as she pleased among candidates, or give them all to a single candidate.\(^ {117}\)

However, Mill quickly recognized the shortcomings of this plan. "[R]eal equality of representation is not obtained unless any set of electors amounting to the average number of a constituency . . . [has] the power of combining with one another to return a representative."\(^ {118}\)

In response to the shortcomings of Mill's plan, Thomas Hare proposed a modified plan. According to Mill, Hare proposed the following:

According to this plan, the unit of representation, the quota of electors who would be entitled to have a member to themselves, would be ascertained by the ordinary process of taking averages, the number of voters being divided by the number of seats in the House; and every candidate who obtained that quota would be returned, from however great a number of local constituencies it might be gathered. The votes would, as at present, be given locally, but any elector would be at liberty to vote for any candidate, in whatever part of the country he might offer himself. Those electors, therefore, who did not wish to be represented by any of the local candidates, might aid by their vote in the return of the person they liked best among all those throughout the country who had expressed a willingness to be chosen. This would so far give

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\(^{115}\) See sources cited supra note 114.

\(^{116}\) Mill, supra note 29, at 152.

\(^{117}\) Id.

\(^{118}\) Id. at 153.
reality to the electoral rights of the otherwise virtually disfranchised minority.\textsuperscript{119}

In this way, a voter is not constrained by those running for office in his district, but may choose any candidate from anywhere in the country. It seems relatively certain that this plan would ensure the election of candidates who would not otherwise carry a majority within their district.

3. Limited Voting

Mill presented yet another plan designed to circumvent strict electoral rules. This plan involved what some commentators labeled "limited voting."\textsuperscript{120} This voting scheme calls for the grant of fewer votes than there are seats available. In Mill's example, certain constituencies elect three representatives, but each voter places only one or two votes.\textsuperscript{121} Accordingly, Mill explains, "a minority equaling or exceeding a third of the local constituency would be able, if it attempted no more, to return one out of three members."\textsuperscript{122}

4. Random Lotteries

Ancient Athenians adhered to a strict conception of democracy. In this sense, when they asserted that the people ruled, they meant every word of it. Their commitment to democratic rule was evident in their procedure for electing political and administrative officers. Citizens were elected to these offices randomly, without any competency or property requirement.\textsuperscript{123} While this proposal may seem much too radical for modern democracies,\textsuperscript{124} it would appear less so if our society adhered to the Athenian notion of isonomia, where all

\begin{itemize}
\item \textsuperscript{119} Id. at 153-54. Representational schemes such as cumulative voting have been proposed in contemporary academic circles. See, e.g., Guinier, supra note 35, at 1632-34; Karlan, supra note 20, at 231-36; Pildes, supra note 22.
\item \textsuperscript{120} See Karlan, supra note 20, at 223-31.
\item \textsuperscript{121} MILL, supra note 29, at 151-52.
\item \textsuperscript{122} Id. at 152.
\item \textsuperscript{123} See OBER, supra note 27.
\item \textsuperscript{124} Over ten years ago, a law student proposed "an alternative method of selecting representatives to legislatures that combines features of four traditional egalitarian systems: voting, lottery, quota, and rotation." Akhil R. Amar, Note, Choosing Representatives by Lottery Voting, 93 YALE L.J. 1283, 1283 (1984). The author proposed his alternative method of selection as a "thought experiment," and it did not do away completely with voting as a selective scheme. Id. This provides a telling comment on the radical nature of random selection processes in their pure form.
\end{itemize}
citizens are politically equal in a sense much stricter than the one espoused by American political standards.

B. Structural Remedies Within Representative Bodies

Once representatives are elected to office, it does not always follow that their electoral victories directly translate into political influence. For those occasions when the majority in a representative body may not wish to accord those representatives in the minority any say in the deliberative enterprise, as well as during the voting and deal making times, different rules may be necessary. This section explores a number of possibilities.

1. Super Majorities

If democracy does seek to foster deliberation and thoughtful decision making, while increasing protection for the "substantive interests of minority groups," an effective way to do so is to demand super majorities, a demand that considerably more than fifty percent of the voting population agree on a measure in order to secure the measure's passage. This is the idea behind the various constitutional provisions calling for supermajoritarian rules, which foster coalition building by requiring a high degree of consensus.

2. Concurrent Majorities

If, instead of thinking of voters as atomistic individuals in search of self-fulfillment, one thought of the electoral process as a contest between a series of competing interests, one's approach to representational issues would change. While seeking to protect minority interests from majoritarian excesses, James Calhoun developed a plan that took this reconceptualization into account. As Calhoun observed, we may take "the sense of each interest or

125. Karlan, supra note 20, at 246.
126. For a discussion of the supermajority requirement, see id. at 245-48; Karlan, supra note 31, at 11 n.35.
127. See infra notes 223-29 and accompanying text.
128. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 124-51 (1956). For a fuller development of Professor Dahl's views, see infra text accompanying notes 204-06; cf. Guinier, supra note 77, at 1461 (advocating interest representation, not just voter representation).
portion of the community which may be unequally and injuriously affected by the action of the government . . . [and] require the consent of each interest, either to put or to keep the government in action." In this way, all interests may in essence have a negative power over the legislation in question. Thus, groups whose interests might be bypassed by overzealous majorities under a simple majoritarian regime may instead have the power to affect this same legislation in positive ways.

3. Rotation in Office

Election to political office has not always meant direct political power to influence policy matters. Much too often, the election of racial minority group representatives to state and local public offices has brought with it procedural shifts within the offices in question. These realignments and rule changes, not surprisingly, have served to permanently relegate newly elected office holders to marginal positions within the political body. In this way, all interests may in essence have a negative power over the legislation in question. Thus, groups whose interests might be bypassed by overzealous majorities under a simple majoritarian regime may instead have the power to affect this same legislation in positive ways.

To ensure that election to office means not only the right to be present but also the right to wield political power, the rotation of elected officials within their given office may be offered as a remedy. In this way, office holders will not permanently be shut out from political decision making by a priori formal rules; instead, rotation in office ensures that, "for a fair proportion of the time, they will occupy positions of formal power."

All of these proposals, in conclusion, present interesting and diverse reasons for their adoption. I seek not to advance any single proposal over any other, but instead to point to the potential of each one, especially in light of the present political context.

The usual response to these proposals is to call them "undemocratic." However this critique often defines democracy merely as entailing simple majority rule. Thus, in order to move beyond our present democratic quagmire, we must rethink critically what democracy truly stands for, both in theory and in practice. Until such a redefinition is developed, promising participatory tools will remain on the democratic shelf.

130. This is the classic "third generation" voting rights claim. See supra text accompanying note 82.
131. Karlan, supra note 20, at 241-44.
132. Id. at 241.
"Democracy, to say something screamingly obvious, is a complex ideal." It is thus unsurprising that the concept of democracy is vague and ill-defined in modern political theory. Our democratic forefathers, the ancient Greeks, did not face such definitional quandaries. For them, democracy had a very clear definition: "[A] city in which the people gathered together at a definite place in one large visible assembly governed the whole state." This definition follows logically from a literal translation of...


134. See OBER, supra note 27, at 3 ("Of course, not all modern proponents of democracy mean quite the same thing when they speak in its favor . . . ."); see also DAHL, supra note 128, at 4 ("Democratic theory itself is full of compromises—compromises of clashing and antagonistic principles."); Louis M. Seidman, Ambivalence and Accountability, 61 S. CAL. L. REV. 1571, 1585-86 (1988) ("[W]e are not in agreement about what makes a political system 'majoritarian.'"); Ellen M. Wood, Democracy: An Idea of Ambiguous Ancestry, in ATHENIAN POLITICAL THOUGHT AND THE RECONSTRUCTION OF AMERICAN DEMOCRACY 59, 66 (J. Peter Euben et al. eds., 1994) ("The concept of democracy has now become wonderfully elastic . . . ."). Even if one concedes that democracy ought to be equated with majority rule, the complexities do not end. See Guinier, supra note 78, at 1439 ("[D]emocracy as majority rule is not self-defining. It could mean control of issue outcomes, voting aggregations to maximize satisfaction, determining the preponderance of opinions or simply decisionmaking by electorally accountable officials.").

135. JAMES W. HEADLAM, ELECTION BY LOT AT ATHENS 29 (D.C. MacGregor ed., 2d ed. 1933); see also Josiah Ober, Public Speech and the Power of the People in Democratic Athens, 26 PS 481, 481 (1993) (asserting that the Greeks took democracy to mean "political power wielded actively and collectively by the demos" (i.e., all residents of the state who are culturally defined as potential citizens, regardless of their class or status"). But cf. ARISTOTLE, THE POLITICS 125-26 (Carnes Lord trans., 1984) (defining democracy in a number of different ways).

Critics often assail the Athenian system for its systematic exclusion of women, children, aliens, and slaves from the ranks of citizenship. See, e.g., Jamin B. Raskin, Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage, 141 U. PA. L. REV. 1391, 1392 n.4 (1993) ("For example, Athenian democracy, the fountain of so many democratic images and hopes, was officially closed to women, slaves, colonial subjects, and aliens."); Butler Shaffer, Comments on Leonard Liggio's "Law and Legislation in Hayek's Legal Philosophy", 23 SW. U. L. REV. 539, 543 (1994) (decrieing "our tendencies to glorify Athenian democracy when most of its population was excluded from participation"). To these critiques, Professor Ober responds:

Oppression of noncitizens is, however, an insufficient explanation for the unique direction of Athenian sociopolitical development. The limitation of the franchise to freeborn males is certainly undemocratic by current standards, but to deny the name democracy to Athens' government, on the grounds that the Athenians did not recognize rights that most western nations have granted only quite recently, is ahistorical.

OBER, supra note 27, at 6.
the Greek word *demokratia*: "the people (demos) possess the political power (kratos) in the state."\(^{136}\) This power could only be exercised directly, by voting in the Assembly.

Our founding parents understood the limitations inherent in the Greek democratic scheme.\(^{137}\) It is also clear, based on the constitutional text and various letters and speeches at the time of its framing, that a representative, republican form of government was the Framers' favored philosophical scheme.\(^{138}\) One may also concede that some Framers equated republicanism with the majoritarian principle.\(^{139}\) The architects of our democratic regime conceded America's inherent sociopolitical limitations and, unlike the system developed in the Athens of Pericles and Demosthenes, relied on representation as the linchpin of their democratic aspirations.\(^{140}\)

What may not be conceded as easily, if at all, is the notion that American democracy is "purely" majoritarian.\(^{141}\) In this vein, equating "we the people" with a strict fifty-percent-plus-one-winner-take-all rule is not an automatic assertion. If democracy means that the people rule, the question shifts to determining who these people are and ascertaining when it is that they in fact speak. Democracy does not necessarily mean that a simple majority speaks for all the people

\(^{136}\) Ober, supra note 27, at 3; see also Thucydides, The Peloponnesian War 108 (T.E. Wick ed., 1982) ("[Our constitution's] administration favours the many instead of the few; this is why it is called a democracy.").

