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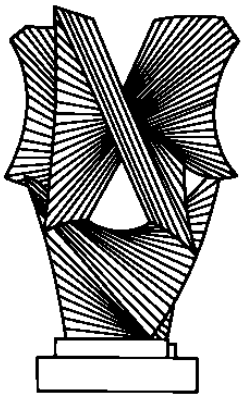

# SUBMAJORITY RULES (IN LEGISLATURES AND ELSEWHERE)

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# SUBMAJORITY RULES

## (IN LEGISLATURES AND ELSEWHERE)

Adrian Vermeule*

Legal and political theory have paid a great deal of attention to supermajority rules,[1] which require a fraction of votes greater than 1/2 + 1 to change the status quo, and thus empower a minority to block change. In this paper I consider the opposite deviation from simple majority voting: submajority rules, under which a voting minority is granted the affirmative power to change the status quo. Submajority rules are rarely discussed,[2] either because they are assumed not to exist,[3] or because they are assumed to lack any institutional virtues, or because submajoritarian decisions are assumed to be chronically unstable in light of the risk that subsequent majorities will reverse or undo the

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[1] For a recent overview, see John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703 (2002).

[2] A useful exception is Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 U. Pa. L. Rev. 1067 (1988). But Revesz and Karlan confine themselves to courts (in fact the Supreme Court), whereas I shall emphasize the many interesting examples of submajority rules that arise in legislatures and other nonjudicial institutions.

[3] See Dennis C. Mueller, PUBLIC CHOICE III, 77 at n. 7 (2003) (denying that either House of Congress uses a less than 50 percent majority rule). It is unclear whether Mueller means to confine his remark to final passage of legislation; if so, but only if so, the remark is correct. One of my principal aims here is to rationalize or justify the use of submajority rules only for agenda-setting and other preliminary or procedural matters, as opposed to substantive decisionmaking.

submajority's decision.[4] I will dispute all three assumptions.

As to the first, submajority rules are not common, but there are important examples in both legislatures and other institutions, and in the constitutions of many jurisdictions. Among the examples I will consider are:

● The Journal Clause, which allows 1/5 of the legislators present in either House to force a roll-call vote;

● The discharge rule in the House, which (at various points, although not today) has permitted a specified minority of legislators to force bills out of committee for consideration on the floor;

● Senate Rule XXII, under which a cloture petition is valid when signed by sixteen Senators;

● The "Seven Member Rule," under which a minority of designated committees in the House and Senate can require the executive branch to divulge information;

● House Rule XI, which entitles committee minorities to call witnesses at hearings;

● The famous "Rule of Four" that allows four Justices to grant a writ of certiorari and thereby put a case on the Supreme Court's agenda.

● Rules governing direct democracy that permit a defined minority of a state's electorate to place a question on the ballot, or to force a recall election.

● Rules governing international organizations, which frequently allow a defined minority to call an emergency session or to force a roll-call vote.

[4] See infra notes ---.

As to the second assumption, submajority rules have important procedural and epistemic virtues. Their principal benefit, I will suggest, is to enable a minority to force public accountability upon the majority, thereby improving deliberation overall. As to the third assumption, the reversibility problem can be and is dampened either through other institutional rules and norms that protect submajoritarian decisions, or by the simpler expedient of adopting submajority rules only for decisions that are inherently irreversible or costly to reverse, such as decisions that release information into the public domain.

## I. Submajority Rules and Near Relations

Every voting rule is a submajority rule in the trivial sense that a submajority's vote can be decisive with respect to the institutional choice. In the most trivial case, under majority rule any individual's vote might be decisive when pooled with the votes of 50% of the group. More substantively, asymmetrical supermajority rules notoriously afford decisive veto power to submajorities—typically 2/5 + 1, 1/3 +1, or even 1/5 + 1—who are empowered to block alteration of the status quo.

The criterion of decisiveness is obviously too broad. A more useful definition for present purposes is as follows: a submajority rule is a voting rule that authorizes (*i*) a predefined numerical minority (*ii*) to change the status quo (not merely to prevent change) (*iii*) regardless of the distribution of other votes. Note that, for either submajority or supermajority rules, the "status quo" referenced in condition (*ii*) can be procedural as well as substantive. House Rule XXVII, which requires a 2/3 supermajority to agree to a suspension of the House Rules themselves, allows a minority to block change in the

procedural status quo, whereas the Supreme Court's Rule of Four authorizes a submajority of four Justices to change the procedural status quo.[5]

This definition excludes majority rule, which trivially fails condition (*i*), and which also fails condition (*iii*) because any given individual (and thus any minority) can be decisive only given some particular distribution of other votes—in the individual case, where the other voters are equally divided. Supermajority rules, on the other hand, fail condition (*ii*).[6] Moreover, condition (*i*) excludes institutions, like legislative committees or juries, that provide a submajority of some larger body (such as the whole legislature or the jury-eligible population) with decisionmaking authority or agenda control over designated issues. Although such bodies can in effect grant minorities the de facto power to affect the agenda or otherwise change the status quo,[7] and are thus relatives of the institutions I will discuss, nonetheless committees, juries and the like typically vote according to an internal majority rule or supermajority rule, not a submajority rule. My focus here is on formal or de jure submajority rules, which have the strikingly countermajoritarian property that fewer votes beat more votes even within the designated voting group.

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[5] Note too that, in institutional settings, the "status quo" is defined by institutional rules. There is no claim here that the status quo would be well-defined in some apolitical sense, apart from the institution's rules, but on the other hand there is no conceptual problem with identifying the status quo when it is so specified.

[6] The text ignores the complications that arise from the rare case of symmetrical supermajority rules, which can be used where the status quo is not the default choice; then no decision is made unless it gains the requisite supermajority. See Robert Goodin & Christian List, *Special Majorities Rationalized* (Aug. 15, 2003)(unpublished manuscript). Symmetrical supermajority rules enable a predefined minority to create nontrivial ties—situations in which no option is chosen—but not to change the status quo, because there is no status quo; symmetrical supermajority rules are thus excluded by condition (ii) in a literal, albeit vacuous, sense. These complications are not important for present purposes, so I shall use "supermajority rules" strictly to refer to the more common case of asymmetrical supermajority rules, under which failure to reach a supermajority decision is equivalent to a choice in favor of the status quo.

[7] On the affirmative agenda-setting power of legislative committees (as opposed to their negative gatekeeping power), see David P. Baron & John Ferejohn, *The Power to Propose, in* MODELS OF STRATEGIC CHOICE IN POLITICS (Peter Ordeshook ed., 1989).

Condition (*ii*) is critical for the following reason. Putting aside the effect of the status quo, any rule that licenses a submajority of n/x to reach a decision D might be redescribed as a converse rule licensing a supermajority of (x–n+1)/x to reach a decision ~D. "[T]he rules 'Four votes are required to grant certiorari' and 'Six votes are required to defeat certiorari' on a nine-judge court are distinguished only by the impact of abstentions."[8] Although the difference is small in the judicial setting, in other institutions, such as legislatures and direct democracy, the status quo will often matter, precisely because abstentions are predictable and important. In III.C. I will suggest that a prime reason for choosing a submajority rule over the converse supermajority rule is that institutional designers might justifiably prefer one status quo position over another, either because the supermajority reciprocal is conceptually ill-defined, or because the larger transaction costs of assembling a supermajority coalition make the default rule sticky.

