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Recommended Citation
Adrian Vermeule, "Absolute Voting Rules" (University of Chicago Public Law & Legal Theory Working Paper No. 103, 2005).

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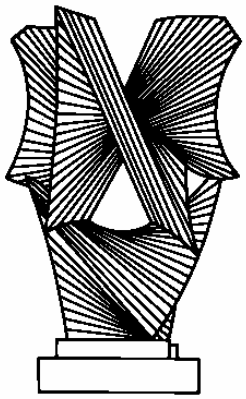
PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 103



ABSOLUTE VOTING RULES

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THE UNIVERSITY OF CHICAGO

August 2005

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Absolute Voting Rules

Adrian Vermeule*

The theory of voting rules developed in law, political science, and economics typically compares simple majority rule with alternatives, such as various types of supermajority rules[1] and submajority rules.[2] There is another critical dimension to these questions, however. Consider the following puzzles:

- In the United States Congress, the votes of a majority of those present and voting are necessary to approve a law.[3] In the legislatures of California and Minnesota,[4] however, the votes of a majority of all elected members are required. All these legislatures use "majority rule." What is the difference between these schemes, and is it consequential?

- In each house of the Parliament of India,[5] to enact a constitutional amendment requires (for most subjects) both (1) a majority of the total membership of the house and (2) two thirds of the members of the house who are present and voting. Which of the two requirements is more difficult to satisfy, and why?

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[1] The classic comparison of simple majority rule and supermajority rules is James M. Buchanan and Gordon Tullock, *The Calculus of Consent, Logical Foundations of a Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962), pp. 63-91. For elaboration, see Dennis C. Mueller, *Public Choice III* (Cambridge: Cambridge University Press, 2003), 67-78. In what follows, I shall use the term "supermajority rules" to denote only the subclass of asymmetric supermajority rules, which privilege the status quo. There are also symmetric supermajority rules, which do not privilege the status quo but which yield nontrivial ties. See Robert E. Goodin and Christian List, "Special Majorities Rationalized," *British Journal of Political Science*, forthcoming (2005).

[2] See Adrian Vermeule, "Submajority Rules: Forcing Accountability upon Majorities," *Journal of Political Philosophy*, 13 (2005), 74-98.

[3] Subject to the requirement of a quorum, as discussed below.

[4] California Constitution Article 4, Section 8(b); Minnesota Constitution Article 4, Section 22. At both the national level and the state or provincial level, constitutions or internal legislative rules commonly prescribe a majority of all elected members for legislative voting on designated subjects, such as constitutional amendments, impeachment or declarations of emergency. See International Center for Parliamentary Documentation of the Inter-parliamentary Union, *Parliaments of the World, A Comparative Reference Compendium* (New York: Facts on File Inc., 1986), p. 528, Table 16: Voting Majority Requirements. Rules requiring a majority of all elected members for ordinary enactments are rare at the national level, but do exist. Examples include the German Bundesrat, in which an absolute majority of states is required, and the former constitution of Hungary and the current constitution of Tunisia, both of which require a majority of all elected members of the legislature.

[5] Constitution of India Part XX, available at http://indiacode.nic.in/coiweb/coifiles/part.htm.

- Article V of the United States Constitution provides that constitutional amendments may be proposed "whenever two thirds of both Houses shall deem it necessary."[6] In 1804, when the Twelfth Amendment was being considered, the total membership of the Senate stood at thirty-four Senators. The vote on the amendment was twenty-two in favor, ten against, with two Senators "not recorded."[7] Did the amendment pass or fail?

- In Illinois, passage of a constitutional amendment by popular initiative requires the approval of three fifths of those voting on the measure, or of a majority of those voting in the election.[8] What if anything does the second option add?

In these examples, there is no dispute about whether the voting rule mandates a simple majority or some particular supermajority. The dimension on which these rules vary is different altogether: the issue is whether the majority (or supermajority) is calculated with reference to the number of votes cast, the whole number of members of the institution, or on some other basis. A fully-specified voting rule must state both a multiplier and a multiplicand. To say that the voting rule should be "a majority" or "a supermajority" is an underspecified statement, like saying "X is more than" or "three multiplied by." If a voting rule is to be coherently stated, one must ask "a majority (or supermajority) of what?"

The choice of multiplicand is at least as important as the choice of a multiplier. Suppose a voting body with 100 members, a quorum rule under which at least a majority of 51 must be present and vote in order to take decisions with legal effect, and a standard multiplicand under which only those present and voting are counted. The choice of a multiplier makes some difference. With these specifications, a minimum simple majority is 26; varying the multiplier to two thirds requires a minimum supermajority of 34. Varying the multiplicand, however, makes a much larger difference. With a multiplicand of all members, a minimum majority is 51 – unanimity if only a minimum quorum is present – and a minimum two thirds supermajority is 67. In this and other examples, what makes the multiplicand important is that the difference between one half and two thirds of a small number may be much less than the difference between one half of a small number and one half of a larger number. Everything depends upon what the numbers actually are, but clearly the choice of the multiplicand is consequential.

In what follows I will try to make progress on the question of voting multiplicands. I examine the most common issue that arises in legislatures, courts and other institutions: given some multiplier, whether simple majority or a supermajority, should the multiplicand be (1) those present and voting or (2) the whole membership of

[6] United States Constitution, Article V.
[7] See David P. Currie, *The Constitution in Congress: The Jeffersonians (1801-1829)* (Chicago: The University of Chicago Press, 2001), p. 61.
[8] Illinois Constitution Article XIV, Section 3.

the institution – for example, all elected legislators?[9] An absolute voting rule is a rule whose multiplicand is all members eligible to vote in the institution. An absolute voting rule can take any multiplier, typically a majority or any of a range of supermajorities. The antonym of an absolute voting rule, I shall say, is a simple voting rule, under which the (majority or supermajority) multiplier takes as a multiplicand all those present and voting. I will consider whether, and under what conditions, absolute voting rules are desirable, both from an impartial standpoint and from the self-interested standpoints of voting majorities and minorities. I compare absolute voting rules both to simple majority rules and to simple supermajority rules. My thesis is that under a plausible range of circumstances, absolute voting rules prove superior to both alternatives.

I proceed as follows. Section I examines the mechanics of absolute voting rules, contrasts them with simple voting rules, and explains the interaction between quorum rules and both types of voting rules. Particularly important here is that absolute voting rules in effect count abstention as a negative vote, whereas simple voting rules ignore abstention entirely. This effect helps absent members of the majority retain control of the institution's decisionmaking, and also permits strategic ambiguity on the part of voters, who are empowered to contribute to a measure's defeat without openly opposing it. The end of the section emphasizes my limited methodological ambitions, which are strictly normative. I make no attempt to offer a positive theory that would explain why absolute voting rules appear where they do and do not appear where they do not.

Sections II through V argue that absolute voting rules are desirable under certain circumstances. As compared to simple majority rules and to simple supermajority rules, there are both majoritarian and minoritarian arguments for absolute voting rules. Section II, III and IV focus on absolute majority rules, while Section V turns to absolute supermajority rules.

Section II suggests that absolute majority rules can increase majority control over the institution's voting outcomes. Under certain circumstances, minorities may exploit majority absenteeism or nonparticipation to produce countermajoritarian results. Absolute majority rules frustrate this, in ways that can be more effective than direct

[9] For discussions en passant, see, among others, Amartya Sen, *Collective Choice and Social Welfare* (New York: North-Holland, 1979); Dan S. Felsenthal and Moshe Machover, "Ternary Voting Games," *International Journal of Game Theory*, 26 (1997), 335-351. The only extended treatment of this question in the literature is Keith L. Dougherty and Julian Edward, "Simple vs. Absolute Majority Rule," MS. 2005 (forthcoming in *Mathematical Social Sciences* The authors evaluate simple majority rule and absolute majority rule by reference to a range of Paretian and ordinal-utilitarian welfare criteria, concluding that by most criteria simple majority rule is superior. In the interests of mathematical tractability, the authors limit their treatment in several ways: (1) transaction costs are ignored; (2) all voting and nonvoting is assumed sincere; (3) absolute majority rules are compared only to simple majority rules, not to supermajority rules; (4) absolute supermajority rules are ignored; (5) there are no political constraints on the choice of voting rules. In what follows, I relax all these assumptions. I suggest, in other words, that the transaction costs of assembling majority and minority coalitions are central to the evaluation of absolute majority rules (Sections II and III), that strategic voting and abstention is also crucial (Section IV), that absolute majority rules satisfy political constraints on the choice of voting rules in cases where supermajority rules do not (Section III), and that these rationales partially generalize to the case of absolute supermajority rules (Section V).

adjustments to the quorum rule, adjustments to the voting multiplier, or arrangements such as proxy voting. Absolute majority rules provide a sort of insurance against strategic behavior by minorities; this effect can be desirable from the self-interested standpoint of voting majorities, and also from an impartial standpoint.

Section III suggests that absolute majority rules provide the effect of supermajority rules while nominally adhering to majoritarian principles. This may be desirable on impartial expressive grounds, and also from the self-interested standpoint of voting minorities or majorities or both.

Section IV suggests that by virtue of counting abstentions and absences as negative votes, absolute majority rules allow strategic nonparticipation that liberates voters from public accountability. This effect can obviously be desirable from the self-interested standpoint of voting minorities; under some circumstances, moreover, it can also be desirable on impartial grounds.

Section V adapts and extend these points to the case of absolute supermajority rules. A brief conclusion follows.

I. Conceptual Preliminaries

This Section offers some terminology and analytic distinctions that are necessary for the substantive discussion in later sections. I.A. examines the mechanics of majority rule with various multiplicands; especially important is the differing effect of abstention under different rules. I.B. examines the relationship between voting rules and quorum rules. I.C. sets out some methodological premises.

A. Voting Multiplicands and Abstention

An absolute majority rule requires a majority of all members, and an absolute supermajority rule requires a defined supermajority of all members. In principle there could also be absolute submajority rules, under which a fraction less than a majority of all members suffices to take action, even in the choice between two options. Examples of the first two types are extremely common, while the third type is rare, so the focus here is on absolute majority and supermajority rules. I will also focus on cases in which voters must choose between two options, such as enacting a measure or adhering to the status quo, so I will ignore the plurality variant of majority rule.

Absolute majority rules are common. Even more common, however, is the scheme of simple majority rule favored by Robert's Rules. Under this scheme, (1) a quorum is a majority of all members; (2) a simple majority is needed to change the status quo; and (3) only those present and voting are counted in calculating whether requirement (2) is satisfied.[10] Throughout Sections II, II, and IV, I will compare this scheme to the following absolute majority voting scheme, which I take to be standard: (1)

[10] See Henry M. Robert, *Robert's Rules of Order: Modern Edition*, ed. Darwin Patnode (Nashville: Thomas Nelson Publishers, 1989), originally published in 1876.

a quorum is a majority of all members and (2) the affirmative votes of a majority of all members are required to change the status quo.

It is obvious that absolute majority rules and simple majority rules perfectly converge where all duly qualified members of the institution are present and cast votes. A major difference between the simple majority scheme and the absolute majority scheme is the effect of abstention from voting or physical absence from the voting institution. Under any absolute voting scheme, the requisite majority needed to enact a proposal is a fixed quantity, whereas under a simple majority scheme the requisite majority is variable. The consequence is that under the absolute majority scheme, abstention or absence from the legislature in effect counts as a negative vote, because it reduces the pool from which the requisite fixed number of affirmative votes can be drawn. Conversely, under a simple-majority scheme, "[e]liminating 'no' votes reduces the number of supporters needed to create a majority."[11] In a 12-person voting body, under a simple majority scheme, 6 affirmative votes fail to enact a measure if 6 voters are opposed (assuming ties are broken in favor of the status quo), but the switch of even one vote from opposition to abstention changes the outcome. Under an absolute majority rule, the switch makes no difference.