\(^{137}\) See, e.g., The Federalist No. 15, supra note 4, at 100 (Alexander Hamilton); The Federalist No. 18, supra, at 122-23 (James Madison & Alexander Hamilton); The Federalist No. 55, supra, at 342 (James Madison). Some contemporary writers and political figures, however, have suggested a series of possibilities by which twentieth century American democracy may be practiced on a direct basis. See, e.g., Wolff, supra note 46, at 37 (proposing a system of "in-the-home voting machines" to record majoritarian preferences across the nation while in the privacy of one's own home); Friedman, supra note 28, at 621 (chronicling the American infatuation with voting through television and 1-900 numbers, and Perot's promise of national electronic town meetings).

\(^{138}\) See sources cited infra note 285.

\(^{139}\) See infra part IV.B.2.

\(^{140}\) See supra note 29 and accompanying text.

\(^{141}\) See Helen Garfield, Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner, 61 Wash. L. Rev. 293, 330 (1986) ("It requires a value judgment . . . [to conclude] that majoritarianism is the dominant principle in our democratic government, overriding all other considerations . . . ."); see also Chemerinsky, supra note 24, at 75 (contending that majoritarianism has been accorded too much weight as a democratic value); Walter Lippman, Filibusters and the American Idea, in The Essential Lippmann: A Political Philosophy for Liberal Democracy 219-20 (Clinton Rossiter & James Lare eds., 1963) ("[I]t is a cardinal principle of the American democracy that great decisions on issues that men regard as vital shall not be taken by the vote of the majority until the consent of the minority has been obtained.").
and, thus, must be accorded the utmost legitimacy.\textsuperscript{142}

In this section, I first explore the basic philosophical and historical underpinnings of democratic theory. Then, I turn to the majority principle itself, and explore its various justifications. Based on the historical and philosophical record, I conclude that blind adherence to the simple majoritarian principle is far from legitimate.\textsuperscript{143}

Once these understandings are developed, I turn to the founding generation, their constitutional blueprint and the intentions behind the founding generation. Here I explore the nature of simple majoritarianism from the perspective of those responsible for forging the basic tenets of American political society. I conclude that the constitutional text, as well as the various letters and speeches of the time, provide little conclusive evidence as to the defining democratic flavor of the emerging American nation.

In sum, this section concludes that American democracy need not operate as a simple majoritarian regime. This conclusion questions those critics who cling blindly to simple majority rule as the American procedure of choice.

\textsuperscript{142} See DAHL, supra note 128, at 35 ("In practice, however, the attempt to identify democracy with the unlimited power of majorities has usually gone hand in hand with an attempt to include in the definition some concept of restraints on majorities."); LAKEMAN, supra note 113, at 26-27 ("[W]e sometimes forget that the majority principle . . . is not necessarily the only right and safe way of resolving a difficulty . . . ."); OFFE, supra note 24, at 264 ("[T]he legitimating function of the principle of majority rule in modern capitalist democracies is thoroughly problematic and disputable."); WOLFF, supra note 46, at 57 (arguing that majority rule, unlike unanimous direct democracy, does not preserve "the moral autonomy of the individual while conferring legitimate authority on the sovereign"); Chemerinsky, supra note 24, at 75 ("[M]ajority rule is not normatively superior to other values."). Not surprisingly, there are dissenting views. See, e.g., Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 NW. U. L. REV. 1115, 1129 n.73 ("It seems reasonable to assume that majoritarian rule is at least important enough to justify a general presumption in favor of majoritarian decisionmaking.").

A. Majoritarian Underpinnings: History, Philosophy, and an Empty Search for Justifications

Democratic theory stands as a continuum. On one extreme, at least a simple majority must stand behind a decision in order for it to be labeled "democratic." On the opposite end, a unanimous decision is required.\(^\text{144}\) Curiously, present democratic arrangements juxtapose these two democratic extremes and present them as the only democratic choices available. In this section, I conclude that while democracy may not be able to justify any adherence to the unanimity principle, it does not require simple majoritarianism in its stead.

Unanimity must serve as the departing point for any serious democratic discussion of "the people" and the procedures by which their voices are heard.\(^\text{145}\) After all, the demos encompasses all citizens within the territory in question, and "what touches all must be approved by all."\(^\text{146}\) However, as a result of sociopolitical impediments found in modern democratic arrangements,\(^\text{147}\) the unanimity principle is unavailing as a democratic procedure of choice. Not only does a unanimity requirement concede too much power to a minority of as little as one,\(^\text{148}\) but it also is untenable in a region as heterogeneous and vast as the United States.\(^\text{149}\)

\(^\text{144.}\) See, e.g., Jean-Jacques Rousseau, *The Social Contract*, in *The Essential Rousseau* 1, 89 (Lowell Bair trans., 1983) (noting that "between a tie and unanimity there are many unequal divisions, any one of which may be made the required proportion").

\(^\text{145.}\) Blinded by ideological and historical mist, we seem to have forgotten what democracy ought to stand for. See, e.g., Wolff, supra note 46, at 27 ("[U]nanimous direct democracy is the (frequently unexpressed) ideal which underlies a great deal of classical democratic theory.").


\(^\text{147.}\) See infra note 149.

\(^\text{148.}\) Cf. The Federalist No. 22, supra note 4, at 147-48 (Alexander Hamilton) ("[I]n the Polish Diet[,] a single [vote] has been sufficient to put a stop to all their movements."); Jean-Jacques Rousseau, *The Government of Poland* 56 (Willmoore Kendall trans., Hackett Publishing Co. 1985) (conceding that the unanimity principle would be "less unreasonable if it applied only to the fundamental provisions of your constitution; for it to apply indiscriminately to every decision of the Diet, however, is inadmissible from every point of view").

\(^\text{149.}\) See, e.g., Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 Pace L. Rev. 263, 272 (1992) ("It is impossible to have a government rule a nation of this size...")
Strangely enough, this conclusion moves most theorists and analysts along the continuum to the other democratic extreme, where simple majority rule resides. This is a curious move, since a refusal to adhere to unanimity procedures in no way mandates adherence to the equally extreme majoritarian paradigm. Justifications for such a move are thus needed.

In this section, I explore the majoritarian terrain. While doing so, history and philosophy provide the proper context for the analysis. First, I look to ancient Athens and its democratic practices. In order to provide a proper context for our current democratic understandings, I then trace the development of political practices through the Middle Ages, up to the emergence of the notion of corporation and representative majorities. Once these historical foundations are laid, I turn to John Locke and Jean-Jacques Rousseau and present their influential ideas regarding majoritarianism. I finally, test the various justifications advanced in defense of simple majority rule.

1. Historical and Philosophical Accounts

Ancient Athenian democracy, widely recognized as the pinnacle of democratic principles, serves as the proper place of departure for examining the underpinnings of majority rule. According to Professor Saxonhouse, "[it] has become the marvelous model of popular government and of the reasoned exchange of ideas." In its most important sense, the Athenians adhered to the concept of isonomia, or political equality. This concept, explained Herodotus, was itself composed of three distinctive features: selection by lot, accountability of public officials, and an assembly as a decision-making body.

For our present purposes, it is the principle of decision making under a system that requires every individual, or even a majority, to consent to every decision.

150. See infra text accompanying notes 167 and 175. For a modern version of this traditional argument, see WOLFF, supra note 46, at 38 (proposing majority rule as a solution to the problems inherent in demanding unanimity "in order for [decisions] to acquire the authority of law").


152. HERODOTUS, THE HISTORY 248 (David Greene trans., 1987). According to Professor Vlastos, the form of government referred to here is not demokratia per se, but a form of government—isonomia (rule of the masses)—that in fact preceded it. Gregory Vlastos, Isonomia, 74 AM. J. PHILOLOGY 337, 337 (1954).
through an assembly of citizens that is most important. The magnitude of this Athenian approach is enormous, as all citizens, independent of wealth or social condition, were allowed to take an active political role in Athenian affairs. And unlike modern times, where elected legislators represent large segments of the population, the concept of representation was nonexistent in ancient Athens. 3

All decisions, their importance notwithstanding, were made by the polis as a whole, by a simple show of hands by those citizens present during the assembly meeting in question. 4

Conversely, some influential Athenian philosophers saw this system “as a political extreme, the reverse side of tyranny,” since it gave “an unfair advantage to mere numbers over quality and virtue.” 5

The Athenian demos ignored such advice, and allowed the masses to rule, since “[t]he many, of whom none is individually an excellent man, nevertheless can when joined together be better—not as individuals but all together—than those [who are best] . . . . For because they are many, each can have a part of virtue and prudence . . . .” 6

Simple majority vote was all that Athenians deemed necessary for governmental decisions, even when deciding matters of utmost importance. 7

Centuries later, unanimity procedures emerged as the decision-making procedure of choice, a shift not at all surprising, considering the central role played by the Church during this period. 8

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154. MOGENS H. HANSEN, THE ATHENIAN ASSEMBLY IN THE AGE OF DEMOSTHENES 41-44 (1987). It must be noted that ancient Athenian democracy, canonized as democracy’s finest hour, did not grant its citizens complete power to run the polis, as decrees enacted by the assembly could be legally challenged through the process of graphe paranomôn. Upon acceptance by the assembly, a citizen could denounce the newly enacted decree as contrary to a “law in force.” The decree would then be presented to the Dikasterion, “the people’s court,” which in turn decided whether a conflict was present. If it did, the decree was immediately declared null and void and rescindable from the record. See id.; Harvey Yunis, Law, Politics, and the Graphe Paranomôn in Fourth-Century Athens, 29 GREEK, ROMAN, AND BYZANTINE STUD. 361 (1988).

155. OBER, supra note 27, at 193. Notice Professor Ober’s choice of words in the context of the larger discussion.

156. ARISTOTLE, supra note 135, at 100-01.

157. The trial of Socrates, albeit conducted in front of a different forum (the people’s courts), provides an illustration of the commitment to this principle. That is, even when a life was on the balance and an arduous decision had to be made, the Athenians did not deviate from the principle of majority rule. See Plato, Apology, in FOUR TEXTS ON SOCRATES (Thomas G. West & Grace S. West trans., Cornell 1984); I.F. STONE, THE TRIAL OF SOCRATES (1988).

158. See MONAHAN, supra note 146, at 136-38. The notion of the state as “confessional, that is . . . restricted and dedicated to preserving the position of the
harmony was expected within the community, as "there should be one soul and one heart in God among you," and differences of opinion were viewed as scandalous subjects. The Church must be one, and must speak as such. Unanimity served this principle well.

During the late twelfth century, the notion of corporation slowly developed. The concept was defined as "a fictive person, a group of individual persons having a common interest; the corporate person or corporation was then conceived of as the seat of the rights and interest of the community as a whole." Most importantly for our purposes, it was from this concept that the notion of representative majorities developed. In the words of Professor Monahan, "the notion of minority was developing around the meaning of corporate person as giving legal status to individuals considered as a group. The majority came to be seen as able to decide for the corporation, and thus bind any dissenting minority to the decision made. Unlike Athenian political practices, where notions of representation were nonexistent and individual citizens voted directly, the Middle Ages witnessed the birth of representative concepts and the notion that a majority of representatives could bind the populace as a whole.

John Locke sought to develop these democratic understandings in the philosophical realm. In his Second Treatise, he argued that passage into civil society involves securing the consent of those involved to make "one Community or Government." By consenting with others to join into civil society, every man "puts himself under an Obligation to every one of that Society, to submit to the determination of the majority, and to be concluded by it ..." Joining into civil society with others entails submitting oneself "and all the power[] necessary to the ends for which they unite into Society" to the will of the majority.