Our working definition also excludes simple plurality voting, under which the option with the most (first-place) votes wins even if it is not an outright majority. Plurality voting fails condition (*i*), because the requisite winning plurality is defined strictly in relational terms ex post, rather than as an predetermined fraction of votes cast or of the voting group. The comparison between plurality voting and submajority rules emphasizes a striking consequence of condition (*iii*): Under submajority rules, the predefined minority prevails even in a pairwise contest in which all other votes, a majority of the whole, are actually cast for the rejected option. Submajority decisions are thus the

[8] Lewis Kornhauser & Lawrence Sager, *Unpacking the Court*, 96 Yale L.J. 82, 99 (1986).

clearest, and crudest, counterexample to the idea that the voting minority recedes when and because it becomes common knowledge that it is a minority.[9]

Plurality voting systems often go to great lengths either to eliminate or to paper over the awkward possibility that the plurality choice might lose in a pairwise competition with one or more of the rejected options or candidates. An example of the elimination strategy is the combination of plurality voting with a runoff election for the top two votegetters, which burnishes the majoritarian credentials of the eventual winner. An example of the papering-over strategy is the structure of the California recall procedure: if recalled by a simple majority, the former governor is disqualified from entering the replacement election under plurality voting,[10] perhaps to avoid the jarringly countermajoritarian spectacle of a governor rejected by a majority and immediately reinstated by a small plurality. A successful submajority vote, by contrast, emphasizes the countermajoritarian features of the decision, especially but not only in binary decisions. If 100 Senators are present and 20 desire to record the Yeas and Nays then, by force of the Journal Clause, they are recorded; it is irrelevant whether the various alternative methods of vote-counting are all on the table and the remaining Senators split their votes among them, or instead vote en masse, 80-20, for some one other method and against the submajority.

## II. Some Virtues of Submajority Rules

In essence, submajority rules are countermajoritarian because they violate the neutrality feature of majority rule, which requires that no choice be preferred over

[9] James Fitzjames Stephen, LIBERTY, EQUALITY, FRATERNITY 28 (1873) ("The minority gives way not because it is convinced that it is wrong, but because it is convinced that it is a minority").
[10] See Cal. Const., art. II, § 15(c).

another by the voting rule itself.[11] "Where submajority rules are in play typically one outcome is favored, in the sense that it will be adopted if it receives k votes, whether or not some other outcome also receives k."[12] The most striking feature of submajority rules is this flaunting of countermajoritarianism. Why, and under what circumstances, would a well-motivated institutional designer wish to adopt a rule of this sort?

The key point, I will suggest, is that submajority rules are never used directly for final substantive decisions, such as the passage or defeat of legislation. Instead they are used for procedural and collateral matters: to set institutional agendas, to decide what information the institution will gather before reaching a decision, and to publicize the decisions the institution has reached (by majority or supermajority vote). Decisions on these matters will, of course, have indirect effects on outcomes. But submajority rules are best understood in deliberative and procedural terms, as devices for forcing public accountability on the majority. Although the proximate effect of these rules is to shape institutional agendas and the informational environment, their ultimate effect is to push institutions in the direction of decisionmaking according to public reason and discursively justifiable principles, rather than private bargaining.

A. Preliminaries

The only voting procedure that directly determines substantive outcomes by submajoritarian standards is lottery voting, under which the votes for and against a proposal become tickets in a random draw. In the most radical versions, a bill favored by

[11] See Kenneth O. May, *A Set of Independent, Necessary and Sufficient Conditions for Simple Majority Decision*, 20 Econometrica 680 (1952).

[12] Kornhauser & Sager, supra note ---, at 99. The Rule of Four, for example, violates neutrality because four votes for certiorari prevail, whereas four votes against certiorari lose. Asymmetrical supermajority rules also violate neutrality. Thus, in the Senate, 40 votes to continue debate succeed in defeating a cloture motion, whereas 40 votes to cut off debate fail.

only 10% of the legislature nonetheless has a 10% chance of being enacted. But lottery voting does not empower a predefined minority, so it fails condition (*i*) of our definition; and in any event lottery voting, though often proposed in various forms, to date remains strictly hypothetical. Besides the general reluctance of modern institutions to adopt randomized decision rules,[13] a prime reason for the nonexistence of lottery voting is doubtless that its brutally countermajoritarian effect is widely deemed unacceptable in examples like the one above, at least in situations where the Jury Theorem applies. I return to this issue in III.B. below.

Submajority rules, then, are used for agenda-setting, publicity and procedure, but never for final substantive decisions. This pattern can be justified on the following grounds: (1) an institution that is committed to making final substantive decisions by majority or supermajority vote, for the standard reasons, might work better if minorities have the power to force accountability upon the majority; and (2) submajority rules are a useful way to confer that power. Accountability-forcing is accomplished by empowering minorities, through submajority rules, to force the majority to make a highly visible, ultimate substantive decision on a given question, rather than disposing of the issue in some less prominent fashion, including simple inaction. Increasing the visibility of final decisions will affect outcomes by increasing the ratio of publicly or discursively justifiable decisions to decisions based on private bargaining. (As I will discuss in II.E, if we hold a certain vision of politics, we will count this displacement of bargaining by arguing[14] as a vice rather than a virtue; for purposes of the preliminary discussion I will

[13] Jon Elster, SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 62 (1997); Bernard Manin, THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT 42 (1997).
[14] Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 3 U. Pa. J. Const. L. 345 (2000).

simply assume that publicly justifiable decisionmaking is an overall good). In the remainder of this section I will untangle a few different threads of these ideas.

A caveat: this is a strictly evaluative point, not an account of how submajority rules come to be. I do not claim, in any of the examples that follow, either that actual institutional actors adopted submajority rules with the intention of producing these benefits, or that the rules' existence can in some other way be explained by their functional merits. The genetic puzzle of submajority rules is that, in many cases, the submajority enjoys its special voting power only by virtue of a delegation from the majority itself, or from a higher majority.[15] Thus a majority of the Supreme Court could probably change the Rule of Four, and a majority of Congress could certainly do so; a majority of the whole Congress has delegated submajoritarian voting power by statute (in the case of the Seven Member Rule), while a majority of the House has delegated power by internal rule (in the case of House Rule XI). But that is true of many majority or supermajority voting rules as well; some higher-order majority vote often suffices to change the voting rule itself. Thus when the House by internal rule required a 3/5 supermajority to adopt new taxes, the best view is that the rule was certainly constitutional because amendable by a simple majority of future Houses;[16] indeed, on one

[15] A speculation might be that submajority rules come into existence only when the majority that creates the rule fears that it will soon become a minority. Perhaps the majority is certain that it will lose power, and thus creates submajoritarian procedural rights to improve its lot when in opposition. This would be a defensive analogue to the usual attempts of outgoing majorities to entrench their power through legislation, judicial appointments, and the like. See Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891*, 96 American Political Science Review 511-24 (2002). Or perhaps the majority is uncertain about its future status, and the uncertainty causes it to adopt rules, including submajority rules, that are welfare-maximizing for all parties. See Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399 (2001).