In general, this feature of absolute voting rules is highly consequential. Suppose that a voting body with 100 members must vote on a proposition.[12] 40 members vote yes, 20 vote no, and 40 either abstain or are not present. There is a standard quorum rule and (at least) 60 participants present, so action can be taken. Simple and absolute majority rules yield different outcomes, however. Under simple majority rule, only those present and voting are counted, so the measure passes 40-20. Under absolute majority rule the measure fails, since the 51-vote absolute threshold is not reached. The measure would also pass even under a two thirds supermajority multiplier with the ordinary present-and-voting multiplicand. In this example, then, the status quo effect produced by changing the multiplicand is larger than the status quo effect produced by increasing the multiplier to two thirds.

What of the nonvoters?[13] If they did not exist, so that the body had only 60 eligible voters, the proposal would pass under an absolute majority rule, indeed even under an absolute majority rule with a two thirds supermajority multiplier. "The effect of the [absolute majority rule] is to count every member of the body that does not vote affirmatively as voting against the passage of the act."[14] In other words, merely by declining to cast a vote in favor of the proposal, nonvoters can defeat the measure under an absolute majority rule. Under either the simple or the absolute majority rule, the abstainers could also defeat the measure simply by casting their votes against the

[11] Cary R. Covington, "Building Presidential Coalitions Among Cross-Pressured Members of Congress," *Western Political Quarterly*, 41 (1988), 47-62 at p. 50.
[12] The example is adapted from Wikipedia, "Absolute Majority Rule," available at http://en.wikipedia.org/wiki/absolute_majority.
[13] I am eliding here a possible distinction between abstention and physical absence from the legislature. The distinction is discussed below.
[14] *Board Of Supervisors of Ramsey County v. Edward Heenan*, Supreme Court of Minnesota, *Minnesota Reports*, 2 (1858) at *2.

measure. The absolute majority rule gives the abstainers another option, however: the strategic ambiguity of nonparticipation. Any particular member may claim other reasons for abstaining or being physically absent, including other pressing business or a desire to suspend judgment on the measure. It will often be unclear whether the abstention was genuinely motivated by these reasons or by opposition to the measure on the merits.

The strategic ambiguity of nonparticipation is seemingly objectionable from an impartial point of view. In the simple majority case, Bentham condemned abstention or absence as an evasion of accountability:

> [Where legislators may be absent,] there is entire security, not for complete prevarication, but for demi-prevarication. Suppose a measure so bad that a deputy, if he were present, could not in honour refrain from voting against it. Does he fear to offend a protector, a minister, or a friend? He absents himself: his duty is betrayed, but his reputation is not compromised.

At first glance, the charge holds a fortiori for strategic abstention under an absolute majority rule. In the latter case, unlike the simple-majority case Bentham is discussing, the abstainer can both vote against the measure (in effect) and also take no part; rather than confronting the choice between "honour" and "reputation," the abstainer may contribute to the measure's defeat while retreating into ambiguity to shield her reputation. In Section IV, however, I will emphasize that this additional effect can make abstention under an absolute majority rule better, not worse, than abstention under a simple majority rule. The core ideas are that nonparticipation is ambiguous, and that strategic voters can exploit this ambiguity to liberate themselves from accountability. Under some circumstances, such as where the relevant accountability would run to partial interest groups rather than constituents or society at large, liberating voters from accountability can actually be desirable on impartial grounds.

There is a complication here about the precise definition of the alternatives. The most common simple-majority scheme requires a majority of those "present and voting." Legislators who abstain may still count towards a quorum, which means that under a simple-majority scheme, the winning majority may be far less than a majority of quorum. In the purest version of the rule, a statute may be enacted (with a quorum present) by the affirmative vote of only one legislator, if no one opposes.[15] Yet there is an intermediate possibility. Consider the following discussion, from a recent case in the Alabama Supreme Court:

> Section 63 of the Alabama Constitution of 1901 provides that "no bill shall become a law" unless "a majority of each house be recorded thereon as voting in its favor. . . ." This provision could be interpreted in at least three ways:
> 1. An absolute majority of each house – that is, 53 members of the 105-member House of Representatives and 18 members of the 35-member Senate – must vote in favor of a bill for the bill to pass;

[15] Id. ("Previous to the constitution [which instituted an absolute majority rule]. . . laws could be passed by a single member voting in the affirmative, if no one voted against him").

> 2. Assuming a quorum of 53 House members and 18 Senate members are present when a vote is taken, a majority of those 53 House members (at least 27) and a majority of those 18 Senators (10) must vote in favor of the bill; or
> 3. Assuming a quorum of each house is present, a majority of those present and voting in each house must be in favor of the bill (e.g. if 53 House members are present, and 10 vote "yes" and five vote "no" and the remaining 38 do not vote, the bill passes the House; similarly, if 18 Senators are present, of which 5 vote "yes" and 3 vote "no" and the remaining 10 do not vote, the bill passes the Senate).[16]

The first interpretation is an absolute majority rule, under which either abstention or absence from the legislature is in effect counted as a negative vote. The second and third interpretations differ in the following way: the second requires a majority of those present, whereas the third requires only a majority of those present and voting. Under the second option, as under an absolute majority rule, an abstention by a legislator who is physically present in effect counts as a negative vote by reducing the pool from which the necessary majority may be drawn. Only by physically absenting herself from the legislature, so as not to count among those present, may the legislator ensure that she has no effect on the vote. Under the third option, by contrast, a legislator may abstain while remaining present, and the abstention is not counted. In other words the first option, absolute majority rule, treats both absence and abstention as a negative vote; the second treats abstention but not absence as a negative vote; and the third treats neither absence nor abstention as a negative vote.[17]

In terms of the three options listed by the Alabama Supreme Court, I am principally interested in the choice between the first and the third. The intermediate second option presents the issues less crisply. For simplicity, I will generally treat physical absenteeism and abstention as equivalent, except in those cases where the difference between the two makes a difference. Examples of such cases include quorum-breaking tactics and certain rules of direct democracy; both are discussed in Section II.

B. Quorum Rules

How exactly do quorum rules relate to the choice between simple and absolute voting rules? The conceptual difference between a quorum rule and any voting rule is that a quorum rule is satisfied, or not, without regard to the content of the votes that are actually cast.[18] The typical quorum is a majority of the whole membership; the

[16] *Birmingham-Jefferson Civic Center Authority v. City of Birmingham*, Supreme Court of Alabama, unpublished, 2005 WL 1023157 (Ala. 2005) (Parker, J., concurring specially).
[17] The same three possibilities exist where the multiplier is a supermajority rather than a majority. In the United States Senate, for ordinary motions a majority of those present and voting are required for passage, assuming the presence of a quorum (as per option 3 in the text). However, two thirds of the senators present are required to ratify a treaty. See U.S. Const. Art. 2, §2, cl. 2. The effect of the latter rule is that abstention by a senator who is present is equivalent to a no vote, but absence is not. See Joseph Freixas and William S. Zwicker, "Weighted Voting, Abstention, and Multiple Levels of Approval," *Social Choice and Welfare*, 21 (2003), 399-431 at p. 413.
[18] *Robert's Rules of Order*, p. 91.

requirement may be satisfied either by counting those physically present or, less commonly, by counting the number of votes cast, without regard to whether the votes are affirmative or negative. Both simple and absolute voting rules, by contrast, are defined by the content of the votes cast. Simple voting rules compare the votes cast in favor with the votes cast against a proposition, and count the proposition as enacted if the former number is greater than the latter. Absolute voting rules compare the votes in favor with a predefined threshold, a majority of all duly qualified members, and count the proposition as enacted if the former number is equal to or greater than the latter.

Despite the conceptual distinction between quorum rules and voting rules, the two types of rules have partially overlapping institutional goals. Quorum rules are intended to block institutional decisions taken with insufficient attendance or participation, somehow defined. As Bentham put it,

> [the quorum rule's] principal use is to contribute indirectly to the compelling an appearance. Is the fixed number deficient [i.e. not satisfied]? Business is retarded; public opinion is thought of; an uproar is dreaded. Those who direct the assembly are obliged to take pains to obtain the attendance of the requisite number.

Of the potential harms from insufficient attendance, I will focus on the risk of outcome error, defined as any difference between the outcomes that the legislature would (counterfactually) produce with full attendance and the outcomes it produces with absenteeism. On this definition, if absenteeism is proportionate between the majority and the minority, there can be no outcome error. Such error arises when there is disproportionate abstenteeism on the part of the majority; when that occurs, a minority that has concentrated its forces at the right moment may exploit a simple majority voting rule to enact measures that would be rejected by a majority if all had participated. In the following passage, Bentham calls this the tactic of "intentional surprise":

> It appears at first extremely singular, that the power of the whole assembly should be thus transferred to so small a portion [i.e. the quorum minimum]. It arises from the circumstance, that abstraction made of intentional surprise, nothing more is to be feared from a fraction of the assembly than from the total number. Allowances being made for the differences of individual talents – as is the whole, so is each part.[19]

As these remarks imply, where the voting-rule multiplier is a majority, outcome error is necessarily countermajoritarian. A principal goal of quorum rules is to minimize this form of countermajoritarian error by ensuring that the legislature may not proceed with only a few in attendance. As I will suggest in Section II, however, a quorum requirement cannot fully achieve this goal, and under some circumstances may not be the most efficient means for doing so in any event. Rather than vary the quorum rule, majoritarian control can be more successfully promoted by varying the voting rule, either

[19] Jeremy Bentham, *Political Tactics*, eds Michael James, Cyprian Blamires, and Catherine Pease-Watkin (Oxford: Oxford University Press, 1999), originally published in 1838, p. 62.

by varying the multiplier or the multiplicand. As between the latter two options, I will suggest that varying the multiplicand is typically the most effective.

C. Methodological Preliminaries

In what follows, I will offer a normative analysis of absolute voting rules. In other words, I attempt to identify good consequences of such rules, on a capacious version of consequentialism that can count such things as the protection of minority rights and the symbolic expression of law's commitments as good consequences.[20] The functionalist temptation is to assume that such arguments are also explanations for the widespread use of particular voting rules. But the normative arguments, standing alone, have no explanatory payoff.[21] For one thing, people are often not motivated by impartial considerations, so we cannot assume that the rules came about because of the normative arguments in their favor. For another thing, even where the normative arguments coincide with the self-interest of the actors who create the voting rules, people who are not motivated by impartial considerations often do not or cannot act in their self-interest either. A legislative majority that would (let us suppose) benefit from adopting absolute voting rules for the future conduct of legislative business may be unable to do so for any number of reasons, including collective action and coordination problems, quasi-rational cognition, emotional pathologies, or simply because there is immediate first-order business that demands priority on a tight legislative agenda.

At the normative level, we may distinguish between majoritarian and minoritarian arguments for absolute majority rules. A minoritarian argument is an argument that identifies good consequences for minorities, consequences that may or may not also be good for the polity generally. In this sense, supermajority rules are typically premised on minoritarian considerations; relative to the baseline of simple majority rules, they give voting minorities the power to block change. One of the aims of the analysis is to explain why, and under what conditions, absolute majority rules may promote minority interests more efficiently or at lower cost than does the use of a supermajority multiplier with a standard present-and-voting multiplicand.

We may also distinguish between impartial considerations and self-interested considerations. From the standpoint of either voting majorities or minorities, absolute majority rules may be desirable because such rules promote the majority's or minority's interests. Impartial arguments, however, must take account of both sets of interests in some broader perspective. Political theory offers sharply competing views of what counts as an impartial perspective, but I need not engage those high-level questions here. At the institutional level, the competing views frequently converge or overlap, and the impartial arguments I shall examine here are all supportable on a wide range of high-level perspectives.