Anticipating a main objection to his theory of civil society, Locke expounded upon the proposition of majority rule as civil


159. MONAHAN, supra note 146, at 137.
160. See id.
161. Even in the Church context, the unanimity principle often proved to be an impossible ideal. Id. at 142. Preference for unanimity notwithstanding, there were times when simple majorities carried the election. Id. at 138.
162. MONAHAN, supra note 146, at 114.
163. Id. at 134.
164. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 331 (Peter Laslett ed., 1965) (emphasis omitted).
165. Id. at 332 (emphasis omitted).
166. Id. at 333.
society's guiding factor. As he explained:

For if the consent of the majority shall not in reason, be received, as the act of the whole, and conclude every individual; nothing but the consent of every individual can make any thing to be the act of the whole: But such a consent is next impossible ever to be had . . . . 167

Locke posited that, upon formation of civil society any form of government chosen by the citizens is legitimate. In his own words, "when they are thus incorporated, [individuals] might set up what form of Government they thought fit."168 Therefore, in light of the various constraints inherent in the unanimity principle, majority rule simply becomes the de facto democratic alternative.

Jean-Jacques Rousseau expressed similar ideas. In The Social Contract, he expressed his belief as to the indivisibility of the general will. This will is so obvious and visible that "it can be seen by anyone with common sense."169 It cannot be represented, so the political community must deliberate together and enact positive laws.170 As a result of these deliberations, the laws acquire legitimate authority over all members of society. As in the ancient Athenian world, where all citizens were expected to take part in the affairs of their polis, Rousseau envisioned a "well-governed republic" where "everyone hurries to assemblies."171

Furthermore, when decisions need to be made, those present at the assembly cast their votes on the choice they perceive to be exemplary of the general will. The choice with the majority of citizens on its side carries the day. As Rousseau explained:

Apart from this original contract, a decision of the majority is always binding on the minority. This is a consequence of the contract itself. But it may be asked how a man can be free, and at the same time be forced to conform to wills that are not his own. How can dissenters be both free and subject to laws to which they have not consented?172

He answered this question in the following way:

[T]he question is wrongly formulated. The citizen consents to

167. Id. at 332.
168. Id. at 337.
169. ROUSSEAU, supra note 144, at 85.
170. Id. at 79.
171. Id. at 78.
172. Id. at 88.
all the laws, even those that are passed against his opposition, and even those that punish him if he dares to violate one of them. The unequivocal will of all the members of the state is the general will; it is through it that they are citizens and free. When a law is proposed in the assembly, what is asked of them is not precisely whether they accept or reject the proposal, but whether it is in conformity with the general will that is theirs. In voting, each man gives his opinion on this question, and the declaration of the general will is drawn from the count of the votes. When, therefore, the opinion contrary to mine prevails, it proves only that I was mistaken, that what I thought was the general will was not. If my private opinion had prevailed, I would have done something other than what I had willed, and then I would not have been free.  

In a sense, all members of society support the same general will, which is, by definition, indivisible. As Rousseau explained it, dissenters are thus forced by the majority to be free. Those who voted against the winning proposition simply erred in their judgment. The majority sets them on the right course.

From the time of the framing of the Constitution, some of our most esteemed states persons have praised majority rule in equally laudatory terms. Thomas Jefferson, for example, wrote to Baron F. H. Alexander von Humboldt that:

\[
\text{[t]he first principle of republicanism (republican democracy) is, that the lex majoris partis is the fundamental law of every society of individuals of equal rights; to consider the will of the society announced by the majority of a single vote, as sacred as if unanimous, is the first of all lessons in importance . . . .}  
\]

Abraham Lincoln expressed a similar idea. As he explained:

A majority . . . is the only true sovereign of a free people. Whoever rejects it does, of necessity, fly into anarchy or to despotism. Unanimity is impossible; the rule of a minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy or despotism in some

173. \textit{Id.}
form is all that is left.175

Various other leading political figures have espoused similar opinions.176

2. Justifications

Concluding that simple majority rule is the democratic procedure of choice might seem sensible, especially when contrasted with its unanimity counterpart. Providing justifications for simple majoritarian decision making, however, is much harder than one might think. At first glance, deciding public policy matters on simple majoritarian grounds is not intuitively better than various other democratic models.177 And simply asserting that majoritarian decision making is a better method than a minoritarian one, as commentators and judicial actors are prone to do,178 is not per-

175. Abraham Lincoln, First Inaugural Address, in LINCOLN ON DEMOCRACY, supra note 1, at 201, 206.
176. See infra part IV.A.2. In all fairness, all arguments for majority rule are not analogous to Thrasymachus’s “the just is the advantage of the stronger” argument. THE REPUBLIC OF PLATO 15 (Allan Bloom trans., 1968). Some are more tempered. See, e.g., Thomas Jefferson, First Inaugural Address, in THEY SPOKE FOR DEMOCRACY: CLASSIC STATEMENTS OF THE AMERICAN WAY 52, 52-53 (Frederick C. Packard, Jr. ed., 1958) (“All too will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights, which equal laws must protect, and to violate which would be oppression.”); Abraham Lincoln, First Inaugural Address, in LINCOLN ON DEMOCRACY, supra note 1, at 201, 206 (“A majority held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.”). Modern exponents of majority rule share this view as well. See HENRY S. COMMAGER, MAJORITY RULE AND MINORITY RIGHTS 16 (1958) (“[M]ajority rule is . . . government within self-imposed restraints.”); Jonathan Riley, American Democracy and Majority Rule, in NOMOS XXXII, supra note 24, at 267, 291 (defining American democracy as “a logically coherent and distinctive conception of just majority rule”). It is my contention that even this kinder type of majority rule needs justification.
177. Note also that present-day data on racial polarization convincingly deflates justifications of majoritarian decision making. See, e.g., Guinier, supra note 78, at 1479; Issacharoff, supra note 33; Kousser supra note 68, at 175. Yet, racial polarization is not necessary to trump the majoritarian claim. That is, I am willing to deal with majority rule solely in the normative realm, as I propose that even there one must provide justifications for majoritarian hegemony.
178. See, for example, Reynolds v. Sims, where the Court stated:

Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to
suasive either. The question is not whether a majority or a minority should rule, but instead whether a simple majority of more than fifty percent is required. Under either rule, minorities do not rule, although they may block majorities from ruling.179

The standard justification for majority rule centers on two related concepts. First, it is argued that majority rule fosters governmental efficiency, as it provides a process under which a decision most likely can be made.180 Second, if one assumes that the majority is a fluid and changeable entity, it follows that those finding themselves as members of the winning coalition will vary in accordance to the decision in question.181 This rendition thus ensures that all citizens will become winners and losers interchangeably.

The first claim depends upon the conclusion that the purpose of government is to act as efficiently as possible. Under such a

result.

377 U.S. 533, 565 (1964); see also H.B. MAYO, AN INTRODUCTION TO DEMOCRATIC THEORY 187 (1960) (“What is the alternative to the majority principle, to trusting the majority of the representatives and using our influence upon them? The simple alternative, for some kind of minority rule, is not usually put forward today plainly and unashamedly.”); J. Roland Pennock, Normative Democratic Political Theory, in 3 ANNUAL REVIEW OF POLITICAL SCIENCE 1, 31 (Samuel Long ed., 1990) (“[R]ule by the majority, more precisely the denial of minority rule over a majority, constitutes a recognition, an acceptance, and an implementation of the individual’s autonomy. . . .”) (emphasis added).

179. This view is succinctly expressed by Professors Buchanan and Tullock, who write:

When the orthodox theorist suggests that qualified majority voting amounts to “rule” by the minority, he is referring to the rule for blocking action. If this line of reasoning is carried to its logical conclusion, we get the paradoxical result that the rule of unanimity is the same as the minority rule of one. Thus the rule of requiring unanimity among members of a jury to acquit or to convict becomes equivalent to the rule that would permit any individual juror to convict or to acquit. Instead of being at the opposing ends of the decision-making spectrum, as our whole construction suggests, the unanimity rule and the rule of one become identical. This paradoxical result suggests clearly that the power of blocking action is not what we normally mean, or should mean, when we speak of “majority rule” or “minority rule.”

JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 259 (1965) (emphasis omitted). In this sense, then, the choice is often misleading. We must think of this issue in terms of ruling and not being allowed to rule.

180. See ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 138-39 (1989); MAYO, supra note 178, at 179; Guinier, supra note 78, at 1440-41.

181. See DAHL, supra note 180, at 138-39 ("[I]f the members of an association need collective decisions to achieve their ends, and the boundaries of a democratic unit are taken as a given, then majority rule is required for maximum self-determination . . . ."); MAYO, supra note 178, at 177-78; cf. Robert A. Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455, 456 (1984) ("The norm of majority rule implicitly relies on the possibility of some underlying communal identity among winners and losers.").
rationale, fifty-percent-plus-one is certainly better than fifty-percent-
plus-two. However, this conclusion does not reveal anything about majoritarianism's intrinsic worth, or what level of efficiency is re-
quired. And once we depart from the governmental efficiency ra-
tonale, as some notable founders did,\textsuperscript{182} the claim hardly stands its ground.

Upon examination of its underlying assumptions, the second claim also falters. The notion that under majoritarianism people will find themselves as members of the winning coalition assumes that democracy primarily entails winning and losing. This is a con-
clusion that one may debate on various grounds. For example, the civic republican tradition develops a view where citizens aspire not to achieve ultimate outcomes, but to further notions of civic virtue and participation.\textsuperscript{183} Certainly, some representative understandings also contravene this claim, since voters in both the winning and losing coalition may expect to be represented by the winning can-
didate.\textsuperscript{184} And at the congressional level, one can certainly think of models where the goal is not to defeat one's opponents, but to do what is right for one's constituency, not to mention the commonwealth.\textsuperscript{185}

Thus, these standard justifications might not serve their re-
quired objectives. However, all is not lost, as a number of con-
ceptual guides may further our quest. We may first seek guidance from higher law principles:

The primary function of a constitution was to mark out the boundaries of governmental powers . . . . In order to confine the ordinary actions of government, the constitution must be grounded in some fundamental source of authority, some "higher authority than the giving out temporary laws" . . . [which] could be gained if the constitution were created by "an act of all" . . . .\textsuperscript{186}

\textsuperscript{182.} See \textsc{The Federalist} Nos. 10, 63 (James Madison); see also Jack N. Rakove, \textit{The Madisonian Moment}, 55 \textsc{U. Chi. L. Rev.} 473, 485 (1988) ("Madison hoped that the diversity of interests would discourage any majorities from forming until a compelling conception of public good could somehow emerge to transcend the interplay of parochial interests.").

\textsuperscript{183.} See supra notes 36-43 and accompanying text.

\textsuperscript{184.} See Davis v. Bandemer, 478 U.S. 109, 131-32 (1986) (plurality opinion) (asserting that "a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate").

\textsuperscript{185.} See \textit{infra} note 249 and accompanying text.