[16] See Skaggs v. Carle, 110 F.3d 831, 835 (D.C. Cir. 1997); John O. McGinnis and Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 483 (1995).

admittedly controversial view, it would be constitutional even if formally entrenched,[17] in which case the requisite higher-order majority would be a supermajority of states adopting a constitutional amendment, rather than a majority of the body that adopted the entrenched statute.

None of this is my concern here. Whatever the mechanisms that produce submajority rules, I want to argue only that, from an external standpoint, hypothetical institutional designers who wish to promote majoritarian accountability in decisionmaking might approve of submajoritarian procedural rules or sensibly choose to employ them as part of an overall design, where their benefits cannot be attained at lower cost by adopting some other voting rule or design mechanism.

B. Distributing agenda-setting power

Submajority rules often have the effect of distributing agenda-setting power away from majorities to minorities. The leading examples in American law are the Rule of Four, [18] which authorizes any four Justices to put a case on the Supreme Court's calendar for plenary hearing and disposition, and the rule governing discharge petitions in the House of Representatives, which, at various points between 1910 and 1935, authorized 145 or 150 legislators to force a bill out of committee.[19] There are similar rules governing

[17] Compare Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L.J. 1665 (2002) with John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 Va. L. Rev. 385 (2003) and Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 G.W. L. Rev. 231 (2003).

[18] See Robert L. Stern et al., SUPREME COURT PRACTICE (8th ed. 2002). There is also a little-known, and empirically unimportant, "Rule of Three" that governs the decision whether to hold a case pending plenary review of a related case. See Revesz & Karlan, supra note ---, at 1068.

[19] See Sarah A. Binder, MINORITY RIGHT, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS 136-53 (1997). If the requisite number of signatures were present, the resulting floor vote would not be on final passage but on the motion to discharge the committee. Both the discharge motion and final passage would, of course, require a majority of a quorum. In what follows I ignore this wrinkle.

international organizations as well.[20]

But why, if at all, should agenda-setting power be distributed in this way? In the judicial case, the Justices first articulated the Rule of Four to assuage two related congressional fears: first, that granting the Court discretionary jurisdiction over (most of) its docket would result in arbitrary selection; second, that "too few" cases would be granted for plenary hearing, while most cases would be disposed of through summary action or simple denial.[21] Yet these concerns are underdeveloped. As to the first, the Justices' criteria of fair selection are vague,[22] and in any event it is unclear why a submajority voting rule would implement those criteria more accurately than an ordinary majority rule. The second concern articulates no theory of optimal docket size that would tell us how many cases are "too few," and it seems to assume, oddly, that the Justices are docket-minimizers, perhaps from a desire to maximize leisure. The subsequent history of the Court's discretionary docket, however, suggests if anything that the Justices will often push the Court's agenda capacity to the limit, so no simple docket-minimizing picture is persuasive.

A better idea is that a submajoritarian agenda rule can force majoritarian accountability. We can interpret accountability in two ways: either as accountability to the claims of reason, or as accountability motivated by the desire to appear reasonable.

[20] Such rules typically empower submajorities to convene special sessions of international bodies. See, e.g., UNESCO, Manual of the General Conference and Rules of Procedure of the Executive Board, Section D, Art. 9 available online at <http://www.unesco.org/confgen/en/articles/article4.htm> (visited Jan. 20, 2004) (authorizing 1/3 of members to call a special session); WIPO, Convention Establishing the World Intellectual Property Organization, July 14, 1967, Stockholm, Art. 6(4)(b) available online at <http://www.certh.gr/cordis/t_en/i/i_410_en.asp-adt_id=6&ads=0.htm> (visited Jan. 20, 2004) (authorizing 1/4 of members to call an emergency session).

[21] See John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U L. Rev. 1, 14 (1983).

[22] See Supreme Court Rule X (certiorari is discretionary; relevant factors are conflict between lower federal courts or state courts and the importance of the federal issue presented).

On the first interpretation, we assume that members of the majority will deliberate sincerely, on the basis of publicly justifiable reasons, if only the relevant questions can be forced upon their attention. The majority's preferences, or its views, are endogenous to the quantity and quality of deliberation that the institution gives to a particular issue. The submajoritarian agenda rule then allows the minority to focus the majority's attention by putting the decision under the most intensive form of scrutiny the institution affords—floor debate (in legislatures), full argument on the merits (in courts), or some other equivalent. Applying this picture to the judicial setting, the 5-member majority is especially accountable to the claims of legal reason advanced by the minority during full-dress argument, and may change its views accordingly.

On the second interpretation of accountability-forcing, we assume that members of the majority act strategically to maximize the satisfaction of fixed preferences. The underlying preferences themselves will not be changed by group deliberation, although deliberation might provide useful information. Nonetheless, a submajority agenda rule can still promote majoritarian accountability by raising the political visibility of the relevant decisions. If members of the majority are concerned for their public reputations, visibility can force majority-bloc members to behave as though their actions are motivated by publicly justifiable reasons.

I will illustrate the second interpretation in both the certiorari setting and the legislative setting. In the former setting, on this account, the Rule of Four serves to prevent an entrenched 5-Justice majority from simply disposing of disfavored claims through low-visibility procedures.[23] (Historically, we might speculate that progressive

[23] See Revesz & Karlan, supra note ---, at 1108.

legislators feared that a conservative majority would bury cases brought by states seeking to overturn intrusive economic due process decisions issued by lower courts). At time 1, let us suppose, the entrenched majority rejected Claim C by articulating principle P. Suppose also that in a different case, to be decided at time 2, principle P logically entails not only Claim C but also Claim C'—a result that the majority dislikes. A low-visibility disposition would enable the majority to sweep C' under the rug at time 2, while a highly visible decision on the merits would force the majority to adopt C' on the basis of the previously articulated principle P, or else be exposed as opportunists; this is the "civilizing force of hypocrisy."[24] On this view, the submajoritarian agenda rule works to counteract the "subtle vices of the passive virtues"[25]—the ability of entrenched majorities to exploit various low-visibility techniques for disposing of cases in unprincipled ways.

This account assumes that certiorari denials or summary dispositions are less visible than merits decisions. The assumption may be objectionable on methodological grounds. It casually posits that the audience for judicial opinions is differentially ignorant, either because the cost of monitoring summary dispositions or certiorari denials is appreciably higher than the cost of monitoring merits decisions, or because the audience is subject to some form of flawed cognition—salience or availability—that sophisticated interest groups cannot wholly dispel. But perhaps we ought not be too impressed by the methodological infirmity of the assumption, if it has the ring of truth about it.