Many absolute majority rules are mandated by higher sources of law, such as a constitution; others are chosen endogenously within the relevant institution, as when a

[20] Amartya Sen, "Rights and Agency," *Philosophy and Public Affairs*, 11 (1983), 3-39.
[21] Jon Elster, *Ulysses and the Sirens* (Cambridge: Cambridge University Press, 1979).

legislature empowered to formulate its own procedural rules chooses absolute majority voting. I will take account of this distinction where it is relevant, but it is not central to the normative analysis I provide, although it would be to a positive analysis. Impartial considerations may, but need not, track the standpoint of higher-level actors who design voting rules for the membership of an institution, such as constitutional framers choosing voting rules for a future legislature, or a legislature choosing voting rules for a judicial system. On some views, constitutional framers stand behind a veil of uncertainty that launders their self-interest and forces them to act as though motivated by impartial considerations.[22] That picture has been questioned at both the theoretical and empirical levels, however.[23] Likewise, as mentioned above, self-interested considerations need not track the standpoint of voting majorities who control the endogenous choice of rules. Even if those majorities are not impartially motivated, they may not succeed in promoting their self-interest either.

The two distinctions we have mentioned give us four classes of potential rationales for absolute majority rules: impartial arguments on majoritarian grounds, self-interested arguments on majoritarian grounds, impartial arguments on minoritarian grounds, and self-interested arguments on minoritarian grounds. In what follows I shall emphasize the range of situations in which some or all of these arguments point in the same direction. Relative either to simple majority rules or to simple supermajority rules, both voting majorities and voting minorities may benefit, in different ways, from absolute voting rules. Moreover, the mutual benefit of voting majorities and minorities may coincide with good impartial reasons to favor such rules.

Given these methodological premises, the following sections turn to the virtues and vices of absolute voting rules. I compare such rules both to simple majority rules and to simple supermajority rules. Absolute majority rules can promote majoritarian control (Section II); can ensure a commitment to nominal or expressive majoritarianism, even where a voting rule with supermajoritarian effect is desirable (Section III); and can allow strategic nonparticipation where it is socially desirable to do so (Section IV). In Section V, I extend and modify these points to account for the case of absolute supermajority rules.

II. Majoritarian Control

In this section, I emphasize that absolute majority rules promote majoritarian control of institutional outcomes. The central concern here is Bentham's tactic of "intentional surprise": under a simple majority scheme, minorities can exploit high majority absenteeism to outvote a rump majority. I begin with a brief discussion of courts, then focus on legislatures and direct democracy.

[22] Geoffrey Brennan and James Buchanan, *The Reason of Rules: Constitutional Political Economy* (Cambridge: Cambridge University Press, 1985).
[23] Jon Elster, *Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints* (Cambridge: Cambridge University Press, 2000).

In most of the United States' regional circuit courts of appeal, judges sit on panels of three; plenary or "en banc" review of the case by the full membership of the court requires, in most circuits, that a majority of the judges in regular active service on the whole court vote in favor of an en banc petition. [24] In many cases, the difference between this rule and the standard present-and-voting multiplicand has proven highly consequential. In Lewis v. University of Pittsburgh, en banc hearing was denied when five of eight available judges, exactly half of the court's full complement of ten judges, voted for an en banc hearing.[25] Under majority rule with a standard multiplicand, the opposite result would have occurred.

The absolute majority rule for voting to rehear cases en banc has typically been justified as a device that allows a "majority of [the court's] judges always to control and thereby to secure uniformity and consistency in its decisions."[26] The feared scenario is presumably that, under a standard simple majority scheme with a present-and-voting multiplicand, a minority of a court's judges may constitute a majority of those who happen to be present and voting, and thus require rehearing in a case in which a majority would decline to rehear. Where there is asymmetrical participation between minorities and majorities, minorities who have strategically coordinated their forces, or who simply seize a fortuitous opportunity, may exploit a simple-majority voting scheme to produce countermajoritarian results.

In the judicial setting, unfortunately, the quoted justification for absolute majority rule is confused. First, there is no necessary connection between majoritarian decisionmaking and consistent decisionmaking. Where three or more voters choose over three or more options, under possible conditions a voting cycle may occur, such that no position can command a stable majority.[27] Even where the choices range over only two options, shifting majorities may undo their predecessors' decisions, turn and turn about. Second, the rule for voting to rehear cases en banc is just an agenda-setting rule. At the actual hearing of en banc cases, however, a majority of the whole court is the required quorum, and the case is decided by ordinary simple-majority voting.[28] Majorities who have been outmaneuvered at the en banc stage will have a later opportunity to outvote the minority on the merits.[29] This limits the damage that minorities can do by exploiting

[24] Each Circuit's rules can be found at its website, listed at www.uscourts.gov/courtlinks/index.cfm.
[25] 3rd Circuit, *Federal Reporter*, 2nd Series, 725 (1983), 910-930, cert. denied 469 U.S. 892 (1984).
[26] *U.S. v. American-Foreign Steamship Corp.*, Supreme Court, *United States Reports*, 363 (1960), 685-696 at p. 689-90.
[27] This idea is credited to the Marquis De Condorcet. An introduction to voting cycles can be found in Kenneth A. Shepsle and Mark S. Bonchek, *Analyzing Politics: Rationality, Behavior, and Institutions* (New York: W.W. Norton & Company, 1997), ch. 4, "Group Choice and Majority Rule."
[28] James J. Wheaton, "Playing with Numbers: Determining the Majority of Judges Required to Grant En Banc Sittings in the United States Courts of Appeal," *Virginia Law Review*, 70 (1984), 1505-1542 at p. 1531.
[29] This statement does not hold where the basis for nonparticipation on the vote to rehear the case en banc was mandatory disqualification, rather than absence or some other reason. A judge who is disqualified at the agenda-setting stage will be disqualified at the merits stage as well. See *Lewis v. University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983) (en banc), cert. denied 469 U.S. 892 (1984) (opinion of Adams, J.). However, several circuits do not count disqualified judges in the multiplicand in any event. See, e.g., 1st Circuit Rules, available at http://www.ca1.uscourts.gov ("[R]ehearing en banc shall be ordered only upon

absenteeism at the agenda-setting stage. Finally, minoritarian manipulation at the agenda-setting stage can sometimes be desirable from an impartial point of view. Allowing a minority to pick its targets may function as a de facto submajoritarian agenda-setting rule, one that can actually promote consistency. Consider the Supreme Court's Rule of Four, under which any four Justices may set a case for plenary hearing. Such a rule is an accountability-forcing device; it allows minorities to force majorities to confront unexplained inconsistencies between an earlier ruling and a current decision.[30]

Courts have at least a prima facie obligation to adhere to consistent decisionmaking over time.[31] Not so for voting in other institutions, such as direct democracy and legislatures, where voters or members need not issue any official statement of rationale for their decisions. The majoritarian-control rationale thus fares better for nonjudicial institutions, where it can be detached from any concern with consistency. I will principally illustrate this point with the case of legislatures, although I turn to direct democracy at the end of the section.

In legislatures, absolute majority rules block intentional surprise by strategic minorities, and thus ensure that the legislative majority retains a veto over outcomes even with a given level of absenteeism or abstention. Consider the ordinary legislative baseline of simple majority voting with a standard present-and-voting multiplicand. Where there is asymmetrical absenteeism between minority and majority, a group that is a minority in the chamber as a whole may prevail over the votes of a rump majority. Suppose a 100-member body, a standard simple-majority scheme, and a quorum of 51 attendees, all of whom vote. The vote is 26 in favor of a measure and 25 against. Because of the standard multiplicand, the 26 prevail even if, with full participation, they would have lost by a massive supermajority of 74-26. Under an absolute majority rule, by contrast, there are not enough votes in favor to enact the measure.

This is an extreme case[32] that illustrates the more general point. An absolute majority rule prevents minorities from concentrating their forces at a decisive time and place, a la Napoleon, in order to overwhelm the few voters who are present from a larger but dispersed majority. More precisely, an absolute majority rule safeguards the majority against affirmative surprise attacks by Napoleonic minorities; it does not prevent the minority from ganging up to block a majority afflicted with absenteeism from taking affirmative steps to enact its preferred measures. This emphasizes that absolute majority rules protect the status quo, just as does raising the voting multiplier from majority to supermajority. I expand upon this point in Section III.

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the affirmative votes of a majority of the judges of this court in regular active service who are not disqualified, provided that the judges who are not disqualified constitute a majority of the judges who are in regular active service." (emphasis added)).

[30] See Vermeule, "Submajority Rules," supra note.

[31] Although this collective aim may not be fully attainable, because of Arrow's Theorem. See Frank H. Easterbook, "Ways of Criticizing the Court," *Harvard Law Review*, 95 (1982), 802-832.

[32] Note, however, that the risk of Napoleonic minorities increases when the quorum rule is set lower than a simple majority, as in the United Kingdom, Austria and Ireland. See Bjorn Erik Rasch, "Parliamentary Voting Procedures," in *Parliaments and Majority Rule in Western Europe*, ed. Herbert Döering (New York: St. Martin's Press, 1995), p. 498.

A minority may employ Napoleonic tactics only if, and when, there is asymmetrical absenteeism or abstention, such that a disproportionate number of the majority do not contribute to the present-and-voting multiplicand. Asymmetrical participation may arise from several causes. First, the minority may care more intensely about a particular issue than do some or many members of the majority. Second, if members decide whether to absent themselves or abstain based on random factors – political campaigning or personal business in the home district, travel problems, illness, mandatory disqualification due to a conflict of interest, and so on – sheer statistical flux will ensure that alert minorities will sooner or later have an opportunity for action.[33]

Third, entrepreneurial minorities will search for and hit upon issues that put majority voters to a political Hobson's Choice, such that neither a vote for nor a vote against a measure is palatable.[34] In such cases, many members of the majority may abstain, potentially giving the minority voting control. In the Philippines Senate in 2004, the minority bloc introduced a resolution indicting a politically controversial figure for fraud. The resulting vote was nine in favor, none against, and nine abstentions. "The minority bloc immediately declared victory . . . . [However, the Senate President ruled that because] the ayes and the abstentions are even, the result is a tie and the resolution has not been adopted."[35] In effect, the Senate President reinterpreted the voting rule as an absolute majority rule to protect the majority bloc.

Finally, asymmetrical participation may arise precisely because a majority tries to maximize its power by spreading itself over more legislative terrain than the minority. This tactic can backfire if minorities are strategic. Thus, in committee voting in the United States House of Representatives before 1995, majorities faced a chronic problem: the multiplicity of committees meant that several committees or subcommittees would often meet at the same time. Simultaneous scheduling meant that "political control [might] slip away to a well-organized minority that might concentrate its strength at a single location for a 'sneak attack' on the majority."[36]

The strategic threat of minority action may itself force the majority to maintain a lower level of absenteeism than it would otherwise choose, and this is a cost. The absolute majority rule avoids that cost, but exacts a price in turn by raising the cost of changing the legal status quo. Under the absolute majority rule, a majority of the whole

[33] See Lawrence S. Rothenberg and Mitchell S. Sanders, "Legislator Turnout and the Calculus of Voting: The Determinants of Abstention in Congress," *Public Choice*, 103 (2000), 259-270; Rothenberg and Sanders, "Rational Abstention and the Congressional Vote Choice," *Economics and Politics*, 11 (1999), 311-340. These studies find that in the 104th Congress, the timing of a vote during the week and during the session was the most important determinant of abstention; campaigning in the home district and (presumably) the demands of travel have a larger effect on the decision whether to vote than does the likelihood of being the pivotal voter.