\textsuperscript{186.} \\textsc{Bernard Bailyn}, \textit{The Ideological Origins of the American Revolution} 182-83 (1967) (emphasis omitted); see also Mayo, supra note 176, at 181 (referring to
Simple majority rule may be the preordained democratic process of choice, a presocietal source of governmental legitimacy.

Second, utilitarianism might prove helpful. Assuming that the people vote on the laws directly and that those in the majority gain at least as much benefit from the enacted laws as those in the minority lose, one may conclude fairly that majority rule "would necessarily maximize the average benefit of the laws among all citizens." The reasons for this conclusion are obvious. If both assumptions hold and if the majority is able to translate its satisfaction into voting preferences, a population of one hundred people will gain at least a satisfaction level of fifty-one and a dissatisfaction level of forty-nine. So long as majorities hold the key to decision making, they will always be ensured a favorable outcome on any single issue.

Finally, adhering to Professor Kenneth May's proof, one may conclude that majority rule is a necessary consequence of reasonable requirements. If one agrees that decisions should be "decisive" (a choice is actually made), "anonymous" (the decision rule does not favor some voters over others), "neutral" (all alternatives are equally valid), and "positively responsive" to majority preferences, it then follows that "only one decision rule could satisfy all four criteria"; majority rule. A society is more than justified in adopting a majoritarian paradigm, as it is the only one able to meet all four requirements.

All of these justifications, however, appear to be post hoc attempts to rationalize existing political practices. Moreover, not one justification alone serves to refute arguments in favor of majoritarianism of the fifty-percent-plus-one variety. Utilitarianism does not accomplish it, for a unanimity requirement would serve its purposes in much better ways, as we would get one hundred

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arguments "couching in terms of natural 'law' and natural rights" as a defense of the majority principle).

187. See DAHL, supra note 180, at 142-44 (outlining the dialogue between majoritarian and utilitarian arguments). For a defense of the classic utilitarian argument, see Frederick Rosen, Majorities and Minorities: A Classical Utilitarian View, in NOMOS XXXII, supra note 24, at 24-43.

188. DAHL, supra note 180, at 143. This assumes that intensity levels remain constant. For a discussion of intensity as part of the democratic equation, see DAHL, supra note 128, at 90-123 (defining "intensity" preliminarily as "the degree to which one wants or prefers some alternative"); Willmoore Kendall & George W. Carey, The "Intensity" Problem and Democratic Theory, 62 AM. POL. SCI. REV. 5 (1968). But see MAYO, supra note 178, at 178 ("[T]he dilemma is an imaginary one, without political relevance. Intensity of feeling . . . has abundant opportunity to make itself felt in the many political processes which are open. It does not take much to convince the lukewarm and wavering and so reduce the majority to a minority.").

189. DAHL, supra note 180, at 139.

190. Id. at 139-41.
satisfied citizens, not just fifty-one minus the forty-nine unsatisfied ones. And neither higher law, nor Professor May's approach does the trick. The best justification, it then seems, is that majority rule is the best we can do under prevailing sociopolitical conditions and that it works better than other systems. In a cynical, albeit realistic, way this justification seems as legitimate as any other.

Assuming, arguendo, that simple majorities are the fairest and most efficient decision-makers available, problems still remain. Professor Hanna Pitkin, for example, asks:

[C]an majorities never be wrong? Are there no occasions in the history of mankind when it was right for a dedicated minority to begin agitating for a revolution, or even to lead or make a revolution? And finally, why should what the majority (or any other proportion) of your fellow-subjects think be binding on you? What justification is there for that? Why should that obligation seem more basic or natural or self-evident than the obligation to obey laws and authority? Because you have consented to majority rule? But then the whole cycle of difficulties begins again.

Does Locke provide any answers? At the outset of his Second Treatise, Locke offered the following:

[W]hen any number of Men have, by the consent of every individual, made a Community, they have thereby made that Community one Body, with a Power to Act as one Body, which is only by the will and determination of the majority . . . . [I]t is necessary the Body should move that way whither the greater force carries it, which is the consent of the majority; or else it is impossible it should act or continue one Body, one Community, which the consent of every individual that united into it, agreed that it should; and so every one is bound by that consent to be concluded by the majority.

191. See, e.g., DAHL, supra note 128, at 45 (arguing that the assumptions undergirding the idea of natural rights "have tended to dissolve in modern times").
192. For example, promajoritarianism advocates base their conclusions on some of the notions critiqued above. See supra text accompanying notes 182-85.
193. See MAYO, supra note 178, at 179; WOLFF, supra note 46, at 38; cf. KISHLANSKY, supra note 149, at 228 (asserting, in reference to early modern England, that "[i]f majorities were not preferable they were practical, and practicality—not for the first time—overcame ideals").
194. Pitkin I, supra note 146, at 994.
195. LOCKE, supra note 164, at 331-32 (emphasis omitted).
The greater force of the community, according to Locke, carries the entire body politic in any direction it chooses. This is so simply because the majority, by definition, is the greater force. Whether Locke means for the state to move in the direction of the greater moral force, or he speaks of a movement in fact, is not clear. The former assumes that the majority in fact accords with the greater moral force, while the latter simply reduces majoritarianism to a “might is right” approach. Either rationale, without more, does not alone provide enough justification.

Professor Stevens conjectures that, based on the available evidence, “[t]he closest Locke seems to come to a justification of majority rule is one based on pragmatism.”196 In this sense, “a majority is the minimum needed for society to make a safe bet on the truth, which draws nearer as the percentage supporting a position increases.”197 Professor Stevens proceeds to answer Pitkin’s question:

[A] majority can surely be wrong. Any group of people may be wrong: experts, interested parties, legislators, astrologists. But given Locke’s trust in the ability of human beings to reason, and hence to understand right from wrong, a majority is the most appropriate Lockean unit to come to a right judgment. Each individual is likely to make a right judgment.198

This argument, on its face, is open to serious questioning, as is any modern argument introducing the notion of “voters” and “reasoning” (i.e., “rationality”).199 Yet, “[i]f it is true that Locke had faith

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197. Id. at 28. This observation is similar to, if not a mirror image of, Condorcet’s famous theorem, which advanced the theory that, upon confronting two alternatives and assuming that “the average voter is more likely right than wrong,” it follows that “the probability that a majority is right increases dramatically the larger it is.” DAHL, supra note 180, at 142; see also WOLFF, supra note 46, at 39 (“[H]istorical observation may reveal that rule by the majority tends to advance the general welfare better than any other system of government . . . .”). For an extended exposition of Condorcet’s argument, see DUNCAN BLACK, THE THEORY OF COMMITTEES AND ELECTIONS 164-80 (1963).
198. Stevens, supra note 196, at 27.
199. See, e.g., V.O. KEY, JR., PUBLIC OPINION AND AMERICAN DEMOCRACY 77-93 (1965) (arguing that there are many public policy issues about which few members of the public hold an opinion). But cf. ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (offering a behaviorist governmental model built upon rational political behavior). Admittedly, capacity to reason and rationality may be treated as distinct from each other. To have the capacity to reason does not directly translate into the capacity to do it well, much less rationally. Yet, if a majority has the capacity
in everyone’s ability to reason, then majority rule in a commonwealth with a broad franchise makes a lot of sense. Without this ability, majority rule is hardly the best alternative.

Rousseau also addressed this issue. In doing so, he conceded that the majority may sometimes follow the wrong course:

It follows from what has been said above that the general will is always well-meaning and always tends toward the public good; but it does not follow that all decisions made by the people are equally sound. We always will our own good, but we do not always see what it is. The people is never corrupted, but it is often misled, and only then does it seem to will what is bad.

This happens when, in language reminiscent of Madison’s, “factions, lesser associations detrimental to the greater one,” influence the voting scheme so that citizens do not vote in accordance with the general will but with their specific association. So long as citizens vote without the influence of others, it follows that the general will should emerge from a tally of votes.

Like Locke, Rousseau also failed to provide conclusive justifications for majoritarianism’s privileged position in democratic circles. Rousseau chose not to confront the issue directly, but to define away majoritarianism’s problems, creating the impression that he had in fact provided the necessary proof. However, like Locke before him, Rousseau fell short.

There are two important accounts of majority rule I have thus far ignored. I refer specifically to Professor Robert Dahl and his theory of “minorities rule” and to Professor Elaine Spitz and her Majority Rule.

Dahl identifies American democracy as one of “minority rule.” That is, instead of worrying about majorities in general and the ways by which a coalition of fifty percent plus one may form, Dahl states that “the more relevant question is the extent to which various minorities in a society will frustrate the ambitions of one another with the passive acquiescence or indifference of a majority of adults or voters.” For this reason, he concludes, pluralism entails the
interchange between multiple centers of power.\footnote{205}{ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 24 (1967).}

Dahl's conception of democratic governance provides a justification similar to one of the standard justifications for simple majority rule. This is the notion that an individual might be in the minority today, tomorrow, and perhaps the next day as well. Over the long haul, however, chances are that the individual will find himself or herself in the majority more often than in the minority.\footnote{206}{The notion of permanent majorities challenges this claim. This is one argument put forth by Professor Guinier in her critique of current American democratic practices. See Guinier, supra note 78.}

One individual cannot win all disputes, this claim suggests, yet majority rule ensures that one wins and loses in turn. Fairness principles would not want it any other way.

However, under Dahl's conception, the fifty-percent-plus-one barrier does not serve to defuse my critique of majority rule, for the barrier itself does not cease to be anything but an arbitrary line. In this regard, analogies to track and field and the "high jump" event are appropriate. As the bar is placed at differing heights for competitors to attempt to clear, the relevant quest for competitors is not to clear any predetermined height, but simply to clear more than all the others.\footnote{207}{This analogy might seem to indicate that the fifty-percent-plus-one requirement, while arbitrary, is in fact valid, for it serves to ensure that one group in society beats out all other opponents. What if the various minorities were unable to achieve a simple majority? Obviously, they would have to either deliberate further, compromise, or see their ideas perish in the vast land of unenacted proposals. Thus, if compromising, why stop at the fifty percent mark? Why not sixty? Seventy? Madisonian democracy, after all, feared popular majorities and sought to control their factious passions. See, e.g., THE FEDERALIST No. 10 (James Madison). Requiring anything above fifty percent would serve to mitigate Madison's concerns.}

Fifty percent plus one is an arbitrarily predetermined mark. Nothing about the mark itself tells us why it should be placed where it is. It simply is.\footnote{208}{Cf. Pennock, supra note 178, at 31 (noting that the "idea that a majority rather than a minority should govern . . . provides major support for the acceptance as right . . . of a regime adopting that principle. That this is so today derives partly from tradition").}

And nothing about the nature of the event itself stipulates that a beginning mark of anything over fifty percent plus one is unavailing or somehow undemocratic.