The analysis is similar in the legislative setting. In the House of Representatives, proponents of the submajoritarian discharge rule justified it by arguing that the rule

[24] Elster, *Arguing and Bargaining*, supra note ---, at 349.
[25] Gerald Gunther, *The Subtle Vices of the "Passive Virtues:" A Comment on Principle and Expediency in Judicial Review*, 64 Colum. L. Rev. 1 (1964).

empowered minorities to force majorities to put up or shut up on the floor.[26] When a submajority requirement of 150 was adopted in 1924,

> Mr. Crisp of Georgia . . . stated that he was a believer in control by the majority party, but continued: "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."[27]

This argument assumes that floor disposition is more visible to interested publics than killing a bill in committee; if so, then the discharge rule forces public justification of the majority's preferred disposition. And if the reasons that enacting majorities or their agents gave, on previous occasions, impose consistency constraints even on rationally self-interested legislators—as the civilizing force of hypocrisy supposes—then the requirement of public justification may indirectly constrain or alter legislative outcomes.

C. Information, agendas and publicity

A closely related function of submajority rules is to allow minorities to collect and publicize information that the majority would prefer not to admit into the public record. Examples are the "Seven Member Rule,"[28] allowing a designated minority of designated committees to force formal disclosure of executive-branch documents, and House Rule XI, which entitles committee minorities to call witnesses at investigatory and oversight

[26] Note that discharge is an issue only in the House, because only the House rules bar nongermane amendments on the floor. Senate rules allow nongermane amendments, so that any bill squelched by a committee can be proposed, by any Senator, as an amendment to unrelated legislation under debate. See Charles Teifer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 Admin. L. Rev. 199, 205 (1998).

[27] Paul DeWitt Hasbrouck, PARTY GOVERNMENT IN THE HOUSE OF REPRESENTATIVES 153 (1927).

[28] 5 U.S.C. §2954 provides:

> An Executive agency, on request of the Committee on Government Operations [now the Committee on Government Reform] of the House of Representatives, or of any seven members thereof, or on request of the Committee on Governmental Affairs of the Senate, or any five members thereof, shall submit any information requested of it relating to any matter within the jurisdiction of the committee.

hearings.[29] In some cases the power to generate information of record just is agenda-setting power in a de facto sense. Legislative majorities set their agendas in light of the information known to them and the information known to relevant publics; by changing the latter, submajorities may force a new agenda item upon the majority or block an agenda item the majority previously intended to pursue. Here too we may interpret the resulting accountability in two ways. On the deliberative interpretation, the power to put information or arguments on the public stage may force the majority to respond in kind, by generating better data in support of a proposed action, or better arguments. On the strategic interpretation, the pressure to respond to information or arguments generated by submajorities may force majorities who are subject to the civilizing force of hypocrisy to not only talk the language of public reason, but actually to act as if motivated by public principle.

D. Voting, agency and transparency

The common theme, then, is that submajority rules subject the majority to public accountability that improves majoritarian decisionmaking. Although the immediate valence of the rules is dramatically countermajoritarian, their downstream effects may thus be justified in majoritarian terms.

On this account, the paradigmatic submajority rule in the U.S. Constitution is the Journal Clause, which provides:

[29] See House Rule XI (j)(1) (minority members shall be entitled to call witnesses upon request by a majority of the minority). House Rule XI (2)(c)(2) allows three members of a standing committee to file a written request that the chair call a special meeting of the committee, but if the chair takes no action a majority is ultimately required to force a meeting, so this is not strictly a submajority rule. In the international setting, there are many clear examples of submajority rules that authorize the minority to call a special or emergency session.

> Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.[30]

This provision makes a number of fundamental design choices; most critically, for open voting rather than the secret ballot in Congress, at least as to some matters and on the request of a minority of legislators.[31] Also important are the design possibilities the clause rejects, and that are present in constitutions of other jurisdictions, such as constitutionally-mandated roll-call voting in legislative committees[32] and a public right of physical access to legislative proceedings.[33] To understand the stakes in all this, consider that throughout most of its history the English Parliament operated in secrecy and indeed punished attempts to publish records of its proceedings, that the Continental Congress initially closed its proceedings to outsiders and the constitutional convention did so throughout, and that even today most legislatures use secret ballots to select their officers while some, like the Italian Parliament, have until quite recently used them for final voting on legislation.[34] The transparency of legislative deliberation and voting is in broad historical compass a recent design innovation, and a normatively controversial one.

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[30] U.S. CONST., art. I, § 5, cl. 3.

[31] Note that the Clause requires only one-fifth "of those present" to trigger a roll-call vote, not one-fifth of a quorum. But in the Senate (not the House), the practice is for the presiding officer to assume that a quorum is present until it is otherwise determined. Under that assumption, at least eleven Senators are required to join the roll-call request (one-fifth of a quorum of 51, rounding up), which may often be more than one-fifth of those actually present. Under senatorial courtesy, however, the leadership will often help members to arrange a desired roll-call. *See* Tiefer, supra note --- at 530-33. House Rule XX(1)(b) allows "one-fifth of a quorum" to call for an "recorded vote" that "shall be considered a vote by the yeas and nays." See Rules of the House of Representatives XX(1)(b), H.R. Doc. No. 107-284, 107th Cong. (2001); see Tiefer, supra note ---, at 358.

[32] *See, e.g.,* IDAHO CONST., art. III, § 12; IOWA CONST., art. III, § 10; LA. CONST., art. III, § 10; MICH. CONST., art. IV, § 17; MONT. CONST., art. V, § 11.2.

[33] *See, e.g.,* IDAHO CONST., art. III, § 12; IOWA CONST., art. III, § 10.

[34] For documentation of these historical points, see Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. Chi. L. Rev. (forthcoming 2004).

Transparency is a solution to an agency problem. Voters are the principals, legislators are the agents, and constitutional provisions that force agents to publicize their actions lower the monitoring costs that principals must incur, thereby making principals and trustworthy agents better off. At the constitutional convention, framers spoke in general terms about the agency problem for which transparency is a cure. James Wilson argued that "The people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."[35] We may thus understand the 1/5 trigger for roll-call voting as a means by which constitutional designers join forces with future legislative minorities to control future legislative majorities. We may surmise that the framers anticipated that competition between legislative factions would routinely produce public voting, as indeed it has done. Legislative majorities (although not voters) might be better off if legislators could agree to enforce strict secrecy provisions, but legislative minorities armed with the submajoritarian roll-call power produce socially beneficial transparency. By enlisting the interests of future legislative minorities, constitutional framers force accountability upon future legislative majorities, in the higher interests of the electoral or popular majorities whose agents the legislators are.

If this is indeed the core idea of the Journal Clause, it is not without costs. For one thing, it is possible that open roll-call voting would have resulted even without a constitutional trigger. Where present or would-be legislators compete to achieve or retain office, legislator-agents themselves benefit by reducing the costs of monitoring to

[35] 2 Farrand at 260 (Madison as reported by Jared Sparks).

principals.[36] By offering contracts or arrangements that lower expected agency costs, either by reducing monitoring costs or in other ways, would-be agents induce principals to select them rather than others, and to entrust them with more discretionary authority than they otherwise would.