[34] Martin Thomas, "Issue Avoidance: Evidence from the U.S. Senate," *Political Behavior*, 13 (1991), 1-20, finds that "proactive issue avoidance" through abstention, by members who do not want either to support or oppose a measure, occurs with nontrivial frequency in the U.S. Senate.

[35] Editorial, "12th Congress Has Nothing to Show," *The Manila Times Internet Edition* (Feb. 9, 2004).

[36] *Guide to Congress*, 5th edition (Washington, D.C.: Congressional Quarterly Press, 2000), p. 552.

body cannot succeed if its participation falls below the absolute threshold, no matter what supermajority results. Under absolute majority rule in a 100-member body, a vote of 50 for and 20 against fails to enact a measure, so the coalition or party that holds an absolute majority must ensure participation by at least a chamber majority to enact legislation. Minorities who are obstructionist, rather than affirmatively Napoleonic, benefit from the status quo effect of an absolute majority rule, so long as a decisive fraction of the majority is absent; and this raises the cost of majority absenteeism, the very cost the absolute majority rule reduces in other situations.

The net effect may still be desirable from the majority's point of view. The threat posed by strategic minorities forces legislative majorities acting under a simple-majority scheme to maintain a sufficient presence at all times. If there is some rate of absenteeism that the majority would like to permit among its membership, an absolute majority rule ensures that the majority can do so without exposing its flank to the minority's concentration of force. The accompanying cost is that the absolute majority rule makes it harder to overcome obstructionist minorities who wish only to block legislation. Under an absolute majority rule, however, the chamber majority at least obtains the benefit of certainty: knowing the vote threshold it must meet to enact legislation, it can at least plan the occasions on which it is feasible and desirable to assemble in full to pursue its program. Generally speaking, an absolute majority rule has the costs and benefits of an insurance policy. It protects the absolute majority from a minority's tactic of concentrating forces, but forces the absolute majority to pay a premium in the form of higher transaction costs of organizing to enact legislation in other cases.[37] Under certain circumstances, majorities will favor this arrangement because the benefits of paying the premium exceed the costs.

There are other institutional arrangements that also tend to promote majoritarian control. I will examine several candidates: (1) the ability of voting majorities to reverse countermajoritarian results in later voting; (2) quorum-breaking by majorities and adjustments to the quorum rule; (3) adjustments to the voting multiplier; and (4) proxy voting. In general, although these devices qualify the risk of strategic minorities, they do not eliminate it. In a range of circumstances absolute majority rules will be the least costly and most effective means of controlling the risk of countermajoritarian results that arises under a simple-majority scheme.

Reversal by voting. I will begin with the ability of the absolute majority to reverse countermajoritarian outcomes in subsequent voting. Bentham expressed skepticism about the need for quorum rules on the following grounds:

> It might be apprehended, that where parties existed, those who found themselves one day in superior force, would abuse this superiority to the production of a decree contrary to the will of the majority. But this danger is not great; for the

[37] Richard Forgette and Brian R. Sala, "Conditional Party Government and Member Turnout on Senate Recorded Votes, 1873-1935," *The Journal of Politics*, 61 (1999), 467-484, shows that party leaders have substantial power over the rate of participation by members in the U.S. Senate.

> majority of to-morrow would reverse the decree of the past day, and the victory usurped by the weaker party would be changed into disgraceful defeat.[38]

The legislative majority that would have prevailed with full attendance may, on this view, simply repeal the minoritarian enactment the next time it assembles, and the minority, anticipating this, will refrain from the useless exercise. The ability to reverse minoritarian legislative action functions as an ultimate constraint that reduces the importance of the quorum minimum, a point missed by George Mason when he argued to the Philadelphia constitutional convention that without a quorum minimum in Congress, "the U[nited] States might be governed by a Juncto."[39]

Yet this is a soft constraint; it dampens but does not eliminate the risk of Napoleonic minorities. Two points are important. First, some measures are costly to reverse in fact, even if they can be easily reversed in law. A measure that reveals information to the public may be impossible to undo in any practical sense. So too, a measure that makes a payment of money or property out of the treasury may be legally difficult to undo if constitutional protections of property are triggered, or simply because it is politically costly for government to demand recoupment from parties who have relied to their detriment.

Second, a minoritarian enactment may decisively change the status quo point. It may then be more difficult for the legislative majority to repeal an earlier minoritarian enactment than it would have been to vote it down in the first instance, even if the enactment has only been law for a brief period. The change in the status quo point may affect outcomes if some legislators support neither the enactment nor its repeal. Suppose that under a simple majority scheme the status quo is no law, that a bill is proposed, that it would be defeated 74-26 with full participation, and that it is enacted 26-25 with asymmetrical absenteeism. It does not follow that the new status quo will be reversed, and the old one reinstated, by a vote of 74-26 when the legislature next convenes with full participation. If 24 of the 49 absent voters – less than a majority of the absentees – are opposed to both the enactment and its repeal, the vote on the reversal will be 50-50. I so, the repeal will fail, because in most legislatures (other than those who give the presiding officer a tiebreaking vote) a tie defeats a measure.[40] Opposition to any change in the status quo on the issue at hand might result from a concern for the stability of legal rules, a wish to use the constrained legislative agenda for other pressing business, or simple status quo bias.

Even bracketing such cases, Bentham's assumption is seemingly that a minority will not strike if the threat of future reversal would make the strike futile. This is erroneous, however; it overlooks the collateral costs that the minority may inflict. Even if the rules allow eventual reversal by an absolute majority, the sequence of minoritarian enactment and majority reversal imposes opportunity costs on the majority. Time, the

[38] Bentham, *Political Tactics*, p. 62.
[39] *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1966), p. 252.
[40] See *Robert's Rules of Order*, p. 79.

most precious resource in legislatures, must be spent merely to restore the status quo ante the minority's Napoleonic victory. This may be a large cost to the majority if, as often happens, the Constitution or some other legal rule mandates a cut-off date for the legislative session -- in which case the minority wins so long as it can delay adverse action long enough.

Thus in the House of Representatives, as mentioned above, minorities have often attempted to concentrate their forces at a particular committee meeting for an attack on overstretched majorities. In some cases the minority's goal is simply to block committee approval of the majority's program, but in others it is to secure affirmative (albeit minoritarian) action from the committee, such as an amendment to a bill or the initiation of a hearing or investigation. In such cases, I conjecture that the minority is under no illusion that the full House would enact a minority-favoring bill, or would otherwise assent to the committee's action. The point of the attack, however, is presumably just to disrupt the ordinary schedule of business, and in general to throw sand into the gears of the House's majoritarian machine.

Quorum rules and quorum-breaking. Although quorum rules do partially promote the aim of majoritarian control, they do so only in a sharply limited fashion. As indicated by the previous example, in which 26 legislators outvote 25 representatives of an overwhelming but dispersed majority, the standard majority quorum requirement is simply too weak to prevent the concentration tactic. Likewise, although House Rule XI provides that "[a] measure or recommendation may not be reported by a committee unless a majority of the committee is actually present,"[41] that majority may be composed mostly of minority members. The basic problem is that under a simple majority voting scheme with a standard majority quorum minimum, absenteeism or abstention by members of the absolute majority does not contribute to defeating a minoritarian proposal; a quorum rule does nothing to address this problem. Moreover, under a pure simple-majority scheme, proposals may be enacted by a very small number of voters, much less than even a majority of a quorum, so long as a quorum is present, although the ability of the rest of the quorum group to intervene doubtless helps to prevent countermajoritarian results if the minority does not constitute a majority in the quorum group as a whole.

To be sure, standard quorum rules do allow quorum-breaking by the rump majority as an ultimate tactic of majoritarian control. Where Napoleonic tactics are feared, all the majority members who are present may physically absent themselves or abstain to ensure that the quorum minimum is not satisfied. In the running example of a 26-25 vote, if the quorum is defined by votes cast rather than by those physically present, the 25 members of the dispersed absolute majority may simply decline to vote rather than voting in the negative, and can thus shut down the body altogether until reinforcements arrive. Even if the quorum is defined by those present, the rump majority can leave the building altogether. This tactic -- postponement of the legislative session to defeat a concentrated minoritarian attack – presumably also underlies the rule, recently adopted in the United States House of Representatives, that a committee chair may postpone a vote

[41] House Rule XI (h)(1).

until a future date certain.[42] The tipoff here is the further provision that, when the committee reconvenes, the proposal will be open for amendment by majority vote, even if the majority of those attending the first session already ordered the previous question.[43] A committee chair who realizes that her troops from the majority side have failed to turn out can thus choose to fight another day.

Quorum-breaking is a sword with two very sharp edges, however. Historically, majorities have benefited by the standard quorum rule, which counts all those physically present as contributing to the quorum. In the House of Representatives before 1890, the quorum rule was defined by the number of votes cast, rather than by physical presence. When the majority party could not muster enough members, this allowed minorities to employ the "disappearing quorum," remaining silent in order to break the quorum and thus to block action. Speaker Thomas Reed ruled that those present but not voting counted towards the quorum, thus putting the minority to the much less appealing choice between being outvoted or physically absenting themselves from Congress.[44] Once put in place, however, the Reed rule binds the majority as well as the minority. Where the majority puts the Reed rule in place at a given time, majoritarian quorum-breaking at a later time requires that the rump members of a dispersed absolute majority not merely abstain, but actually stage a public walkout.[45] This version of the quorum-breaking tactic is politically more costly, because more obviously strategic; I will give an example shortly. The walkout tactic is also risky, because it requires high coordination and compliance among majority members. If even some of the majority's members defect (by participating in the minority-dominated vote), the result will be the worst-case scenario from the majority's point of view: a quorum will be established, but with the minority in voting control.

Similar issues are presented by a closely related tool of majoritarian control, which is to adjust the quorum rule upwards while retaining a simple-majority voting rule. Consider a scheme, used in a few legislatures, that combines (1) a simple majority voting rule with a standard present-and-voting multiplicand and (2) a supermajority quorum requirement, such as the presence of two thirds of the membership. Under this scheme, the minority's concentration of force in our running example would be inadequate. The downside consequence of this hybrid scheme, however, is that minorities may exploit the disjuncture between the quorum rule and the voting rule to block action by an absolute majority or even a supermajority. If 66 legislators favor a measure, and 34 oppose it, the measure will not be defeated if the minority votes against it but will be defeated if the minority withdraws from the legislature to defeat the quorum. In a legislative struggle

[42] House Rule XI (h)(4)(A).
[43] House Rule XI (h)(4)(B).
[44] See Sarah A. Binder, *Minority Rights, Majority Rule: Partisanship and the Development of Congress* (Cambridge: Cambridge University Press, 1997), pp. 125-128. The celebrated first example of a disappearing quorum occurred when Rep. John Quincy Adams and supporters refused to answer the roll-call during voting on a pro-slavery bill, precluding a quorum. Roger H. Davidson and Walter J. Oleszek, *Congress Against Itself* (Bloomington: Indiana University Press, 1977), p. 23.
[45] Note that, when concentrated minorities have the upper hand because of majority absenteeism, it is too late for the majority to attempt to change or suspend the Reed rule itself -- even apart from the blatantly strategic character of such a course.

over redistricting in Texas, a legislative chamber with 150 members, a quorum minimum of 100 and a majority party of 88 was temporarily paralyzed by the walkout of 51 dissenters.[46] Importantly, however, the high political costs of this conspicuously strategic behavior soon forced the minority's return[47] -- a circumstance that also illuminates the limits of the walkout tactic as a tool of majoritarian control.