Professor Spitz provides a distinct defense of majority rule. As she envisions it:

Majority rule is a social practice in a sovereign entity among related, politically equal people with shared as well as diverse interests and desires. Designed to enable a people to decide
upon a mutually acceptable course of action without resort to force, its characteristic features include the free expression of ideas, discussion, negotiation, calculations of strategy, and finally voting for representatives... \(^{209}\)

Most importantly, she proceeds:

The practice of majority rule... helps sustain the viability of a community by recognizing its diversity; enabling its multiple parts to achieve some overall direction; providing a peaceful, nonarbitrary social decision mechanism; and encouraging a decent amount of stability. For highly differentiated people with multiple purposes this method of maintaining community may be irreplaceable.\(^{210}\)

Professor Spitz's characterization does seem to render simple majority rule as the democratic procedure of choice. After all, any procedure that depends on practices such as "inclusivity, discussion, periodic conflict resolution, and joint action"\(^{211}\) does deserve to occupy the democratic high ground. With regards to my analysis, however, it is not clear why simple majorities accomplish these practices in ways that super majorities would not. Say, for example, that a fifty-percent-plus-one majority is able to fulfill all of Professor Spitz's conditions as well as her idealistic practices. It is hard to see how a sixty percent majority would not accomplish her goals in a similar manner. Why does rule by the people, to restate quickly, entail rule by fifty percent plus one over fifty percent minus one? Nothing in Professor Spitz's argument seems any more persuasive than earlier justifications.

This quandary is a real one, and one which the Founders well understood while developing their constitutional legacy. A cursory glance at the various constitutional arguments, as reflected in the text of the Constitution itself, corroborates such an assessment.

**B. The Constitutional Compact**

A cadre of "lawless"\(^{212}\) men gather together as representatives of

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209. SPITZ, supra note 149, at 211.
210. Id. at 214.
211. Id. at 215.
212. This is the contention of some commentators, based on Article XIII of the pre-existing Articles of Confederation, which specifically called for confirmations of any amendments by the legislatures of every state. See Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 456 n.3 (1989); Bruce Ackerman & Neal
larger entities. Their mission: to revise some articles of which they do not think much anyway. They meet in secret, lest word gets out about this revisionary idea. Rather paternalistically, these fellows believe they know what really is best for the populace and will let the people know about their endeavor only when the time is right. They talk long, work hard, accomplish much. As the story goes, these characters complete their constitutional blueprint in four months’ time. Legitimately concerned with providing a document able to withstand the passage of time, these propertied men juxtapose as many definite clauses as deemed necessary with enough vague ones as to provide much needed flexibility.\footnote{213} As a result, their Constitution is anything but rigid. Out of necessity, the Framers’ intentions are not always clear.

Where did the Framers really stand on the issue of majority rule? Did their majoritarian philosophy get explicit recognition in the final parchment? Were their intentions as majoritarian as their philosophies might seem to indicate? These are the questions addressed below. The answers may prove rather surprising.

1. Expounding on the Text\footnote{214}

A careful reading of the constitutional text provides scant evidence as to the Framers’ understandings and intentions regarding majority rule. This is not terribly surprising, as the very purpose of the Constitution is “to declare certain values transcendent, beyond the reach of temporary political majorities.”\footnote{215}

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Katyal, Our Unconventional Founding, 62 U. CHI. L. REV. 475 (1993). But see THE FEDERALIST No. 43, supra note 4, at 279-80 (James Madison) (arguing that the Articles of Confederation may be viewed as a treaty among the several states, no longer binding its members as a result of repeated state violations); Akhil R. Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043, 1047-54 (1988).

\footnote{213. Compare, e.g., U.S. CONST. art. I, § 8, cl. 3 (“[Congress shall have the power to regulate commerce . . . among the several states.”) with U.S. CONST. art. I, § 2, cl. 2 (delineating the qualifications for House membership).

\footnote{214. I take a skeptical view of attempts to extract from past texts any meaning their authors might have intended. I adhere to Professor White’s views, and exercise caution while examining an “authoritative” historical text, such as the Constitution, and the various “intractable interpretive difficulties” it presents. G. Edward White, Reading the Guarantee Clause, 65 U. COLO. L. REV. 787, 789 (1994).


The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to life, liberty, and property, to free speech, a free press, freedom of}
While musing on the topic of Polish government, Rousseau developed a useful structure upon which to analyze our own Constitution. Speaking of the Polish Diet and the power of all its members to exercise a veto power, he asserted: "The liberum veto, not a bad thing in and of itself, becomes the most dangerous of abuses when it exceeds certain limits."\textsuperscript{216} Unanimous decision making, he conceded, would be "less unreasonable if it applied only to the fundamental provisions of [the] constitution; for it to apply indiscriminately to every decision of the Diet, however, is inadmissible from every point of view."\textsuperscript{217} Therefore, unanimity is not intrinsically bad, to be avoided at all costs. And sometimes, he posited, "[i]n accordance with the natural right of societies . . . [unanimity] was required both for the establishment of your body politic and for the fundamental laws that bear directly upon its very existence . . . ."\textsuperscript{218}

The concept of majority rule was not completely lost on Rousseau. Consistent with his previous exposition on the subject,\textsuperscript{219} he explained that "[t]he majority principle . . . should apply to matters of a purely administrative character."\textsuperscript{220} In between the two, a large chasm exists, a democratic continuum, and "[d]epending on the importance of the questions being voted on, [different variations] may be taken as determining the preponderance of the vote."\textsuperscript{221} The importance of the veto and the care with which it ought to be exercised is reflected in his assertion that "the right [must] be made

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worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

319 U.S. 624, 638 (1943).

216. \textit{ROUSSEAU}, \textit{supra} note 148, at 56. The basis of this view "appears to have been the notion of the absolute equality of each and every Polish gentleman, and this led directly to the conclusion that the unanimous vote of the Diet was required to approve proposed legislation." C. Gordon Post, \textit{Introduction} to \textit{CALHOUN, supra} note 129, at xxii.

217. \textit{ROUSSEAU, supra} note 148, at 56.

218. \textit{Id.} at 57.

219. See \textit{supra} note 148.

220. \textit{Id.} at 58.

221. \textit{Id.} In his \textit{Social Contract}, Rousseau posited similar ideas:

Two general maxims may be used to determine the proportion. The first is that the more serious and important the decision is, the closer the prevailing opinion should approach unanimity. The second is that the shorter the time in which the decision must be made, the more the required majority should be reduced; in matters that must be decided without delay, a difference of one vote should be enough. The first of these maxims seems better suited to enacting laws, the second to conducting public affairs. In any case, it is by a combination of both that the best proportion to require for a decisive majority can be determined.

\textit{ROUSSEAU, supra} note 144, at 89.
dangerous to exercise, by attaching to it grave consequences for the individual availing himself of it."222 In this sense, Rousseau accorded some weight to both democratic polarities. Both unanimity and majoritarianism can, and must, coexist amicably.

The Constitution contains a number of supermajoritarian requirements. For example, the impeachment clause states that "no person shall be convicted without the Concurrence of two-thirds of the Members present."223 Also, the concurrence of two-thirds of either House is officially required to officially expel one of its members;224 and two-thirds majorities in both Houses are needed in order for Congress to override a Presidential veto.225

These examples show that the Rousseauian rationale is at work in the American constitutional structure.226 For another example, Article II, Section Two, provides for the President to have "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."227 John Jay explains the reasons for subjecting this power to such a stiff procedural obstacle:

The power of making treaties is an important one, especially as it relates to war, peace, and commerce; and it should not

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222. ROUSSEAU, supra note 148, at 59.
223. U.S. CONST. art. I, § 3, cl. 6. According to Justice Story:

[T]he power of impeachment is not one expected in any government to be in constant or frequent exercise. It is rather intended for occasional and extraordinary cases, where a superior power, acting for the whole people, is put into operation to protect their rights, and to rescue their liberties from violation.

1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §751 (4th ed. 1873). For an exposition of the various objections to this clause, including the decision to deposit impeachment power in the Senate instead of in the other branches, see THE FEDERALIST Nos. 65, 66 (Alexander Hamilton).

225. U.S. CONST. art. I, § 7, cl. 3. "[T]his power is important as an additional security against the enactment of rash, immature, and improper laws." 1 STORY, supra note 223, § 885. Moreover, Justice Story proceeded:

[T]he departure from the general rule of the right of a majority to govern ought not to be allowed but upon the most urgent occasions; and an expression of opinion by two thirds of both houses in favor of a measure certainly afforded all the just securities which any wise or prudent people ought to demand in the ordinary course of legislation.

Id. § 890. For Hamilton's views on the subject, see THE FEDERALIST No. 73, supra note 4, at 442-47 (Alexander Hamilton).

226. See also 1 STORY, supra note 223, §751 (alluding to the "occasional and extraordinary" nature of certain cases warranting a supermajoritarian check).
be delegated but in such a mode, and with such precautions, as will afford the highest security that it will be exercised by men the best qualified for the purpose, and in the manner most conducive to the public good.\textsuperscript{28}

The importance of the treaty power is also apparent in Hamilton’s perceived necessity to address the clause yet again a few weeks later. While addressing the many objections raised by critics of the Constitution, Hamilton explained why neither the President nor the Senate should have the treaty power without the other’s concurrence:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States. To have intrusted the power of making treaties to the Senate alone would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations.\textsuperscript{29}

The treaty power, in short, was deemed an important one and placed above everyday political processes. Accordingly, simple majoritarianism would not do.

The electoral college provision also follows a similar pattern. According to its language, simple “electoral college” majorities are enough for the election of the President.\textsuperscript{30} At first glance, the Rous-

\textsuperscript{28} THE FEDERALIST No. 64, supra note 4, at 390 (John Jay).

\textsuperscript{29} THE FEDERALIST No. 75, supra note 4, at 451 (Alexander Hamilton).

\textsuperscript{30} Interestingly, the same stipulation is not found in Article I for the election of congressional representatives. All we find there is for the people to elect their House representatives directly, U.S. CONST. art. I, § 2, cl. 1, and for state legislatures to elect their Senators, U.S. CONST. art. I, § 3, cl. 1. No reference is made to the method of election. Moreover, this section also delineates the procedure to be followed in the event that more than one candidate has a majority or an equal number of votes:

\begin{quote}
[The House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice.]
\end{quote}

U.S. CONST. art. II, § 1, cl. 3. \textit{But see} U.S. CONST. amend. XII (amending the process of
seanlian dichotomy between administrative and substantive decision making might seem absent here, since presidential elections must certainly be deemed important, delicate, and in need of careful deliberation. When viewed in the context of national politics and electoral colleges, however, the difficulty disappears.

The ultimate purpose of this provision is to expedite the election of the President according to the majority’s wishes, while ensuring “that the office of President will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications.” As a result, the people cannot vote directly on the election, but must select electoral voters to do so for the state as a whole. In this way, explained Hamilton:

[T]he immediate election [is] made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which [are] proper to govern their choice. A small number of persons, selected by their fellow-citizens, from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.

It is clear that this process was a check on majoritarian passions.

Various other mechanisms exist in the constitutional structure to impede majorities from imposing their collective will. Examples include the bicameral structure, the staggered election for the Senate, and election of senators by state legislatures. The counterbalancing of congressional power “[t]o declare War” and “[t]o provide for organizing, arming, and disciplining, the militia.”

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231. The Federalist No. 68, supra note 4, at 414 (Alexander Hamilton).
232. Id. at 412. John Jay expressed similar views:

As the select assemblies for choosing the President, as well as the State legislatures who appoint the senators, will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtue, and in whom the people perceive just grounds for confidence.

The Federalist No. 64, supra note 4, at 391 (John Jay); see also 2 Story, supra note 223, §§ 1453, 1473 (discussing the various reasons for and objections to the constitutional method of presidential election).