There is also an important procedural cost to the submajoritarian trigger for roll-call voting. Constitutional designers in the states[37] and in other polities, such as Canada and Japan,[38] have tied submajority rules to publicity, especially roll-call voting, in similar ways. But no polity (of which I am aware) allows a single legislator to force a roll-call vote.[39] The tradeoff that explains this pattern is obvious; constitutional designers face an optimization problem. On the one hand, submajority rules allow minorities to force accountability on majorities; and we are supposing that this is beneficial. On the other hand, there is a cost to roll-call voting. As Story put it,

> The restriction of call of the yeas and nays to one fifth is founded upon the necessity of preventing too frequent a recurrence to this mode of ascertaining the votes, at the mere caprice of an individual. A call consumes a great deal of time, and often embarrasses the just progress of beneficial measures. It is said to have been often used to excess in the congress under the confederation; and even under the present constitution it is notoriously used, as an occasional annoyance, by a dissatisfied

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[36] See John Ferejohn, ACCOUNTABILITY AND AUTHORITY: TOWARD A THEORY OF POLITICAL ACCOUNTABILITY, IN DEMOCRACY, ACCOUNTABILITY AND REPRESENTATION 131 (Adam Przeworski, Susan C. Stokes, and Bernard Manin, eds, 1999).

[37] See, e.g. CAL. CONST. Art. IV §7B (stating "Each house shall keep and publish a journal of its proceedings. The rollcall vote of the members on a question shall be taken and entered in the journal at the request of 3 members present"); HAW. CONST. Art. III §12 (stating "The ayes and noes of the members on any question shall, at the desire of one-fifth of the members present, be entered upon the journal.").

[38] INTERNATIONAL CENTRE FOR PARLIAMENTARY DOCUMENTATION OF THE INTER-PARLIAMENTARY UNION, Parliaments of the World: A Comparative Reference Compendium 480 (2nd ed., 1986)(in Canada, all votes are voice votes unless 5 MP's request a roll call); JAPAN CONST. Chapter III Art. 57 §3 ("Upon demand of one-fifth or more of the members present, votes of the members on any matter shall be recorded in the minutes").

[39] However, in some international organizations a single member can force a roll-call vote. See, e.g., Rules of Procedure of the Human Rights Committee, UN Doc CCPR/C/3/Rev.6 (2001) (Rule 52), available online at <http:// www.unhchr.ch/tbs/doc.nsf/> (visited Jan. 20, 2004); Rules of Procedure of the Committee on the Rights of the Child, UN Doc CRC/C/4 (1991) (Rule 54), available online at <http://www.unhchr.ch/tbs/doc.nsf/> (visited Jan. 20, 2004). Note that these organizations typically have far fewer members than a domestic legislature. In a decisionmaking body with a small number of members, the optimum might also be equivalent to the minimum -- one member.

> minority, to retard the passage of measures, which are sanctioned by the approbation of a strong majority.[40]

This optimization problem was debated quite explicitly at the constitutional convention. At one extreme, Gouvernor Morris "urged that if the yeas and nays were proper at all any individual ought to be authorized to call for them"; he feared that "the small States may otherwise be under a disadvantage, and find it difficult to get a concurrence of 1/5."[41] At the other extreme, several members complained that roll-calls had been abused, in the states, by "stuffing the journals with them on frivolous occasions."[42] George Mason spoke for the silent majority on this issue: he praised the 1/5 rule as "a middle way between two extremes,"[43] presumably the point at which the net benefits of the rule reach an internal maximum.

Two other submajority rules—one actual, one hypothetical—also illustrate this optimization problem. The actual one is Senate Rule XXII (2), under which a cloture petition (a petition to vote to cut off debate) can be lodged with the signatures of sixteen senators, and is given priority in the order of business. A much lower numerical threshold would permit harassing petitions by outlying senators on either extreme;[44] a much higher one would collapse the decision to file a cloture petition with the vote on the merits of the petition. The hypothetical example is a proposal under which the signatures of ten representatives or twenty senators would be necessary, but also sufficient, to raise a

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[40] Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Book III, §842 (2nd ed, 1851).
[41] 5 Debates on the adoption of the federal Constitution, in the convention held at Philadelphia, in 1787, at 407 (Jonathan Elliot, ed., Philadelphia, J.B. Lippincott Co. 1881).
[42] Id. at 407 (quoting Mr. Gorham).
[43] Id. at 407.
[44] Cf. 55 Cong. Rec. 24 (65th Cong., March 8, 1917) (statement of Senator Sherman) ("by this day's work [adopting the original version of Rule XXII] a majority of the Senate hereafter will be enabled to apply the previous question on the application of 16 Senators who may represent eight of the smaller States in the Union").

constitutional point of order against a pending bill.[45] In the latter example, "the requirement [of a submajority] makes the point-of-order strategy more costly to those trying to use it to force changes in the bill, but it still allows a small group of intensely concerned lawmakers to bring the attention of the full body to a constitutional issue."[46]

E. Transparency, deliberation, and bargaining

The discussion so far has argued that submajority rules allow minorities to force public accountability upon unwilling majorities; and that the pressure of public accountability pushes decisionmaking, by legislatures and other institutions, in the direction of transparently articulated principle and public consistency.

It is hardly clear, of course, that consistent decisionmaking according to transparent principle is a good thing. At a general level, the institutional-design tradeoffs inherent in transparent decisionmaking are well understood,[47] although it is a daunting empirical task to specify how the relevant variables should be weighed in particular settings. Transparency reduces the cost to principals, such as citizens and voters, of monitoring their agents, such as legislators, who absent monitoring would divert resources to themselves or simply shirk their official duties. It is thus a favored recipe of democrats and good-government reformers who seek to reduce official corruption and to encourage regular attendance by legislators; we have seen that agents may even compete among themselves by offering principals institutional arrangements that provide for ever-greater transparency.

[45] Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 Duke L.J. 1277, 1329 (2001)
[46] Id.
[47] For discussion, see Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. Pa. J. Const. L. 345 (2000); David Luban, *The Publicity Principle*, in THE THEORY OF INSTIUTIONAL DESIGN 154-98 (Robert E. Goodin ed. 1996); Adrian Vermeule, *Judicial History*, 108 Yale L.J. 1311 (1999).