Supermajority multipliers. If a standard quorum rule and standard quorum-breaking tactics are not well-suited to block Napoleonic tactics by minorities, another option is to make an upward adjustment in the voting rule multiplier. One might, that is, adopt (1) a standard quorum minimum, (2) a supermajority multiplier, and (3) a standard present-and-voting multiplicand. Many legislatures use such a scheme for some issues, although few use it generally for all issues. The larger questions about such a scheme, of course, involve the costs and benefits of supermajority rules, including the expressive costs of allowing minorities to block change and the more material cost of the resulting status quo bias. I focus on such issues in Section III. Quite obviously, a chamber majority that creates a supermajority multiplier to protect itself from affirmative minority action will pay a high price when obstructionist minorities block action that the majority would desire to take. But the same is true of an absolute multiplicand, which dampens the risk of affirmative minority opportunism while increasing the costs of organizing to overcome obstructionist minorities.

Here I wish to make a narrower point. Insofar as affirmative Napoleonic minorities rather than obstructionist minorities are the worry, upward adjustments to the multiplier are generally inferior to adjustments to the multiplicand, on essentially mathematical grounds. The effect of large changes in the multiplicand will frequently swamp the effect of small changes in the multiplier. The difference between one half of all those present and voting and two thirds of the same multiplicand, on the one hand, will often be much less than the difference between one half of those present and voting and one half of all members, on the other. With 100 members and a standard quorum rule, as we have seen, only a voting rule with unanimity in the multiplier will duplicate the effect of an absolute voting rule if the number of those present-and-voting is equal to the quorum minimum of 51.[48] (If any of those present do not vote, the absolute majority rule cannot be satisfied even by unanimity). This is not a realistic case, because participation will usually not be so low. The larger point, however, is that if the asymmetries in absenteeism are serious, one may need a very high multiplier to duplicate

[46] See "Texas House Paralyzed by Democratic Walkout, Redistricting at Issue," May 19, 2003, available at http://www.cnn.com/2003/allpolitics/05/13/texas.legislature. For similar European cases, see Rasch, "Parliamentary Voting Procedures," p. 497.

[47] See Michael Martinez, "Dems' flight was wrong, many El Pasoans say," *El Paso Times*, November 20, 2003, p. 1A; "GOP Gets Quorum in Texas Senate: Democrat breaks ranks, facilitating remapping effort," *Chicago Tribune*, September 16, 2003, p. 10l.

[48] In the judicial setting, the Florida Supreme Court made a parallel point to justify adopting a simple-majority voting rule for en banc decisions by intermediate appellate courts: "[An absolute majority rule] could punish the litigants by possibly requiring an extraordinary number of judges to call an en banc hearing or, if called, to vote in favor . . . . [On] an eight-judge court, if only five are sitting (e.g. two disqualified and one ill), an extraordinary vote of all five of the sitting judges would be required. . . ." *In re Rule 9.331*, Supreme Court of Florida, *Southern Reporter*, 2nd Series, 416 (1982), 1127-1131 at p. 1129.

the majority-protecting effect of an absolute majority rule. In a legislature of 100 members divided 50-50 on the relevant issue, where 75 participate and all absentees are from one group, even a two thirds supermajority rule would permit an enactment by the 50 voters from the other group (i.e. by a vote of 50-25), although the enactment would fail under full participation, a simple majority rule, and standard tiebreaking rules.

Proxy voting. Finally, there is the possibility that majorities can use proxy voting to maintain control while permitting their members the desired rate of absenteeism. In the House of Representatives before 1995, "proxy voting was simply a means of ensuring majority control over committees as subunits of the House and preventing such control from succumbing to the whims of committee scheduling or flukes of members absences."[49] When in 1995 the Republican majority abolished proxy voting in committees,

> [T]he Republicans endured immediate political pain for their decision. They were forced to conduct numerous simultaneous committee meetings and House floor votes to ensure prompt passage of the legislative agenda promised in the election campaign, while struggling to maintain voting control with the narrowest House majority in forty years. . . . [T]he Republicans eventually loosened some of the other restrictions they had passed on the number of committee and subcommittee assignments members might hold, so they would be able to place enough majority members in the right places to ensure control.[50]

This point dramatizes that, in the absence of control devices such as proxy voting or an absolute majority rule, majorities will be forced to maintain a lower rate of absenteeism than they would otherwise desire. Proxy voting lowers the cost of majority absenteeism, as legislative minorities often point out in high-minded fashion.

Why then is proxy voting not more common? Although some legislatures permit it at the committee level, most do not, and it is all-but-universally prohibited at the level of voting in the whole legislature (the main exceptions being Brazil, France and some of the francophone nations of Africa).[51] The standard conjecture, which I accept here, is that there are tight political constraints on proxy voting. On this view, the politically active public understands that full participation in every case is an unattainable and indeed undesirable goal, and will thus tolerate some level of absences and abstentions. But representatives who both absent themselves and conspicuously cast a proxy vote will be seen as irresponsible. If the proxy was given before the relevant proposal was placed on the agenda, the proxy vote will be and seem uninformed, rather than being a ministerial arrangement.

So far I have suggested that absolute legislative majorities will favor absolute majority rules in some circumstances, if they believe that the insurance benefits of

[49] *Guide to Congress*, p. 552.
[50] Id., p. 553.
[51] See *Parliaments of the World, A Comparative Reference Compendium,* pp. 479-493.

absolute voting rules outweigh the greater organizational demands and transaction costs. An absolute majority rule raises the costs of assembling a coalition to enact laws, and thus makes it harder for majorities to overcome obstructionist minorities, but it also provides protection against tactics that might allow opportunistic minorities to obtain affirmative enactments. Is the promotion of majoritarian control in this way desirable from an impartial point of view? This is the opposite of the standard question about supermajority multipliers, which is whether minorities should be empowered to block change from some status quo; as I will emphasize in Section III, absolute majority rules themselves produce status quo bias, just as supermajority multipliers do. Here the question is whether it is impartially desirable to block a minority from producing affirmative changes in the status quo by concentrating its forces to take action disfavored by an absolute majority.

The simplest point is that the bare threat of Napoleonic tactics under a simple majority scheme might cause chamber majorities to adopt socially inefficient precautions, by requiring more frequent attendance by more members than is desirable from the social point of view. Relative to simple majority rule, an absolute majority rule reduces the cost of majority absenteeism or nonparticipation, at least insofar as the threat is affirmative minoritarian opportunism rather than minoritarian obstruction. The insurance benefit of an absolute majority rule reduces the costs of majority absenteeism where Napoleonic minorities are the concern, but raises the costs of majority absenteeism where obstructionist minorities are at issue. Depending on how these two effects cumulate on net, an absolute majority rule might produce any given level or rate of absenteeism among the majority's membership.

This effect would be impartially desirable when the given rate is also the socially optimal rate. Absenteeism or nonparticipation is a good as well as a bad. Absenteeism or nonparticipation clearly does inflict social costs, most obviously a deliberative deficit in legislative proceedings. On the interpretation of legislative deliberation suggested by the Condorcet Jury Theorem,[52] any reduction in the number voting reduces the probability that the eventual majority's decision is correct, so long as each legislator is more likely to be right than wrong, and where there are right (and wrong) answers to be found. Even where the subject for legislative deliberation involves value choices, more heads may still be better than fewer, if exposure to a broader number and variety of views blocks group polarization and dampens opinion cascades.[53] There are contrary considerations, however. There is some rate of absenteeism, greater than zero, that is desirable from the social point of view (as well as the majority's point of view). It is not plausible to think that it would be best for all legislators to be present at all times, and in any event perfect attendance is simply infeasible. Absenteeism should be optimized rather than minimized; the social cost of simple majority rule is that a narrow chamber majority might be forced

[52] For a definition of the Jury Theorem and discussion of its relevance to legislative deliberation, see Jeremy Waldron, "Legislators' Intentions and Unintentional Legislation," in *Law and Interpretation: Essays in Legal Philosophy*, ed. Andrew Marmor (Oxford: Oxford University Press, 1995), p. 344-46.

[53] Here I assume that abstainers take no part in either deliberation or voting, bracketing the point that one might participate in one but not the other. Physical absentees of course take no part in either deliberation or voting; to my knowledge, no current legislature permits electronic participation by physical absentees.

to maintain too many members on hand. Admittedly, this point is somewhat unsatisfying, because it is hard to say anything very general about what the optimal level of absenteeism is, or about which voting rule is most likely to provide incentives that approach the optimum.

More interesting and more tractable is the question whether affirmative minoritarian lawmaking would be a bad, were the threat to materialize. Napoleonic tactics allow minorities to change the status quo; they are thus equivalent, in effect, to the formal "submajority rules" that many institutions use. There is a crucial difference, however. Where formal submajority rules are used, they are universally restricted to agenda-setting and preliminary or procedural issues.[54] No legislature or other institution, to my knowledge, formally permits a minority or submajority to change the status quo of substantive legal rules by enacting new measures. Such a scheme is not conceptually impossible, but it is normatively undesirable.

For one thing, affording minorities such power may bring the rulemaking institution into widespread disrepute. If majorities chafe at the blocking power of minorities under a standard supermajority scheme, they may simply rebel at the prospect of a minority power to enact new binding rules. The collateral institutions of the legal system, such as executive and judicial offices and juries, will be predominantly controlled by the majority. That control will in turn tend to undercut the efficacy and legitimacy of statutes that are the product of affirmative minoritarian lawmaking. Minority-enacted rules may be flouted by the public, ignored by enforcing officials responsive to the majority, or narrowly construed by majority-appointed judges. By contrast, where what is at issue is the power of minorities to block majority-preferred legislation under a supermajority voting rule, no such problems of implementation arise; any statutes that are enacted will be approved by a supermajority.

Even apart from implementation problems, affirmative minority power to bind majorities is difficult to defend on normative grounds. It is one thing to grant minorities the procedural power to force public accountability upon majorities. As a member once stated in the House of Representatives, "I believe the minority party has the right to smoke out the majority and make them face issues, make them vote on great public questions."[55] It is a different thing altogether to empower minorities to make new binding, substantive law against the wishes of the majority. The standard arguments for majoritarian lawmaking, which I discuss in Section III, weigh against such a scheme, but the standard arguments in favor of minority veto power through supermajority rules do not weigh in its favor. Standardly, supermajority rules are justified on the ground that they allow minorities to block majority-initiated laws against which the minority has especially intense preferences. In the typical case, the minority intensely desires to engage in a behavior that the majority wishes, less intensely, to prohibit. Assuming that the status quo permits the behavior, a minority power to block a majority-initiated prohibition is fully sufficient to protect the minority's intense preferences. Nothing in that

[54] See Vermeule, "Submajority Rules: Forcing Accountability upon Majorities," supra note.
[55] Statement of Representative Charles Crisp, quoted from Paul DeWitt Hasbrouck, *Party Government In The House of Representatives* (New York: Macmillan, 1927), p. 153.

standard argument, however, supports the converse idea that a minority with intense preferences should be allowed affirmatively to prohibit a behavior in which the majority wishes to engage. The standard arguments for defensive minoritarianism do not at all justify affirmative minority lawmaking power.

To justify that very different idea, one of two perspectives would have to be adopted. First, one might stipulate to a strictly utilitarian theory of just lawmaking, and argue that an intensely interested minority should be allowed affirmatively to bind a majority if aggregate preference satisfaction will increase as a result. Apart from the standard questions about utilitarianism and its variants, on which I will say nothing here, a crucial question would be whether the asymmetrical absenteeism needed to produce minoritarian enactments is in general a plausible proxy for asymmetries in intensity of preference. The answer is probably no, because the strategic behavior of Napoleonic minorities need not correlate with intensity of preference. That a minority has concentrated its forces at a given time and place to take advantage of the majority's disproportionate absenteeism may reflect nothing more than canny tactics, as opposed to any underlying difference in preferences.