233. U.S. Const. art. I, § 1 (vesting all legislative power in the Senate and the House of Representatives).
234. U.S. Const. art I, § 3, cl. 1. The latter mechanism was amended in 1913 by the Seventeenth Amendment. See U.S. Const. amend. XVII.
235. U.S. Const. art I, § 8, cl. 11.
236. U.S. Const. art I, § 8, cl. 16.
for example, with the President’s role as “Commander in Chief of
the Army and Navy”\textsuperscript{237} provides further evidence as to the Framers’
structural assurances against majoritarian power.

Conversely, “administrative decisions” can be decided by
simple majority, and sometimes by even less than a majority. For
example, Article I, Section Five requires that a majority of each
house “shall constitute a Quorum to do Business”\textsuperscript{238} and allows that
yeas and nays will be entered on the Journal “at the desire of one
fifth of those present.”\textsuperscript{239}

Arguments in favor of a constitutionally mandated simple
majority requirement are based on two independent claims. One
claim asserts that the Constitution stipulates a number of super-
majoritarian requirements, yet “never places any special obstacles in
the way of the enactment of ordinary legislation signed by the
President.”\textsuperscript{240} Thus, the argument goes, simple majorities are re-
quired whenever the constitutional text does not specifically call for
supermajorities. This claim may be answered persuasively in the
following way: “When the Constitution mandates a legislative
majority, as it does for quorums, or a supermajority, as it does for
treaties, it does so explicitly.”\textsuperscript{241} It is also curious that such an
important procedural detail would be left out of the final document
if the Framers in fact intended the Constitution to mandate such a
procedure. That such a stipulation would not have hindered rat-
ification, but perhaps would have bolstered it, adds to the curious-
ness of the omission.\textsuperscript{242}

Seemingly, the best textual evidence is found in Article I, Sec-
tion Three, which provides that the Vice President has no vote in the
Senate “unless they be equally

\begin{thebibliography}{9}
\bibitem{237} U.S. CONST. art. II, § 2, cl. 1.
\bibitem{238} U.S. CONST. art. I, § 5, cl. 1.
\bibitem{239} U.S. CONST. art. I, § 5, cl. 3.
\bibitem{240} Comment, An Open Letter to Congressman Gingrich, 104 YALE L.J. 1539, 1541
\bibitem{241} John O. McGinnis & Michael B. Rappaport, The Constitutionality of Legislative
\bibitem{242} This claim is based on Professor Sutherland’s assertion that “[m]ajority rule
had come to be the premise of thought and argument, the datum from which political
theory started.” SUTHERLAND, supra note 24, at 199.
\bibitem{243} U.S. CONST. art. I, § 3, cl. 4.
\end{thebibliography}
would often choose to use majority rule and that majority rule would be the default rule applied when no other procedure was adopted.\(^{244}\) The fact that majority rule has been a default democratic procedure even before the time of the framing supports this conclusion.\(^{245}\)

Secondly, and most importantly, the Framers envisioned a role for the Senate unlike the one for the House. As Madison explained, "the nature of the senatorial trust . . . requir[es] [a] greater extent of information and stability of character . . . ."\(^{246}\) More specifically, he proceeded:

> It is a misfortune incident to republican government . . . that those who administer it may forget their obligations to their constituents and prove unfaithful to their important trust. In this point of view a senate, as a second branch of the legislative assembly distinct from and dividing the power with a first, must be in all cases a salutary check on the government.\(^{247}\)

In this vein, "[t]he Senate was designed to be a select deliberative body whose special job—unlike that of any other governmental institution—was to protect the people from policy and value pref-

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244. McGinnis & Rappaport, supra note 241, at 488.
245. See Sutherland, supra note 24, at 199.
246. The Federalist No. 62, supra note 4, at 376 (James Madison); see also James Madison, Journal of the Federal Convention 124-25 (E.H. Scott ed., 2nd ed. 1898) (wishing for "the Senate to consist of the most distinguished characters, distinguished for their rank in life and their weight of property, and bearing as strong a likeness to the British House of Lords as possible").
247. The Federalist No. 62, supra note 4, at 378 (James Madison). Alexander Hamilton also offered a similar perceptive. As he stated:

> All communities divide themselves into the few and the many. The first are the rich and well born, the other the mass of the people. The voice of the people has been said to be the voice of God; and however generally this maxim has been quoted and believed, it is not true in fact. The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government. They will check the unsteadiness of the second . . . . Can a democratic assembly, who annually revolve in the mass of the people, be supposed steadily to pursue the public good? Nothing but a permanent body can check the imprudence of democracy.

1 The Records of the Federal Convention of 1787, at 299 (Max Farrand ed., 1911) (quoting Alexander Hamilton); see id. at 48 (quoting Roger Sherman's view that he was "opposed [to] the election by the people," insisting that election ought to be by the state legislatures. The people, he said, "immediately should have as little to do as may be about the Government. They want information and are constantly liable to be misled").
ferences that would be unwise in the long-term.\footnote{248} The Senators themselves, according to Alexander Hamilton, would act as Burkean representatives, "bound to perform services necessary to the good of the whole, though his state should condemn them.\footnote{249}

Thus, to require a majoritarian procedure from a such a distinguished body hardly serves as conclusive evidence regarding the Framers’ majoritarian stance. In an interesting sense this position accords with Rousseau’s teachings on the subject of majority rule and general will: representatives vote not their atomistic pre-dilections, but their perceptions as to what the general will might be.\footnote{250} This rationale helps explain why Article I, Section Three, contains a clause with such a simple majoritarian flavor, yet a similar clause is not found in reference to the more plebeian House of Representatives. It also helps to explain the clause itself on its own terms and serves to deflate arguments in favor of simple majority rule as a constitutional imperative. The Framers, in sum, might have been willing to accord majority rule as the senatorial procedure because they trusted the institution itself. This does not mean that the Framers were majoritarians at heart in all situations.

Article IV, Section Four, contains the much debated Guarantee Clause: “The United States shall guarantee to every State in this Union a Republican Form of Government . . . .”\footnote{251} On its face, this clause does nothing more than guarantee republicanism; it does not specify how representatives in the various states are to conduct their business.

In this sea of uncertainty,\footnote{252} it has been speculated that the

249. 2 J. ELLIOT, THE DEBATES OF THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 320 (1861); see also id. at 303 (“It is therefore absolutely necessary that the Senate should be so formed as to be unbiased by false conceptions of the real interests or undue attachment to the apparent good of their several states.”). For Burke’s views on the general subject of representation, see EDMUND BURKE, To the Electors of Bristol, in EDMUND BURKE: SELECTIONS 118, 124 (Leslie N. Broughton ed., 1925) (“Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”).
250. See supra text accompanying note 173.
252. See White, supra note 214, at 806; see also THE FEDERALIST No. 39, supra note 4, at 240 (James Madison) (providing no satisfactory answer to the question of whether the “distinctive characters of the republican form” may ever be found); Eule, supra note 9, at 1541 (asserting that the Clause did not have “a single connotation for those who drafted the Constitution, let alone for the far greater number who ratified it”); Samuel B. Johnson, The District of Columbia and the Republican Form of Government Guarantee, 37 HOW. L.J. 333, 358 (1994) (“From its inception, the word ‘republican’ has}
Guarantee Clause’s goals might involve providing “accountability to the majority with filters to protect minorities,” perhaps requiring “that the structure of day-to-day government—the Constitution—be derived from ‘the People’ and be legally alterable by a ‘majority’ of them.” Yet, these ideas are nothing but conjecture. In any case, they are arguments about the outer boundaries of republican government. If we were to concentrate instead on the concept’s core, “[m]ost scholars would agree that a republican government is, at the very least, one in which the people control their rulers.” Beyond this definition, the terrain becomes uncertain. All we can safely say is that the Guarantee Clause guaranteed a system of representation to the states at large.

On this issue, reliance on Justice Story’s perceptiveness also proves fruitful. He explained:

The want of a provision of this nature was felt as a capital defect in the plan of the confederation, as it might, in its consequences, endanger, if not overthrow, the Union. Without a guaranty, the assistance to be derived from the national government, in repelling domestic dangers which might threaten the existence of the State constitutions, could not be demanded as a right from the national government. Usurpation might raise its standard, and trample upon the liberties of the people, while the national government could legally do nothing more than behold the encroachments with indignation and regret.

The Guarantee Clause does not stipulate what is entailed by the
representation it provides or what types of majorities the clause requires. Interestingly, Professor White concludes that "readings of the Clause, taken over time, have not been majoritarian, but political." Over the course of the Constitution's history, the Guarantee Clause has meant all things to all people. A static majoritarian meaning is not available.

Article V sheds some light on the Framers' design in some very interesting ways. The Article addresses how "We the People" may alter our original compact:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . . .

Most importantly for our present purposes, Article V allows for two-thirds of state or national representatives to propose amendments and three-fourths of the state conventions or legislatures to ratify it. This points yet again to the Framers' distrust of the people and their factional spirit.

As explained by Federalist No. 43 in language reminiscent of Rousseau, the amendment process "guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults." In more explicit terms, and according to Justice Story, "[t]he great principle to be sought is to make the changes practicable, but not too easy; to secure due deliberation and caution; and to follow experience, rather than to open a way for experiments suggested by mere speculation or theory." Thus, factional interests would be circumvented, discouraged, and ultimately prevented.

Similarly, Article VII stands as proof of the Framers' commit-

258. White, supra note 214, at 802.
260. THE FEDERALIST No. 43, supra note 4, at 278 (James Madison).
261. 2 STORY, supra note 223, §1827.
ment to supermajority rule. The article reads in full: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same." This article is clearly consistent with the Rousseauian dichotomy. Constitutional ratification, qualifies as a momentous occasion in need of wide consensus.

Finally, the Bill of Rights, if included as part of the constitutional text, undoubtedly affects our understanding of the Constitution’s approach to majority rule. It is in the Constitution’s first ten amendments where one finds the Framers’ clearest com-

262. U.S. CONST. art. VII. Article VII is hardly a good example of legitimate constitutional design. Following Rousseau’s advice, unanimity ought to be required “for the establishment of your body politic.” ROUSSEAU, supra note 148, at 57. The Constitution was meant to replace the Articles of Confederation, then the law of the land. The Articles, specifically Article 13, did require unanimity by state governments (not constitutional conventions) for the adoption of any amendment. See Articles of Confederation, art. XIII, reprinted in ALFRED H. KELLY & WINFRED A. HARBISON, THE AMERICAN CONSTITUTION 1048-49 (5th ed. 1970) ([N]or shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State."). Whether the Articles were a compact between the states or a treaty no longer binding on its members, see supra note 212, is in fact irrelevant. It still remains that the Constitution replaced the Articles, and that anything short of unanimity does not seem legitimate. Tacit consent was not enough to give the Constitution its required legitimacy. In this sense, Article VII can be seen as a way for the Framers to facilitate passage of a plan they knew to be perilously close to rejection by some of the state conventions. See 2 STORY, supra note 223, §1851 (requiring unanimity would have served to derail the Constitution, even though all 13 states ultimately ratified). But cf. THE FEDERALIST NO. 40, supra note 4, at 253 (James Madison) (asserting that the thinking of the Framers rested on "the transcendent and precious right of the people to 'abolish or alter their governments as to them shall seem most likely to effect their safety and happiness'") (quoting the Declaration of Independence). Traditional objections to the unanimity principle certainly applied here as well. See id. at 251 (objecting to the "absurdity of subjecting the fate of twelve States to the perverseness or corruption of a thirteenth"); THE FEDERALIST NO. 43, supra note 4, at 279 (James Madison) ("To have required the unanimous ratification of the thirteen states would have subjected the essential interests of the whole to the caprice or corruption of a single member.").