This is all to the good as far as it goes, but transparency has important costs, in part precisely because of its democratizing effects; transparency changes official and legislative deliberation both for good and for ill. Without transparency, agents gain less from adopting positions that resonate with immediate popular passions, so transparency may exacerbate the effects of decisionmaking pathologies that sometimes grip mobilized publics.[48] Transparency subjects public deliberation to reputational constraints: officials will stick to initial positions, once announced, for fear of appearing to vacillate or capitulate, and this effect will make deliberation more polarized and more partisan. The framers closed the Philadelphia convention to outsiders precisely to prevent initial positions from hardening prematurely.[49]

The pressure to take a principled public stand also dampens explicit bargaining.[50] Although anticorruption reformers count this as an unqualified good, it is in fact a qualified one. Bargains may represent corrupt deals by which agents enrich themselves at principals' expense, but bargains also permit logrolls that may allow the legislative process to register the intensity of constituents' preferences,[51] and that help to appease

[48] Many public pathologies are relevant here, including reputational and informational cascades, preference falsification, rational and irrational herding behavior, and group polarization. See Cass R. Sunstein, *The Law of Group Polarization*, 10 J. Pol. Phil. 175 (2002); Timur Kuran, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (1995); Jacob Gersen, *Informational Cascades, Cognitive Bias, and Catastrophic Risk* (unpublished manuscript, on file with author).

[49] See Elster, *Arguing and Bargaining*, supra note ---, at 386:
"At the Federal Convention, the sessions were closed and secret. As Madison said later: 'Had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument.'"(citing 3 Farrand at 479 (Madison as reported by Jared Sparks)).

[50] An interesting example of this effect is provided by a NATO rule that allows any delegate to demand a separate vote on each paragraph or part of a proposal. The effect of the rule, and presumably the intention of its framers, is to dampen logrolling by allowing a minority to put each of the elements of a bundled proposal to a separate vote. See Rules of Procedure for the Parliament of NATO, 123 GEN 03B (2003) at Art. 26(4) available online at <http://www.nato-pa.int/default.asp?TAB=346> (visited Jan. 4, 2004).

[51] Logrolling may, of course, either permit socially beneficial trades or inflict socially harmful externalities on nontraders. Much depends on the details of the situation. "Today, no consensus exists in the normative

policy losers by giving everyone something. Argument by reference to public principle, by contrast, is a hydraulic force that presses competing camps towards total victory or total defeat. Alternatively, transparency might simply drive decisionmaking underground, creating "deliberations" that are sham rituals while the real bargaining is conducted in less accessible and less formal venues, off the legislative floor or in closed committee markup sessions.

These remarks are general; to illustrate the tradeoff concretely, we may point to the similar ambiguity surrounding open roll-call voting within legislatures. Open voting allows legislators to give third parties credible, because verifiable, commitments to vote in particular ways in return for bribes or in response to threats. With secret voting, by contrast, legislators cannot strike credible vote-selling bargains with the executive or interest groups, so the value of legislators' votes to those groups declines.[52] From the standpoint of voter-principals, the ability of legislators to credibly commit to sell votes to interest groups represents an agency cost insofar as the interest groups' goals differ from the voters'.[53] To be sure, even with secret voting interest groups may pay for outcomes rather than actions, offering legislators payments conditional on favorable legislative decisions. Yet interest groups can always pay for outcomes, even with open voting, so secret voting at least reduces the value of the legislator's vote by removing one dimension over which bargains can be struck. And paying legislators for legislative

public choice literature as to whether logrolling is on net welfare enhancing or welfare reducing, that is, whether logrolling constitutes a positive- or a negative-sum game." Thomas Stratmann, *Logrolling*, in PERSPECTIVES ON PUBLIC CHOICE: A HANDBOOK 322 (1997).

[52] Luban, supra note ---, at 187 (citing Sen. Robert Packwood).

[53] It is a separate question whether an open market in votes provides legislators themselves any benefit. As Ferejohn points out, ex ante competition between candidates for legislative office may dissipate the rents that legislators could otherwise obtain from vote-selling. Ferejohn, *supra* note --- at 140 n.6. This effect merely reallocates rents from legislators to their interest-group supporters; it does nothing to alleviate the agency loss to voters of legislative vote-selling, and indeed exacerbates it insofar as increasing expenditures on (rent-dissipating) competition between candidates is itself socially wasteful.

outcomes is senseless unless interest groups can identify the swing or marginal legislators, who alone control outcomes anyway. But the interest groups' ability to identify swing legislators is endogenous to the voting practice; with secret voting, any legislator may claim to be marginal in order to win an interest-group payment, but no such claims will be credible.

The upshot of these points is that open voting has cross-cutting or ambiguous effects on voters' control of their legislative agents. On one hand, a switch from secret to open voting reduces agency costs by reducing the voters' costs of monitoring their legislative agents. On the other hand, a switch from secret to open voting also creates an agency cost by creating an open market for legislative votes, allowing interest groups to divert legislators from voters' goals. These two variables move in opposite directions, so the institutional-design question is how the two costs net out. The question is empirical, not a priori.

Evaluating the big tradeoff between deliberation and bargaining, and the smaller tradeoff between open voting and secret ballots, plunges us into empirical and normative difficulties. At a minimum we must arbitrate between competing empirical priors about the agency costs of transparency and secrecy; at a maximum, we might have to choose between competing normative accounts of voting, institutional decisionmaking, and politics, including the bedrock choice between deliberative accounts of democracy as judgment-aggregation and welfarist accounts of democracy as preference-aggregation.[54] I will avoid these depths. My point here is instead a modest and strictly conditional one: if we want to make normative sense of what constitutional designers have done with

[54] Jeremy Waldron, *Rights and Majorities: Rousseau Revisited*, Nomos XXXII (1990).

submajority rules, the best account is one that depicts submajority rules as devices for forcing transparency, and thus accountability, or principle, upon otherwise unwilling majorities.

## III. Some Problems with Submajority Rules

Here I will canvass some problems with submajority rules. Of these, some are pseudo-problems, while some represent real costs of using submajority rules in institutional design. The most important example in the latter category is the reversibility problem, which can, however, be dampened by collateral institutional rules or avoided altogether by using submajority rules only for decisions that are costly to reverse or intrinsically irreversible.

### A. Cycles, agenda-setting and manipulation

There is the standard social-choice concern that a submajoritarian rule for agenda-setting combined with a majority voting rule for substantive decisions enables submajorities to manipulate outcomes for countermajoritarian ends, by exploiting latent voting cycles. (Note that this problem cuts across the difference between rules that empower submajorities to add agenda items, on the one hand, and supermajoritarian agenda rules, or equivalent structures like the committee system, that empower minorities to affect agendas by blocking items that a majority might wish to consider.) Yet the manipulation of outcomes by agenda-setters is not clearly a real-world problem. The broadest and most ambitious claims in the massive literature on cycling and agenda-setting have, to date, achieved great technical refinement but few compelling results for

students of real-world lawmaking institutions.[55]

At the level of theory, exploitation of the voting many by the agenda-setting few is extremely difficult to achieve, and requires strong modeling assumptions even to become minimally plausible. For one thing, some of the relevant stories arbitrarily assume that the agenda-setter is strategic while the voters are sincere, or that the agenda-setter is fully informed about the voters' rankings while the voters do not understand the agenda-setter's aims.[56] For another, real institutions never employ the arbitrarily long agenda chains necessary to move outcomes to the agenda-setter's preferred point.[57] In models that take a slice or snapshot of ongoing institutions, agenda-setters can affect outcomes in limited ways, as in the standard models of committees acting under a closed rule. Such models, however, just pose the familiar questions about whether and why floor majorities permit committees with outlying preferences, relative to the floor median, to exploit closed rules or to exist in the first place.[58]

Where Congress (rather than some abstract "legislature" or "committee") is the subject, there is all the less reason to think that agenda manipulation is an important concern. For one thing, legislators are above all members of political parties, and a two-party system dampens the possibility of the cycles that are a prerequisite for agenda

[55] Here I essentially follow the lead of Gerry Mackie, DEMOCRACY DEFENDED (2003) and Bernard Grofman, *Public Choice, Civil Republicanism, and American Politics: Perspectives of a "Reasonable Choice" Modeler*, 71 Tex. L. Rev. 1541 (1993).