Second, one might defend a scheme of affirmative minority lawmaking as a means of ensuring "second-order diversity."[56] As with probabilistic voting, the standard simple-majority scheme ensures that minorities will sometimes win due to fluctuating majority absenteeism or abstention, and this may be valued as producing a more diverse, less monolithic body of law.[57] The comparison to probabilistic voting is revealing, however, and works to the disadvantage of affirmative minoritarian lawmaking. Probabilistic voting can produce minority-preferred policies, but does not reward strategic behavior by minorities.[58] By contrast, as noted above, the threat posed by strategic minorities may force legislative majorities acting under a simple-majority scheme to maintain a sufficient presence at all times. Given that there is some socially beneficial rate of absenteeism, this represents a social cost that is not present under probabilistic voting and other schemes that are second-order diverse.

These are ceteris paribus points. If correct, they establish only that from an impartial standpoint it is a bad, not a good, that a simple-majority scheme can either allow minoritarian lawmaking or else force majorities to maintain an excessively high level of participation, from the social point of view. Of course this does not show that absolute majority rules are impartially superior to simple majority rule in all circumstances; one must take other considerations into account. For example, as I discuss in Section III, the absolute majority rule has a supermajoritarian effect, and thus produces the same sort of status quo bias as a standard supermajority multiplier. The narrower point I wish to make here is that the prospect of affirmative minoritarian lawmaking, and

[56] See Heather Gerken, "Second-Order Diversity," *Harvard Law Review*, 118 (2004), 1099-1178.
[57] Dennis C. Mueller, "Probabilistic Majority Rule," *Readings in Public Choice Economics*, (Jac C. Heckelman ed. 2004), p. 296.
[58] At least in the last round of voting, a probabilistic voting rule makes sincere voting a dominant strategy. See id. p. 300.

the costs of preventing such lawmaking, count against the standard simple-majority scheme to which absolute majority rule is an alternative.

A Note on Direct Democracy

A special form of absolute majority rule can be observed in direct democracy. Several states that permit lawmaking or constitutional amendment by initiative or referendum also employ some variant of the Illinois rule,[59] cited above, under which direct constitutional amendment requires the approval of three fifths of those voting on the measure or a majority of those voting in the election. In Wyoming, the requirement is that statutory initiatives must pass by a majority vote, provided that the initiative must receive a number of votes greater than 50% of the number of votes cast in the preceding general election.[60] In the well-known Massachusetts scheme, the proviso takes a submajoritarian form: the rule is that statutory and constitutional initiatives must be approved by a majority, provided that the total number of votes cast on the initiative equals at least 30% of the votes cast in the election.[61]

I suggest that these rules are qualified attempts to block, or at least reduce the incidence of, affirmative minoritarian lawmaking through direct democracy.[62] The effect of the rules is to place a ceiling on the amount of abstention that will be allowed if an initiative is to pass. Under the Wyoming scheme, the fraction of abstainers on the measure must be less than a majority; under the more permissive Massachusetts scheme, abstention on the measure must be no more than 70%; while under the Illinois scheme, a high favorable supermajority among those voting on the measure can compensate for high abstention on the measure.

There is a core of good sense in all this. In general, the concern about affirmative minoritarian lawmaking is even more plausible in direct democracy than in the legislative setting. The rate of abstention in direct democracy is sufficiently high that many successful initiatives and referenda represent affirmative minoritarian lawmaking, in the sense that the measure would have been defeated with full turnout and full voting among all registered voters. The failure of voters to go to the polls at all is a well-known phenomenon; indeed, on rational-choice premises the puzzle is to explain why anyone votes, rather than why many do not.

[59] National Conference of State Legislatures, "Supermajority Vote Requirements," at http://www.ncsl.org/programs/legman/elect/supermajvote.htm.
[60] Id.
[61] Id.
[62] Barbara A. Terzian, "The Ohio Constitution – Then and Now: An Examination of the Law and History of the Ohio Constitution on the Occasion of Its Bicentennial," *Cleveland State Law Review*, 51 (2004), 357-394 at pp. 391-393, illustrates that the choice between (1) a rule requiring a majority on the initiative measure and (2) a rule requiring an absolute majority of votes cast in the election is highly consequential. Under the latter rule, only nine of thirty-four constitutional amendments were approved by referendum in Ohio between 1851 and 1912; "[m]ost of the amendments had received a majority of the votes cast on the issue but had failed to receive the requisite constitutional majority."

Less well-known is that even those voters who do go to the ballot box, and vote on a choice of candidates, often abstain from casting a vote one way or another on initiatives or referendums that are bundled on the same ballot as the candidate election. Voters who express a preference for governor will often express no preference on the myriad of initiatives farther down the ballot. In this light, there is an important wrinkle in the direct-democracy rules I have mentioned: they exemplify the intermediate case between a pure present-and-voting multiplicand and a fully absolute multiplicand. The rules do not say that a majority or even some submajority fraction of all registered voters must approve an initiative or referendum. Rather, they say that the initiative must receive some majority in its own right, and (substitute "or" in the Illinois case) some fraction of the votes cast in the election overall. Voters who cast votes in the election but abstain on the direct-democracy measure are counted as opposed to the measure, while voters who absent themselves from the polls entirely do not count as opposed to the measure. These rules, in other words, treat voters who abstain differently than voters who are absent.

This differential treatment is puzzling. If the concern is affirmative minoritarian lawmaking through the initiative process, why should the unexpressed preferences of those who do not bother to vote at all be ignored entirely, while the unexpressed preferences of those who abstain only on the measure are assumed to be negative? I can offer no wholly convincing justification for such a scheme, other than the two speculative remarks that follow. First, the assumption behind such rules may be that in the run of cases, absence from the polls betokens lumpish indifference to whether the measure is enacted or not, whereas abstention on the measure by a voter who has gone to the polls betokens uncertainty about whether the measure is good or bad, in light of the high costs of informing oneself about all initiatives. If this is so, the apathetic absentee just has no negative preference that needs protecting, not even a counterfactual negative preference that would arise if the voter were given full information. The engaged but uncertain voter, by contrast, might decide against the measure if possessed of full information. Quite obviously, this account is rife with contestable assumptions.

Second, and more plausibly, the rules may represent nothing more than a semi-coherent compromise between a desire to protect majorities from minoritarian initiatives, on the one hand, and the brute facts of high absenteeism in general elections, on the other. It may simply be that direct democracy would be crippled or infeasible if absence from the polls were treated as a negative vote; the high rate of nonvoting (adding those who are absent to those who abstain) would ensure that no initiatives would ever pass. The constitutional designers who instituted direct democracy in these polities, on this view, simply accepted a higher risk of affirmative minoritarian lawmaking as the price of the institutional arrangements they favored. On this conjecture, the rules described here represent half-measures that protect majorities from minoritarian initiatives to some degree, but only to the extent feasible.

III. Expressive Majoritarianism

I now turn to a different justification for absolute majority rules: such rules combine supermajoritarian effects with expressive or symbolic majoritarianism. At the Philadelphia convention of 1787, some delegates disliked the proposal, which eventually prevailed, to require a two thirds majority of Senators present in order to ratify a treaty. Wilson "thought it objectionable to require the concurrence of 2/3 which puts it in the power of a minority to controul the will of a majority."[63] Some time later, Sherman moved to amend the proposal to say that "no Treaty be made without a Majority of the whole number of the Senate." In response to an objection that "[t]his will be less security than 2/3 as now required,"[64] rather than criticizing the dubious calculation underlying the objection,[65] Sherman argued that "[i]t [the absolute majority rule] will be less embarrassing."[66] Although the amendment was defeated, the argument is interesting. A rule cast in majoritarian form would sidestep, at least in appearance, the sort of majoritarian objection to the supermajority multiplier that Wilson had offered.

As above, we may interpret this justification in both impartial and self-interested terms. Impartially, where voting rules with supermajoritarian effect are desirable, it may nonetheless be desirable to retain an expressive commitment to majoritarian voting. More cynically, however, minorities might favor absolute majority rules over supermajority rules with equivalent or roughly similar effect because the absolute majority rule makes the minority's power to block change less conspicuous to the public. Majorities constrained by politics to adopt a voting rule with minority-protecting effect might prefer the absolute majority rule on the same grounds. The political appeal of majority rule may be decisive, whatever the impartial considerations.

Relative to a simple-majority voting scheme, absolute majority rules produce a status quo bias,[67] just as supermajority multipliers do. This point does not depend upon the possibility under simple majority rule that minorities can obtain countermajoritarian enactments, as discussed in Section II. Even if absenteeism is always distributed proportionately, so as to preserve the majority's ratio and thus majority control, an absolute majority rule always raises the costs of assembling a decisive coalition in favor of enactments, because it forces the majority to organize and assemble a large fraction of its membership. With 100 legislators, a vote of 26-25 in favor suffices to enact under a simple majority rule but not under an absolute majority rule; the same is true of a vote of 50-49 in favor. Under an absolute majority rule, majorities with only a small numerical superiority in the legislature as a whole must ensure the presence and the affirmative vote of almost all of their members to enact proposals. This is a transaction cost or

[63] *The Records of the Federal Convention of 1787*, p. 540.
[64] Id., p. 549.
[65] Williamson meant, presumably, that the costs of assembling an absolute majority of the Senate's members would be less than the costs of assembling a two thirds supermajority of the Senators present. Given that the Senate initially had twenty six members, an absolute majority would be fourteen, so Williamson's claim would hold true if and only if less than five Senators were absent or abstained (because two thirds of twenty one is also fourteen).
[66] *The Records of the Federal Convention of 1787*, p. 549.
[67] Dougherty and Edward, "Simple vs. Absolute Majority Rule," supra, p. 17.

organizational cost that, in some cases, will prevent majorities from enacting proposals that would otherwise pass. Both supermajority multipliers and absolute majority rules thus raise the cost of changing the legal status quo, relative to the simple-majority baseline.[68]

Conversely, proposals that minorities would wish to block will pass under a simple-majority scheme, will fail under a supermajority multiplier where the minority is large enough, and will fail under an absolute majority rule where it is too costly for the majority to mobilize its whole coalition. Here we need not consider the possibility of logrolls and side payments, because deals are equally possible under either alternative to the simple majority scheme. With a supermajority multiplier the majority may pay off a decisive fraction of the minority to vote in favor of the proposition; under an absolute majority rule the majority may pay off a decisive fraction of the minority to provide the votes needed for an absolute majority.

The status quo effect of absolute majority rules varies in magnitude. Where legislative majorities are large it is less important, but the same is true of a supermajority multiplier. It is hard to generalize about whether absolute majority rules or a supermajoritarian multiplier produces a greater status quo bias. In what follows, I will assume that the expected costs of assembling a decisive coalition are similar under the two alternatives to the simple majority scheme. The assumption serves to isolate the issue on which I wish to focus, the different formal and expressive properties of supermajoritarian multipliers and absolute majority rules.

Assuming equivalent status quo effect, why might one or the other alternative be preferable, and from whose standpoint? The normative arguments for and against majority rule are well-known. Where value choices are involved, May's theorem shows that majority rule has powerful egalitarian appeal. With two options, it is the only voting rule that simultaneously (1) treats votes neutrally, without regard to whether they are cast for or against a proposition; (2) treats each voter anonymously, without regard to identity; and (3) is positively responsive to shifts in voter preferences.[69] A supermajority multiplier, by contrast, violates neutrality. Votes against a proposition can defeat it even if the same number of votes in favor cannot enact it – hence the status quo bias.[70] Where right answers rather than value choices are involved, the Condorect Jury Theorem entails that majority voting is most likely to identify those answers so long as voters are on

[68] I am assuming here that all other institutional rules remain constant. Where that is not so, constitutional designers may of course increase or decrease the transaction costs of assembling coalitions by adjusting other features of the relevant institutions, not just the voting rules. At the Philadelphia convention, one alternative to the rule requiring two thirds of all Senators present to ratify a treaty was an absolute supermajority rule, proposed by Rutledge and Gerry. They moved that " 'no Treaty be made without the consent of 2/3 of all the members of the Senate' – according to the example in the present Cong[res]s". The last reference was to the Articles of Confederation, which required the consent of nine of thirteen States to make treaties. Ghorum responded that "[t]here is a difference in the case, as the President's consent will also be necessary in the new Gov[ernmen]t." *The Records of the Federal Convention of 1787*, p. 549.