A way out of this critique may be found by looking to Article V and its requirement of seventy-five percent of votes for the adoption of new amendments. By way of analogy, we may look to the Constitution as an entirely new amendment. By doing so, and requiring sixty-nine percent of the state conventions to ratify it, we may then say the Framers were providing themselves the same requirement granted to future generations. The problem with this line of reasoning, of course, is its circularity. Also, it completely fails to address Rousseau’s position concerning the “natural right of society.” ROUSSEAU, supra note 148, at 57.

263. U.S. CONST. amends. I-X.

264. See Akhil R. Amar, The Bill of Rights and the Fourteenth Amendment, 100 YALE L.J. 1131, 1201 (1991) (asserting that the Constitution must be read as a single document, including the Bill of Rights, and not as a “jumble of disconnected clauses”).
mitment to constitutionalism and the idea that certain values must not be subject to the whims of the majority.265 The Bill of Rights is "replete with biblical 'thou shalt nots' and enforced by judges who are politically insulated and authorized to invalidate legislative and executive action they believe to violate those rights . . . ."266 Professor Eule speaks of the Bill of Rights in terms of an "[e]ntrenched-rights safety net," where a few matters are placed beyond the reach of the majority.267 One of the Bill of Rights' "more significant role[s], . . . has been to protect individuals from the tyranny of the group."268

In the end, my analysis echoes previous works. Robert Bork, for example, links individual rights to limits on majoritarianism, asserting that:

the United States was founded as a Madisonian system, which means that it contains two opposing principles that must be continually reconciled. The first principle is self-government, which means that in wide areas of life majorities are entitled to rule, if they wish, simply because they are majorities. The second is that there are nonetheless some things majorities must not do to minorities, some areas of life in which the individual must be free of majority rule.269

265. See Eule, supra note 9, at 1530 (asserting that the Bill of Rights has served as "the single most striking countermajoritarian check in the entire constitutional scheme"). But see Amar, supra note 264 (positing that individual and minority rights were not the sole motif of the Bill of Rights, nor its most important one).

266. Murphy, Civil Law, supra note 24, at 108.

267. Eule, supra note 9, at 1526, 1529. Professor Eule develops a theory of constitutional structures and the filtering of majoritarian spirits. These filters are: a "Representation" filter, which allows for deliberation to occur, thus "offer[ing] time for reflection, exposure to competing needs, and occasions for transforming preferences," id. at 1527; and a "Separation of Powers" filter, encompassed in the constitutional spirit by federalism and the tripartite system of coequal branches providing checks on each other's extensions of power, id. at 1528.

268. Eule, supra note 9, at 1530; see also James Winthrop, Amend the Articles of Confederation or Amend the Constitution? Fourteen Conditions for Accepting the Constitution, MASS. GAZETTE (Boston), Feb. 5, 1788, reprinted in 2 THE DEBATE ON THE CONSTITUTION 155, 157 (Bernard Bailyn ed., 1993) (stating, upon addressing the Massachusetts Convention, that "[a] bill of rights . . . serves to secure the minority against the usurpation and tyranny of the majority").

269. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139 (1990); see also DAHL, supra note 128, at 36 ("No one has ever advocated, and no one except its enemies has ever defined democracy to mean that a majority would or should do anything it felt an impulse to do. Every advocate of democracy . . . and every friendly definition of it, includes the idea of restraint on majorities."); cf. Whitcomb v. Chavis, 403 U.S. 124, 167 (1971) (Harlan, J., dissenting) ("The scheme of the Constitution is not one of majoritarian democracy, but of federal republics, with equality of representation a value subordinate to many others."
I say nothing new when I assert that majorities may not always do as they please. If the constitutional text tells us anything, in fact, it points to the cautious conclusion that the Framers were indeed fearful of the power of the majority. When it comes to the making of choices deemed to be part of the "normal" course of business, the Constitution trusts simple majorities to determine outcomes. For those times when matters are deemed substantial, on the other hand, the Constitution requires supermajorities. Finally, for those rights considered fundamental, the Constitution requires complete excision from majoritarian politics. Majoritarianism, in this light, is perhaps a democratic default, to be used when other practices prove impracticable. The Constitution goes no further.

2. The Framers' Documented Intentions

Looking to the constitutional text provides a glimpse of what the Framers were up to. We cannot garner the whole story, however, simply by turning to the text alone. The Framers' personal letters, speeches and diaries also divulge, often in much greater detail, what the founding generation intended in Philadelphia in the summer of 1787. This section tests the notion of simple majority rule against the extraconstitutional words of some of our prominent Founders and important interpretations of those words.

The Framers were not blind adherents to the concept of unrestricted majority rule. As Professor Eule comments, "[i]f the Constitution's Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection." The Framers'
personal references corroborate this assertion.

In a letter to Thomas Jefferson, James Madison delineated the same basic argument he would later make famous in his *Federalist No. 10*:

Those who contend for a simple Democracy, or a pure republic, actuated by the sense of the majority, and operating within narrow limits, assume or suppose a case which is altogether fictitious. They found their reasoning on the idea, that the people composing the Society, enjoy not only an equality of political rights; but that they have all precisely the same interests, and the same feelings in every respect. Were this in reality the case, their reasoning would be conclusive. The interest of the majority would be that of the minority also; the decisions could only turn on mere opinion concerning the good of the whole, of which the major voice would be the safest criterion; and within a small sphere, this voice could be most easily collected, and the public affairs most accurately managed. We know however that no Society ever did or can consist of so homogeneous a mass of Citizens.

What assurances, other than good faith, do minorities have that they will be protected from majoritarian excesses?

Generally, we may conclude that the Framers feared abuses of power, more so in the context of the new republic they set out to establish. Alexander Hamilton, in *Federalist No. 6*, spoke of the inherently dangerous condition found “if these States should be wholly disunited, or only united in partial confederacies,” as we may not “forget that men are ambitious, vindictive, and rapacious.”

James Winthrop told the Massachusetts Convention:

> The experience of all mankind has proved the prevalence of a disposition to use power wantonly. It is therefore as

274. *Letter from James Madison to Thomas Jefferson (Oct. 24, 1787)*, in *1 DEBATE ON THE CONSTITUTION*, supra note 268, at 199-200. Madison’s concerns in this regard are frequently found throughout his writings. In a letter to Jefferson, he writes again:

> In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents.


necessary to defend an individual against the majority in a republick, as against the king in a monarchy. Our state constitution has wisely guarded this point. The present confederation has also done it.276

Unsurprisingly, these fears affected the way in which these men confronted the constitutional task ahead of them. For example, democratic principles at the time of the framing did not carry the same connotations as they do today. “[T]o the members of the Federal Convention,” explains the historian Catherine Bowen, “the word democracy carried another meaning than it does today. Democracy signified anarchy; demos was not the people but the mob.”277 It was for this reason that Edmund Randolph complained at the convention “that the general object was to provide a cure for the evils under which the United States labored; [and] that, in tracing these evils to their origin, every man had found it in the turbulence and follies of democracy.”278 Elbridge Gerry complained that democracy is “the worst . . . of all political evils.”279

This concern over the power of the multitude, some historians have contended, was the central factor behind the elite movement to draft a new constitution. Charles Beard, for example, argues that simple direct majority rule “was undoubtedly more odious to most of the delegates to the Convention than was slavery.”280 Professor Douglass adds that most revolutionary leaders “were basically conservative and felt that majority rule and political equality constituted not only a threat to their dominant political position but a danger to the very freedoms for which the struggle against Britain had been undertaken.”281

278. MADISON, supra note 246, at 81.
279. Id. at 747.
281. ELESHA P. DOUGLASS, REBELS AND DEMOCRATS: THE STRUGGLE FOR EQUAL POLITICAL RIGHTS AND MAJORITY RULE DURING THE AMERICAN REVOLUTION 5 (1955). Furthermore, he
Professor Amar has persuasively established majority rule as a starting point in the Framers’ quest for a more perfect Union. He deftly pastes together a number of quotes from a variety of sources—including Justice Story’s Commentaries, letters by Jefferson, the Federalist Papers, pamphlets of the day; records of the Federal Convention and the state ratifying conventions—to ultimately conclude that the Framers were indeed majoritarians at heart. If we are to follow Professor Amar’s method, more sources may certainly be gathered. In reference to Article Thirteen of the Articles of Confederation, for example, James Madison wrote: “Could any thing in theory, be more perniciously improvident and injudicious, that this submission of the will of the majority to the most trifling minority?” “A Citizen of Philadelphia” gave perhaps the most extreme defense of simple majority rule:

[even if] the majority have adopted a system of despotism . . . the minority are still bound to submit to it; for it is the choice of the majority, and they cannot be free, unless it be adopted. If it is rejected, then the majority, who are deprived of what they love and prefer, yield to the minority, which is contrary

writes:

All were agreed that the primary purpose of government was to protect rights and that the strongest possible barriers should be erected against the arbitrary use of power, but they did not conclude that the best way to effect these objectives was to place all power in the hands of the people. Far from it; as men of their age they feared that unchecked majorities of constituents or representatives would be as productive of tyranny as an unchecked despot.

Id. Various other historians and commentators concur on this issue as well. See, e.g., Gordon S. Wood, The Creation of the American Republic 1776-1787, at 496-97, 512-14 (1969) (holding skeptical view of the people’s capacity to govern wisely, and hoping to temper democratic excesses with the principle of representation); Monaghan, supra note 271, at 171 (“Understanding the Constitution as a reaction to the democratic ‘excesses’ of the post-revolutionary era is now deeply ingrained in American thinking, at least outside the law schools.”); White, supra note 214, at 795 (explaining that “those who pioneered in the creation of a ‘Republican Form of Government’ for America tempered their theoretical commitment to sovereignty in ‘the People’ with a comparable commitment to the idea that the people needed protection from their own excesses”).

282. See Akhil R. Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 Colum. L. Rev. 457, 482 (1994) (“In the 1780s the special status of majority rule was extraordinarily well understood.”); Amar, supra note 252, at 749 (observing that republican government “require[s] . . . that the structure of day-to-day government—the Constitution—be derived from ‘the People’ and be legally alterable by a ‘majority’ of them”). But see Monaghan, supra note 271, at 139 (“Amar’s exaltation of the prerogatives of ‘We the People’ cannot be reconciled with the founding generation’s abiding fear of the excesses of democracy.”).

283. James Madison’s Reply to Patrick Henry (June 6, 1788), in 2 DEBATE ON THE CONSTITUTION, supra note 268, at 611, 613 (defending the taxing power and explaining federalism).
to every principle of democracy.  

There are many more examples.  