[56] Mackie, supra note ---, at 18-19, summarizes the author's critiques of common cycling stories; in many cases the story arbitrarily assumes that agenda-setters or manipulators are strategic while other voters behave sincerely.

[57] See Grofman, supra note ---, at 1569; Scott Feld et al., *Limits on Agenda Control in Spatial Voting Games*, 1 Mathematical & Computer Modelling 405 (1989).

[58] Canonical treatments of the principal-agent problem between floor and committees include Keith Krehbiel, INFORMATION AND LEGISLATIVE ORGANIZATION (1992); Barry R. Weingast & William J. Marshall, *The Industrial Organization of Congress; or, Why Legislatures, Like Firms, Are Not Organized as Markets*, 96 Journal of Political Economy 132 (1988); Kenneth A Shepsle & Barry R. Weingast, *The Institutional Foundations of Committee Power*, 81 American Political Science Review 85 (1987).

manipulation. "[A] two-party system inevitably creates a single-dimensional competition along the ideological spectrum. The effect of this single-dimensional competition reduces the number of likely preference orderings."[59] And, in fact, about 85% of roll-call votes in the Congress are predicted by a simple model that uses a single dimension (left-right) to measure legislators' ideologies.[60] For another thing, agenda manipulation requires sophisticated voting, but legislators will find it difficult to justify clever votes to constituents who may see only that the legislator has conspicuously voted against their interests and against the legislator's professed commitments.[61] Here is another link between submajority rules and publicity or transparency: provisions like the Journal Clause increase the number of public roll-call votes, in turn dampening agenda manipulation.

Empirically, it has been notoriously difficult for cycling theorists to demonstrate clear cases of agenda manipulation in Congress.[62] (Judicial decisionmaking displays better examples,[63] in part because legislatures enjoy greater scope than courts for logrolling and other practices that measure the intensity of participants' preferences and thus avoid the standard cycling conditions.[64]) As far as Congress goes, early claims that congressional history was replete with exploitative agenda-setting have been grievously undermined by

[59] Grofman, supra note ---, at 1557. We may add epicycles about cycling, such as the claim that latent or hidden cycles occur *within* the two major parties and are thus important even if the observable action within the legislature occurs on a single dimension. This seems unpersuasive, however. Intraparty conflict is centrally about money—which factions can bring the most money to the table—and this sort of willingness-to-pay to influence political outcomes effectively cardinalizes preferences, whereas the main cycling results hold only with ordinal preferences.

[60] See Keith T. Poole & Howard Rosenthal, *A Spatial Model for Legislative Roll Call Analysis*, 29 Am. J. Pol. Sci. 357, 368 (1985).

[61] See Arthur T. Denzau et al., *Farquharson and Fenno: Sophisticated Voting and Home Style*, 79 American Political Science Review 1117 (1985).

[62] See Mackie, supra note ---; Donald P. Green & Ian Shapiro, PATHOLOGIES OF RATIONAL CHOICE THEORY 107-13 (1994).

[63] See Maxwell Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. Pa. L. Rev. 309 (1996).

[64] See Maxwell Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L.J. 1219, 1276-80 (1994).

subsequent work.[65] Levine and Plott famously manipulated a flying club into a countermajoritarian decision,[66] but were expelled upon publication of their results; the danger for unscrupulous agenda manipulators in real lawmaking institutions is that those who have been duped in the short run eventually discover the bad faith, and band together to punish their overly cunning colleagues. So the possibility of outcome manipulation by agenda-setters looks theoretically abstruse, and empirically difficult either for participants to achieve or for analysts to confirm, at least in legislatures.

B. Submajorities and the Jury Theorem

A different critique is that submajority rules may produce inaccuracy, or less accuracy than majority rule would attain, in situations where the conditions for the Condorcet Jury Theorem hold.[67] This point does not hold uniquely for submajority rules; it is equally true for any deviation from simple majority voting, despite the occasional

[65] For an example of this ebb-and-flow, compare William H. Riker, THE ART OF POLITICAL MANIPULATION (1986) (purporting to identify examples of agenda manipulation in congressional history) with Mackie, supra note ---, and Keith Krehbiel & Douglas Rivers, *Sophisticated Voting in Congress: A Reconsideration*, 52 Journal of Politics 548 (1990) (both works criticizing Riker's evidence and conceptual premises). Mackie also criticizes, persuasively in my view, the other work purporting to identify legislative cycles, such as John L. Neufeld, et al., *A Paradox of Voting: Cycling Majorities and the Case of Muscle Shoals*, 47 Political Research Q. 423 (1994). Even if Mackie's analysis were thought to fail as to one or two examples, still the number of identified cycles is trivial—too small a tail to wag the gigantic dog that is the legislative cycling literature.

[66] See Michael E. Levine & Charles R. Plott, *Agenda Influence and its Implications*, 63 Va. L. Rev. 561 (1977).

[67] In the following discussion I shall address only versions of the Jury Theorem in which the "correct" answer is exogenously chosen or determined. In another, thinner version the Jury Theorem merely captures the probability that a majority of the voting pool has correctly chosen the result that a majority of voters would consider best promotes their individual interests, rather than the common interest somehow defined. See Nicolas R. Miller, *Information, electorates and democracy: some extensions and interpretations of the Condorcet jury theorem*, in INFORMATION POOLING AND GROUP DECISIONMAKING (Bernard Grofman and Guillermo Owen, eds.,1986); Paul Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 J. Legal Stud. 327, 337-39 (2002). In the latter form, however, the Theorem lacks the special epistemic credentials that make it normatively challenging for nonmajoritarian decision rules. See Jules Coleman, *Rationality and the Justification of Democracy*, in POLITICS AND PROCESS 194, --- (Geoffrey Brennan and Loren Lomasky, eds., 1989). If all the Theorem is aggregating is the probability that the majority has correctly determined where its interests lie, minorities or submajorities with different interests owe it no normative respect, and the Theorem underwrites no objection to submajority or supermajority rules.

confused suggestion[68] that supermajority rules do better on the score of accuracy. Apart from this *tu quoque* point, however, how serious is the problem?