[69] The literature stems from Kenneth May, "A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision," *Econometrica*, 20 (1952), 680-684.

[70] Again, I am bracketing the case of asymmetrical voting rules, which do not favor the status quo. See Goodin and List, "Special Majorities Rationalized."

average more likely correct than incorrect, and so long as errors are uncorrelated. Against these points, advocates of supermajority rules emphasize that most legislative decisions involve value choices rather than Condorcetian aggregation; that supermajority rules may prevent welfare-reducing exploitation of minorities who hold especially intense preferences on certain issues;[71] that supermajority rules induce broader consensus; and that (tangentially to my interests here) supermajority rules dampen Arrovian cycling in cases where three or more options are present.[72]

Although these normative points and counterpoints are standard in the theory of voting, I bracket them here in favor of a focus on the relative public or political appeal of different voting rules. By assumption, both an absolute majority rule and a supermajority multiplier have supermajoritarian effect, relative to the baseline of a simple-majority scheme. They differ in their public face, not in their intralegislative effect. The suggestion I will pursue is that absolute majority rules may be favored by minorities or majorities precisely because they are nominally majoritarian. This nominal majoritarianism may also be good from an impartial point of view.

Majority rule has strong political appeal even where there are good normative arguments for supermajority multipliers. Psychologically, majority rule has a strong focal-point quality. Where all vote, and where voting rules are unspecified, the common intuition is that more should defeat fewer. Groups organizing themselves into new voting bodies, such as constitutional conventions or legislatures, often assume majority voting as a matter of course. Even where voting rules are controversial and explicitly debated, different self-interested factions may each prefer different self-interested deviations from majority rule; majority rule may then be each faction's second choice, and emerge as the compromise winner. Under supermajority multipliers, by contrast, it often smacks of inegalitarian privilege that fewer votes can defeat more, even if the usual normative arguments for supermajority rules apply.

The political appeal of majority rule is an indeterminate political force, not a hard political constraint. It can be and is overcome in some political settings. It is striking, however, that the political appeal of majority rule often reasserts itself even where supermajority multipliers or other minority-veto schemes are in effect. When President Bush was attempting to obtain the U.N. Security Council's assent to the second invasion of Iraq, the voting rules required (1) a supermajority of the council's voting members and (2) no vetoes by any permanent member. Anticipating that this high threshold could not be overcome, American diplomats thought it crucial to world opinion to obtain a simple majority of votes on the Council in any event.[73] Likewise, in legislatures where supermajority multipliers are in effect, majority leaders will often force explicit votes even if they know that a supermajority cannot be formed. The public embarrassment

[71] See Buchanan and Tullock, *The Calculus of Consent*, supra note. Against this view, it has been pointed out that majority rule gives minorities the best chance to overturn unfavorable decisions in the future. See A.J. McGann, "The Tyranny of the Supermajority: How Majority Rule Protects Minorities," Journal of Theoretical Politics 16(1): 53-77 (2004). This question is orthogonal to the issue I am interested in here.
[72] See Joseph Greenberg, "Consistent Majority Rule over Compact Sets of Alternatives," 47 Econometrica, 1979, p.. 627-36.
[73] Peter Singer, ONE WORLD xv (2d ed. 2004).

attendant upon defeating a proposal, or a nominee to office, with only a minority of votes is a cost to the minority ex post; the majority's threat to impose that cost, if credible, has a disciplining effect ex ante. In the judicial setting, a leading objection to requiring a supermajority of Supreme Court Justices to invalidate statutes on constitutional grounds is that it would be intolerable if a majority voted to invalidate and yet the statute remained binding law.[74] In the last case, the source of uneasiness with supermajority rules might be an intuition that some questions in law have right answers, in which case one would prefer a majority rule on Condorcetian grounds. That is not a plausible description of the first example, however, and usually not of the second example.

In these examples, the political appeal of majority rule imposes a cost on the voters or groups who otherwise benefit from supermajority multipliers. Conversely, avoiding the public costs of open minoritarianism is a benefit to the same groups. Where there is equivalent minority-protecting effect from increasing the multiplier and from adopting an absolute multiplicand, or where the benefit to the minority from increasing the multiplier above a simple majority is less than the political costs of doing so, minorities may prefer absolute majority rules. In dynamic terms, minorities may fear that the open countermajoritarianism of supermajority rules will eventually produce a public backlash.

An implication is that, at any given level of supermajority multiplier, an absolute voting multiplicand increases the minority-protecting effect of the voting rule without further flaunting of countermajoritarianism, if multiplicands are generally less visible to the public than are multipliers. In the United States Senate in 1975, some Senators attempted to relax the voting requirement for cloture (the technique for shutting down a filibuster), previously set as two thirds of those present and voting. The leading proposal was to permit cloture with the assent of three fifths of those present and voting. The minority had enough bargaining strength, however, to exact a concession that three fifths of the whole number of senators "duly chosen and sworn" would be required.[75] This multiplicand not only increased the supermajoritarian effect, relative to the majority's proposal, but did so in a less visible way than would an equivalent upward adjustment to the multiplier. This example involves a choice between a simple supermajority rule and an absolute supermajority rule, rather than between a simple supermajority rule and an absolute majority rule. However, I will suggest in Section III that some of the same considerations that apply to the latter choice also apply to the former choice.

Less intuitively, even the majority might sometimes prefer an absolute multiplicand to a supermajority multiplier, on two grounds. (Here we are still bracketing the majoritarian-control argument discussed in Section II). First, in intralegislative bargaining with a powerful minority over what the voting rules shall be, a majority that must grant concessions in the form of a minority-protecting rule may prefer an absolute multiplicand to an avowedly supermajoritarian multiplier, if the former helps to disguise

[74] See Evan H. Caminker, "Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons From the Past," *Indiana Law Journal*, 78 (2003), 73-117.
[75] Sarah A. Binder and Steven S. Smith, *Politics or Principle, Filibustering in the United State Senate* (Washington, D.C.: Brookings Institute Press, 1996), p. 181.

the majority's weakness. For the same reason, even if a supermajoritarian multiplier is already in place or must also be conceded, the majority may prefer that further concessions come through varying the multiplicand, as in the filibuster example just mentioned.

Second, holding constant the degree of minority-protecting effect, an absolute multiplicand differs from a supermajority multiplier in that the latter produces a variable threshold for success of a proposition or motion, while the former produces a constant threshold. The certainty provided by the former benefits the majority as well as the minority. In the Senate, under the absolute multiplicand described above, no more and no less than 60 votes are required for cloture of debate (on issues other than rules changes; the latter still require two thirds of those present and voting). All else equal, the majority as well as the minority benefits from knowing how many votes must be produced. In fact this benefit is greater to the majority, which incurs higher costs in assembling the members of its coalition, and thus derives greater value from knowing the precise target it has to meet.

Let us now turn to the impartial arguments. Suppose that there are no political costs to departing from majority rule. Still, one might favor an absolute majority rule because it expresses a symbolic commitment to majoritarianism that is absent from a supermajority rule with equivalent minority-protecting effect. Let us imagine an institutional designer who (1) favors majority rule (in some relevant domain) on sincerely held-normative grounds, but who (2) is constrained by an entrenched minority to agree to voting rules with minority-protecting effect. Such a rulemaker might prefer to do so by agreeing to an absolute majority rule, in order to produce or maintain a symbolic adherence to majority voting.

On the other hand, it might be better to more clearly expose the supermajoritarian effect of the voting rule to public view by adopting an expressly supermajoritarian multiplicand. This is just an instance of a well-known conundrum: whether a state of affairs that is actually bad and symbolically good is better or worse than a state of affairs that is actually bad and transparently bad. I have no general answer to offer, but certainly it is a respectable view that one should choose the symbolically good over the transparently bad, either for intrinsic reasons, or in the hope that over the long run the good symbolism will capture peoples' hearts and minds and thus produce a political revulsion against the bad practice. Conversely, an impartial rule-designer who sincerely believes that supermajority rules are superior (in the relevant domain) will not face the conundrum at all; from that point of view, an explicit supermajority multiplier combines good substance with good symbolism.

IV. Strategic Nonparticipation

I now turn to a final justification for absolute majority rules. We have seen that such rules treat both absence or abstention as equivalent to a negative vote. Standard simple-majority schemes, on the other hand, treat absence or abstention as a nullity. The incentive effect of standard simple-majority schemes is that opponents of a measure must

attend and vote negatively in order to contribute to the defeat of a measure. Under an absolute majority rule, opponents may contribute to the defeat of a measure either by a negative vote, or by not voting or attending at all.

Why, if at all, should opponents of a measure enjoy a choice of this sort? Under a standard conception of political accountability, simple-majority rules seem preferable because they force both supporters and opponents to stand and be counted. This is the core of Bentham's complaint that abstention and absenteeism amount to a type of "demi-prevarication." On Bentham's analysis, the member who would vote in the negative, if forced to vote sincerely on a measure stipulated to be bad, may simply absent herself or abstain; typically this may be because she "fear[s] to offend a protector, a minister, or a friend,"[76] or (we may add) an interest group or a President. Under a simple-majority scheme the effect of the absence or abstention is to "deprive one party of [her] vote,"[77] that is an affirmative vote in favor of the measure, but the absence does not amount to a negative vote, and is thus less objectionable to the third party who is pressuring or coercing the member for support. As we have seen, under a simple-majority scheme, in contrast to an absolute majority rule, "[e]liminating 'no' votes reduces the number of supporters needed to create a majority."[78] When pressuring vacillating legislators for support, if President Lyndon Johnson "could not obtain a favorable vote, he might ask, in effect, for an abstention."[79]

On Bentham's view, then, under a simple-majority scheme the opponent of a bad measure, who is assumed subject to pressure or coercion from third parties to vote in the affirmative, faces a Hobson's Choice: either "betray her duty" or "compromise her reputation." Absenteeism or abstention amounts to choosing reputation over duty. Absolute majority rules solve this problem, in the following sense. Under an absolute majority rule, the opponent of a bad measure can have her cake and eat it too, opposing a measure simply by failing to attend or to vote in its favor. This allows the opponent both to do her duty, from an impartial point of view, and to avoid compromising her reputation with the third-party coercer by casting an openly negative vote. In short, absolute majority rules liberate voters from public accountability.

One might reason that the third-party will also understand the negative effect of absence or abstention under an absolute majority rule, and will thus punish the member's absence or abstention in precisely the same way, or to the same degree, that the third party would punish a formal negative vote. This is erroneous, however. Some absences or abstentions occur from reasons or causes other than opposition on the merits, causes such as illness, involuntary absence, other business either within or without the legislature, and so on. The third party knows this, and if the third party cannot reliably sort between the different motives for absence, the member may plausibly lie about her motives. Here the member takes refuge in prevarication that promotes her duty rather than betraying it.

[76] Bentham, *Political Tactics* at p. 57.
[77] Id.
[78] Covington, "Building Presidential Coalitions Among Cross-Pressured Members of Congress," at p. 50.
[79] Id. (quoting Edwards (1980)).