These quotations, viewed myopically, indeed seem to point us in Professor Amar's direction. The Framers, however, simply followed established democratic principles, which decreed majoritarianism as the proper democratic starting point. That "democracy

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284. Pelatiah Webster, Reply to the Pennsylvania Minority, PA. GAZETTE (Phila.), Jan. 23, 1788, reprinted in 1 DEBATE ON THE CONSTITUTION, supra note 268, at 566, 568. Interestingly, this view is reminiscent of Socrates' stance in Plato's Crito. Facing imminent death, Socrates explains to Crito, by way of a fictitious conversation between the laws and himself, why he must abide by the laws' decrees. As he states, "Then consider, Socrates,' the laws would perhaps say, ... 'But to whoever of you stays here and sees the way that we reach judgments and otherwise manage the city, we say that he has already agreed with us in deed to do whatever we bid.'" Plato, Crito, in FOUR TEXTS ON SOCRATES, supra note 157, at 110.

285. See, e.g., THE FEDERALIST No. 22, supra note 4, at 146 (Alexander Hamilton) (asserting that a fundamental maxim of republican government requires that the sense of the majority should prevail); David Ramsay to the Citizens of South Carolina, COLUMBIAN HERALD (Charleston, S.C.), Feb. 4, 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, supra note 268, at 147, 147 ("In a state of nature, each man is free and may do what he pleases; but in society, every individual must sacrifice a part of his natural rights; the minority must yield to the majority, and the collective interest must control [sic] particular interests"); Mercy O. Warren, Observations on the Constitution, reprinted in 2 DEBATE ON THE CONSTITUTION, supra note 268, at 284, 303 ("It is a republican principle that the majority should rule"); Webster, supra note 284, at 568 ("In a republic, the majority should certainly govern."). Noah Webster, as "A Citizen of America," developed a similar view:

On the first view of men in society, we should suppose that no man would be bound by a law to which he had not given his consent. Such would be our first idea of political obligation. But experience, from time immemorial, has proved it to be impossible to unite the opinions of all the members of a community, in every case; and hence the doctrine, that the opinions of a majority must give law to the whole State; a doctrine as universally received, as any intuitive truth.

Noah Webster, A Citizen of America, reprinted in 1 DEBATE ON THE CONSTITUTION, supra note 268, at 129, 130 (emphasis omitted); see also id. at 153-54 ("[I]n civil society, political liberty consists in acting conformably to the sense of a majority of the society. In a free government, every man binds himself to obey the public voice, or the opinions of a majority; and the whole society engages to protect each individual.") (emphasis omitted). As "Giles Hickory," Noah Webster also expressed related views:

It is a dictate of natural law that a majority should govern; and the principle is universally received and established in all societies, where no other mode has been arbitrarily fixed. This natural right cannot be alienated in perpetuum; for altho [sic] a Legislature, or even the body of the people may resign the powers of government to forty or to four men, when they please, yet they may likewise resume them at pleasure.

Noah Webster, Giles Hickory III, AM. MAG. (N.Y., Feb. 1788), reprinted in 2 DEBATE ON THE CONSTITUTION, supra note 268, at 304, 312 (emphasis omitted).
is often characterized as the rule of the majority, so tight is the nexus between democratic governance and majority rule,\textsuperscript{286} somewhat deflects Professor Amar's claim. That the Framers were actually willing to submit themselves and their "liberty" to the whims of majorities is a much different claim and one lacking in evidentiary support.

As Professor Eule counsels, "[a]t a minimum" one must proceed with "some hesitation when we talk in hushed tones of the Framers' dedication to 'majority will.'"\textsuperscript{287} While this is the best one might be able to discern by looking to the past, turning one's attention to modern times provides a more compelling story.

3. Judicial Reflections

Early on, voting rights cases were categorized as "political questions."\textsuperscript{288} Under this approach, the Supreme Court refused to address these issues and instead deferred to the political branches of government.\textsuperscript{289} In the early 1960s, however, the Court sidestepped all precedential constraints and deftly overcame earlier doctrinal obstacles. In the case of Baker v. Carr,\textsuperscript{290} Justice Brennan announced for a divided Court that "allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision."\textsuperscript{291} Luther v. Borden,\textsuperscript{292}

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\textsuperscript{286} Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. CHI. L. REV. 689, 702-03 (1995). Support for this proposition may be garnered from a number of sources. See, e.g., ARISTOTLE, supra note 135, at 125 ("Since the people are a majority, and what is resolved by the majority is authoritative, this will necessarily be democracy."); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 27 (2d ed. 1986) ("Democracies do live by the idea, central to the process of gaining the consent of the governed, that the majority has the ultimate power to displace the decision-makers and to reject any part of their policies."); DAHL, supra note 127, at 34 ("Running through the whole history of democratic theories is the identification of 'democracy' with political equality, popular sovereignty, and rule by majorities."); Arend Lijphart, Majority Rule in Theory and Practice: The Tenacity of a Flawed Paradigm, 43 INT'L SOC. SCI. J. 483, 483 (1991) ("The view equating democracy with majority rule is... strong and widespread").
\textsuperscript{287} Eule, supra note 9, at 1524.
\textsuperscript{288} Colegrove v. Green, 328 U.S. 549, 552 (1946) (Frankfurter, J.) ("Due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.").
\textsuperscript{289} See, e.g., id. at 556 ("To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket.").
\textsuperscript{290} 369 U.S. 186 (1962).
\textsuperscript{291} Id. at 237.
\textsuperscript{292} 48 U.S. (7 How.) 1 (1849).
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holding that claims under Article IV's Guarantee Clause were nonjusticiable, no longer stood as a barrier to voting debasement claims.

In the following years, the Court swung its gates wide open. In *Westberry v. Sanders*, the Court declared that the concept of "one person, one vote" governed in congressional redistricting. In *Reynolds v. Sims*, the Court announced that "[l]egislators represent people, not trees or acres," and held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." By 1964, voting rights had emerged onto the constitutional landscape.

It is important to note that the Court has not determined conclusively what type of democratic procedure legislatures are bound constitutionally to follow. On the one hand, the "one person, one vote" standard points to the conclusion that majority rule must serve as the constitutional definition of democracy. As Justice Harlan explains in his dissent in *Whitcomb v. Chavis*, the line of cases from *Gray v. Sanders* to *Hadley v. Junior College District* "can be best understood... as reflections of deep personal commitments by some members of the Court to the principles of pure majoritarian democracy."

This view is contradicted directly by the Court's decision in *Gordon v. Lance*. In that case, the Court confronted a provision in West Virginia's constitution and certain West Virginia statutes requiring approval by sixty percent of the voters in a referendum to raise taxes beyond the rates already established by the state constitution or to incur bond indebtedness. Chief Justice Burger, writing for the majority, concluded that "any departure from strict majority

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293. 376 U.S. 1 (1964).
294. Id. at 7-8.
296. Id. at 562.
297. Id. at 568.
298. For the development of the standard, see Gray v. Sanders, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.").
299. See, e.g., Reynolds, 377 U.S. at 565 ("Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators.").
300. 403 U.S. 124 (1971).
303. 403 U.S. at 166 (emphasis omitted).
304. 403 U.S. 1 (1971)
rule gives disproportionate power to the minority.” But, he proceeded, “there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue.” Thus, the Court’s most recent pronouncement on this issue has not accorded majoritarianism the legal status that some have attributed to it.

An analysis of the Court’s internal procedural rules provides rather important clues about its position on majority rule. Nowhere in the Constitution does one find instructions as to how the Court must conduct its business. For example, the Court could institute a unanimity rule, and decide all cases by a nine-to-zero vote. In fact, "critics of dissent advocate the primacy of the unit over its members and argue that the Court is most 'legitimate,' most true to its intended role, when it speaks with a single voice." Such was the Court’s practice for a time during Chief Justice Marshall’s early tenure, as well as during certain moments when the Court has faced some of its toughest challenges. Generally, however, some of the hardest and most controversial cases are decided by a five-to-four vote.

At present, certain internal Court rules operate both as majoritarian deliberative valves and majoritarian constraints. For example, only four Justices’ votes are needed to accept a case for adjudication. While accepting a case ensures nothing, only cases accepted can be

305. Id. at 6.
306. Id.
309. During the school desegregation cases, where the Court found itself swimming against a strong southern sociopolitical tide, Chief Justice Warren also sought and achieved unanimity, because he wanted the Court to speak as one. See Richard Kluger, Simple Justice 694-99 (1977). Chief Justice Burger, in later cases, tried to follow the same strategy. See Bob Woodward & Scott Armstrong, The Brethren: Inside the Supreme Court (1979). In this regard, it is important to note that sometimes the Chief Justice does command a higher level of influence than his fellow Justices. See Walter F. Murphy, Elements of Judicial Strategy 82-89 (1964).
adjudicated on their merits. If the Court denies certiorari, the litigants do not get a hearing. The Court also employs an unwritten "'Rule of Three,' which postpones decisions on petitions for certiorari or jurisdictional statements pending disposition of a case already given plenary review." Both of these rules, in sum, "have a significant impact on the Court's substantive decisions and on the behavior of various actors in our legal system.

Nevertheless, the Court decides its cases on a simple majoritarian basis. I argue that the Court adheres to the majoritarian paradigm for reasons similar to those found in the political arena: justifications are lacking, yet practicality rules. However, the various procedural devices the Court uses to select cases shows us that simple majoritarianism does not stand alone; minoritarianism also plays an important role.

Representation and constitutionalism stand at the vortex of our democratic system of governance. Beyond that, the Court has not explicitly stipulated that simple majority rule is mandated constitutionally, nor does it have any reason to do so. Chief Justice Burger's and Justice Harlan's competing assertions serve to illustrate the schizophrenic way in which we view simple majority rule.

CONCLUSION

The standard democratic conception equates legitimate democratic outcomes with simple majoritarianism. According to this view, majorities are "entitled to rule, if they wish, simply because they are majorities." This equation is accurate in a limited sense, for nobody would dare to propose as democratic a system where minorities rule over majorities.

However, the historical evidence supports a more cautious view. In this Note, I have put forth part of this evidence and con-

312. Id.
313. See supra note 193 and accompanying text; cf. supra notes 243-50 and accompanying text (discussing simple majority rule for the Senate).
314. See supra notes 298-306 and accompanying text.
315. BORK, supra note 269, at 139. For competing definitions, see DAHL, supra note 128, at 36 ("[N]o one has ever advocated, and no one except its enemies has ever defined democracy to mean, that a majority would or should do anything it felt an impulse to do. Every advocate of democracy ... and every friendly definition of it, includes the idea of restraints on majorities."); cf. Whitcomb v. Chavis, 403 U.S. 124, 167 (1971) (Harlan, J., dissenting) ("[The scheme of the Constitution is not one of majoritarian democracy, but of federal republics, with equality of representation a value subordinate to many others.").
clude from it that democracy need not entail a majority-rule system of the fifty-percent-plus-one variety to the disregard of all other systems. Like all other competing definitions, such a particular, majority-rule definition must be defended.

In the final analysis, I conclude that simple majority rule does not deserve its privileged democratic status vis-à-vis other competing definitions. This move away from simple majoritarianism would help clear a path for participatory and representational improvements. American democracy and its many citizens deserve nothing less.