This is the strategic ambiguity of nonparticipation: if members who are opposed on the merits can mimic members who have good grounds for abstention or absence, a type of pooling equilibrium arises that helps to shield all nonvoting members from third-party coercion. This holds true even if the third party is the whole electorate in the district. In principle, the electorate may punish abstainers or absentees to hold them accountable for their abstention or absence. But it is common ground that some nonvoting is excusable, even praiseworthy. Members who can gin up a plausible pretext for nonparticipation may thus take refuge in the inability of third parties to sort good reasons from phony excuses.

What are the normative implications of this ambiguity? Absolute majority rules work well in the situation Bentham posits, where the underlying measure is assumed to be bad. Liberating voters from public accountability can be good as well as bad, because accountability can be bad as well as good, depending upon who the voter is accountable to and whether that party desires legislation that is good or bad, according to some independent theory. Accountability to third parties or subgroups who have interests different from the aggregated interests of the represented class as a whole – such as ill-motivated executives or organized rent-seeking groups – is bad representation under any plausible view.

By the same token, nothing in the strategic ambiguity of nonparticipation guarantees that its effect will be good. If we take Bentham's third party to be the whole class of those whose interests are affected -- voters from a legislative district, for example – then this mechanism allows members to liberate themselves from accountability in a way that can be normatively improper. Recall the case from the Philippines Senate in 2004, where a politically-motivated resolution of indictment received nine votes for, none against, and nine abstentions, a tally that defeated the resolution under the prevailing absolute majority rule. Were these abstentions good, because they amounted to strategically sophisticated votes against a bad proposal, or were they bad, on the opposite grounds? One simply cannot tell from the voting alone. Under some circumstances, whatever normative theory of representation is assumed to govern will imply that liberating the member from accountability is desirable. One would have to have a full substantive theory of representation and legislation to specify the cases in which the strategic ambiguity of nonparticipation is good, as against those in which it is bad. I offer no such theory here; so far as the theory of voting rules is concerned, it suffices to note that the justification I have sketched can hold under certain conditions.

V. Absolute Supermajority Rules

From absolute majority rules I turn briefly to absolute supermajority rules – those with a supermajority multiplier and an absolute multiplicand. Such rules are less common than either simple majority rules or absolute majority rules, but they are still well-represented in the constitutions and rules of many polities. In Hungary, ordinary motions require an absolute majority of all members, while constitutional amendments require a two thirds majority of all members. This contrasts with the standard scheme in the United States Congress, where ordinary motions require a simple majority of a quorum and

constitutional amendments require two thirds of those present and voting. The contrast shows both variation in the multiplier, if we compare ordinary to extraordinary proposals in either polity, and also variation in the multiplicand, if we compare the two polities with each other.

In Sections II, III and IV, the running contrast was between an absolute majority rule and a simple majority voting scheme. Here, the parallel contrast is between an absolute supermajority rule and a simple supermajority rule, namely a rule that combines a supermajority multiplier with a present-and-voting multiplicand. The basic difference is the same. An absolute supermajority rule in effect counts abstention as a negative vote, while a simple supermajority rule does not count abstentions at all. Where a simple supermajority scheme is in place, abstention is better than a negative vote from the standpoint of proponents of a measure, because abstention reduces the number of positive votes needed to create a requisite supermajority. "For example, in 1962 Larry O'Brien [a representative of the President] asked a group of southern Democratic senators to support a vote of cloture on a liberal Democratic filibuster. They would not vote for cloture, but five agreed not to vote, providing the number needed for the two-thirds majority."[80]

Of the three rationales for absolute majority rule canvassed in Sections II through IV, the first – majoritarian control – applies mutatis mutandis to absolute supermajority rules. The second – the political appeal of majority rule – does not apply at all, with a nuance I will discuss below. The third – the strategic ambiguity of nonparticipation – is entirely insensitive to variation in the multiplier, and so applies in exactly the same way. I shall briefly expound upon each of these points.

Under an absolute supermajority rule, the concern about majoritarian control becomes a concern about supermajoritarian control. The basic point is parallel, however. Under the United States federal constitution, an important early debate within Congress was whether the rule for proposing constitutional amendments to the States, a rule that required a two thirds vote "of both Houses," should be interpreted to take a standard multiplicand or an absolute multiplicand. The Bill of Rights itself obtained the votes of two-thirds of those present in the House of Representatives, but perhaps not of the whole membership of the House; the evidence is ambiguous.[81] The issue was clearly decisive, however, when the Twelfth Amendment was considered. In the Senate, twenty-two Senators voted in favor, ten against, and two abstained. The amendment would pass under a standard multiplicand but not under an absolute one, because "[t]wo thirds of thirty-four is twenty-three."[82]

In this situation, the Senators who interpreted the provision to contain an absolute multiplicand relied prominently on the risk of Napoleonic minorities, who might

[80] Id.
[81] Currie *The Constitution in Congress: The Jeffersonians (1801-1829)* (2001) at p. 63. I draw upon Currie's discussion throughout this paragraph and the next.
[82] Id. at p. 61.

concentrate their forces to pass a constitutional amendment against the objection, not merely of a majority, but of a supermajority. As Senator Plumer put it:

> If the concurrence of two-thirds of all the members composing the Senate were not necessary to propose an amendment, it would follow that twelve Senators (the representatives of six States), when only a quorum is present [i.e. 18 Senators], might propose an amendment contrary to the opinion & against the will of twenty two senators [i.e. by a vote of 12 for, 6 against, and 16 absences of Senators opposed to the measure] – And that the vote of these twelve who are in fact but little more than one full third of the Senate, should be considered as constitutionally performing the act that required the concurrence of two thirds.[83]

Here the concern is even more than usually plausible. For one thing, legislative absenteeism was a major feature of the early Congress, both because of the higher costs of travel in the period and because of the greater relative importance to legislators of nonlegislative business in their home states. For another, it is unclear, as a matter of constitutional law, whether a supermajority of Congress could vote to retract or nullify a proposed constitutional amendment after it is sent to the states but before it has been ratified. As discussed in Section II, Bentham thought that the ability of Napoleonic minorities to produce countermajoritarian enactments would be constrained by the ability of majorities to convene in full on a later occasion and undo the previous decision. Even if that is so for ordinary legislation, the check is attenuated in this setting, because a congressional supermajority may not have the authority to reverse a previous minoritarian proposal for amendment.

To be sure, the ultimate check on minoritarian amendment is that, even in Plumer's scenario, three-quarters of the states must ratify to make an amendment effective. Yet under current law and practice, an amendment, once proposed, may go into effect even if the necessary state ratifications cumulate over a period of decades or – in the notorious case of the Twenty-Seventh Amendment – even centuries.[84] Minorities might propose an amendment to the states even if current ratification is unlikely, in the hope that the political tides will shift over the long-term future.

Let us turn from majoritarian control to the political appeal of majority rule. In Section III, we saw that an absolute majority rule might prove more politically palatable than a simple supermajority rule, even assuming equivalent supermajoritarian effect. That rationale does not apply where the nominal multiplier of both alternatives is expressly supermajoritarian, as in a choice between an absolute supermajority rule and a simple supermajority rule. Even here, however, it remains true that a minority might prefer an absolute to a simple supermajority rule. If the multiplicand is less visible to the political

[83] *William Plumer's Memorandum of Proceedings in the United States Senate, 1803-1807*, ed. Everett S. Brown (New York: The MacMillan Company, 1923), pp. 49-50.

[84] The 27th amendment – providing that salary changes of members of Congress can only take effect after the next general election – was originally submitted in 1789, but was not ratified until 1992. See, e.g., Michael S. Paulsen, "A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment," *Yale Law Journal*, 103 (1993), 677-786.

public than is the multiplier, then the form of the rule partially disguises its true supermajoritarian effect.

In a legislature of 100 members, an absolute supermajority rule requiring three-fifths of all members requires 60 votes, no matter how many participate. If 90 members participate, however, a simple supermajority rule with equivalent effect would have to take a two-thirds multiplier, and an even higher one if participation falls below 90. As between the absolute supermajority rule and the simple supermajority rule that produces equivalent minority power or status quo bias, minorities might prefer the former because it is politically unpalatable to be a visible beneficiary of very high supermajority multipliers. In the constitutions and legislative rules of liberal democracies, multipliers higher than two thirds or three quarters are quite rare, especially for subjects other than constitutional amendment.[85] If this upper bound arises because the public perceives high multipliers as giving excessive power to very small minorities, there is a political constraint on the size of the multiplier. Protecting minorities with a less visible absolute multiplicand, however, can partially evade this constraint.

The numbers just given are not hypothetical. As previously mentioned, in the Senate bargaining over filibuster rules in 1975, the minority rejected a proposal that would have allowed cloture with a three-fifths vote of those present and voting, demanding (and obtaining) instead a rule requiring a three-fifths vote of all Senators. Cloture on motions to change the rules themselves, however, requires two-thirds of those present and voting – the same requirement that applied to all cloture motions before 1975. On the analysis here, the minority Senators may actually have improved their position over the pre-1975 baseline, by obtaining the three-fifths absolute supermajority rule for cloture motions unrelated to the rules.

Finally, the same Senate procedure illustrates that the strategic ambiguity of nonparticipation applies fully in the case of absolute supermajority rules. When Senate Democrats filibustered a controversial nominee for U.N. Ambassador, John Bolton, the final vote on cloture was 54 in favor, 38 against and eight abstentions.[86] By virtue of the absolute majority rule for cloture, which requires 60 of the Senate's 100 voters to succeed no matter how many participate, the cloture motion was unsuccessful. The abstentions effectively counted as no votes; had six of the eight abstainers voted in favor, cloture would have been obtained. I conjecture that some fraction of the abstainers opposed the nomination but took refuge in abstention in order to deflect political pressure. Here again, there is ample room for normative disagreement over the tactic. Conditional on believing the nomination disastrous, however, one might see the possibility of abstention-cum-opposition as a useful way to shield principled action from adverse political retaliation.

[85] Finland requires a 5/6th super majority for constitutional amendments. See Finland Constitution, ch. 6, Section 28 and ch. 6, Section 73, at http://www.oefre.unibe.ch/law/icl/fi00000_.html. See also Rasch, "Parliamentary Voting Procedures," p. 494.

[86] Charles Babington and Jim VandeHei, "Democrats Block Vote on Bolton," *The Washington Post*, June 21, 2005, p. A01.

Conclusion

My thesis has been that, from both impartial and partial perspectives, absolute voting rules prove desirable under a range of plausible circumstances. One might attempt to convert this normative analysis into a positive claim, by surveying the terrain of voting rules and arguing that we observe absolute voting rules where and only where their costs exceed their benefits, relative to the alternatives. Another approach, represented by mathematical voting theory, is to assume away institutional problems of transaction costs, political constraints and strategy, and expressive or other noninstrumental considerations. On such grounds, there are plausible arguments that simple majority rules are systematically superior to absolute majority rules.[87]

For the methodological reasons set out in Section I, the former procedure seems extremely dubious. It is a species of functionalism that assumes, with wild optimism, that institutions systematically converge to optimal results. There is no general mechanism that guarantees this; institutional actors often adopt rules that are neither impartially justified nor even justifiable from the standpoint of those actors' enlightened self-interest. The latter, highly formal procedure loses the richness of institutional arrangements. I have tried to steer a middle course between these extremes, offering normative arguments that take account of institutional problems. Such arguments suggest that constitutional designers and rule designers do well, in identifiable circumstances, by considering absolute majority rules as a real alternative to the standard approach of varying the voting multiplier.

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[87] See Dougherty and Edward, "Simple vs. Absolute Majority Rule," supra, pp. 10-16.

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