If the sorts of decisions covered by procedural submajority rules indeed fall within the Jury Theorem's scope, then this would be a raw epistemic cost of submajoritarianism. Then the only thing left to say would be that submajoritarian inaccuracy at the predecisional or agenda-setting stage might trade off against increased jury-theoretic accuracy at the stage of substantive decisionmaking. That tradeoff would obtain if, for example, the increased publicity accompanying an up-or-down decision on the merits of legislation reduces the tendency of legislator-voters to follow the lead of party mavens, and thus increases the effective number of independent votes, with a resulting increase in the group's overall accuracy. This is of course a contingent empirical conjecture, and we might well think the opposite instead. Publicity might enhance the control of party leaders, by making commitments to vote in certain ways more easily monitored, and might thus reduce the effective number of independent votes and thus reduce the Condorcetian accuracy of the whole voting group. (Of course if party leaders have a very high voting competence then group accuracy might possibly increase, despite the reduction in the number of votes,[69] but under plausible assumptions a larger number of

[68] John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 Va. L. Rev. 385, 420 n. 119 (2003). The authors say that "the Condorcet jury theorem suggests that the greater the number of voters in favor of a measure, the more likely it is to be true. . . . Thus, supermajority rules will result in principles and measures that are more likely to be 'true' than those generated by majority rule." (internal citation omitted). The first sentence is correct, but the second does not follow from the first; in fact the second sentence is a howler. Where the Jury Theorem's conditions are met, so that the average competence of the voter pool is greater than .5, majority rule is optimal, precisely because the simple majority subset of all voters is more likely to get the right answer than is any smaller subset. The authors have conflated the decision rule (majority or supermajority) with the size of the group voting under the rule, whatever it might be.

[69] David M. Estlund, *Democratic Theory and the Public Interest: Condorcet and Rousseau Revisited*, 83 American Political Science Review 1317 (1989).

moderately competent voters quickly outperforms a single voter of even superhuman accuracy).[70]

In fact, however, there is little reason to treat most submajoritarian decisions as the sort of decisions that fall within the Theorem's scope in the first place. Even with well-motivated participants, agenda decisions are value choices about how the institution's time is best spent, not judgments that we might label accurate or inaccurate. Participants in agenda decisions are not, or not commonly, trying to converge upon a correct judgment on the same question; they are expressing different preferences about how a fixed resource, time, should be expended, and each participant may be right (about how best to satisfy their own preferences) even if they reach different answers. The same point holds for other collateral decisions typically subject to submajority rules, such as the decision whether to publicize legislative votes; recall that to publicize voting is always an agenda choice in itself, since a principal cost of roll-call voting is time, and the framers' principal fear was that roll-call voting would be abused to delay legislative proceedings. Speaking generally, it is hard to see that the Jury Theorem bites at all on the preliminary or collateral, nonsubstantive choices that submajority rules, where they exist, typically regulate.

This point, I think, sharpens the contrast with substantive versions of lottery voting that permit the enactment of bills or decisions favored by less than a majority.[71]

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[70] Thus Przeworksi:

> [A]n assembly of the size n=399 in which the average individual has only a 0.55 chance of voting correctly has a 0.98 chance of making the correct decision by majority rule; only a dictator with [competence greater than] 0.98 would do better, and there may be no one in the population who is that wise. Hence, more stupid voters are likely to reach better decisions than a few wise ones.

Adam Przeworksi, *Minimalist Conception of Democracy: A Defense*, in DEMOCRACY'S VALUE 27 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

Potentially submajoritarian lottery voting of this sort might in principle be used to select representatives[72] or jurors[73]; to make preliminary, procedural or collateral decisions, including agenda-setting in the face of cyclical majorities;[74] or to make ultimate substantive decisions.[75] In the last case, the Jury Theorem helps to explain or rather justify the failure of lottery-voting proposals to find any market among real-world constitutional designers. Whereas preliminary decisions are usually value choices, not technical or causal decisions that can be more or less accurate, substantive decisions often or sometimes do possess the latter feature, and will thus fall within the Jury Theorem's scope. This problem would be obviated if lottery-voting rules were tailored to apply only to preliminary and procedural decisions of value choice, rather than ultimate substantive decisions. A continuing puzzle, for which I have no answer, is why that chastened form of lottery voting is rare or nonexistent.

C. Selecting the status quo point

We have seen that for every submajority rule there is a reciprocal supermajority rule, with a mirror-image status quo point. Why do *those* rules not exist, while the corresponding submajority rules do? Norms, or institutional designers, might say that the legislative roll must be called for every vote on final passage unless 4/5 + 1 opt for a voice vote; is there any reason to think that rule a bad one? There is a mirror-image

[71] Richard Zeckhauser, *Majority Rule with Lotteries on Alternatives*, 83 Quarterly Journal of Economics 696 (1969).
[72] Akhil Reed Amar, *Choosing Representatives by Lottery Voting*, 93 Yale L.J 1283 (1984); Jon Elster, *Solomonic Judgments: Studies in the Limitations of Rationality*, 78-90 (1997). The latter notes that the choice of laws, as opposed to the choice of lawmakers, could be organized through lottery voting—either through random-agenda setting or random substantive decisions -- but states that "I do not know of any regime which has actually adopted this practice." Id. at 90.
[73] Douglas Gary Lichtman, *The Deliberative Lottery: A Thought Experiment in Jury Reform*, 34 Am. Crim. L. Rev. 133 (1996).
[74] Bruce A. Ackerman, SOCIAL JUSTICE IN THE LIBERAL STATE 291-93 (1980 ).
[75] Robert Paul Wolff, IN DEFENSE OF ANARCHISM 44-45 (1998).

question about supermajority rules. Why should not the 3/5 rule for tax increases be a rule requiring 2/5 + 1 to reject any proposed tax increase?

In some circumstances, submajority rules are undoubtedly equivalent to their supermajority reciprocals. As Kornhauser and Sager suggest,[76] it is hard to believe that a Rule of Six—all certiorari petitions are on the docket unless six Justices vote to deny them—would produce any different results than the Rule of Four; abstentions are sufficiently rare on the Court, and the alternatives are sufficiently similar, that nothing turns on the location of the status quo point. But this equivalence does not hold generally.

First, in some situations the supermajority reciprocal is conceptually ill-defined. Under standard procedures for recall elections, some submajority fraction—say, 15% of the number of voters in the last regular statewide election—are empowered to alter the status quo by putting the recall question on the ballot in a special statewide election. Here the idea of a supermajoritarian reciprocal is obscure; what would it mean to say that a recall question is always on the ballot (every day?) unless 85% + 1 affirmatively vote not to hold the recall election? The supermajority reciprocal is well-defined in the certiorari setting only because an outside actor—the litigant—is authorized to file a certiorari petition in the first place. In the direct-democracy setting, however, there is no exogenously-defined pool of *potential* questions that can be put on or off the agenda by supermajority voting.

Second, even where the supermajority reciprocal is conceptually well-defined, transaction costs may make the status quo sticky, thereby making consequential the choice between a submajority rule and its supermajority reciprocal. A submajority rule

[76] Kornhauser & Sager, *Unpacking the Court*, 96 Yale L.J. 82 (1986).

will be preferable to the reciprocal supermajority rule where, and to the extent that, the costs of assembling the necessary submajority are appreciably lower than the costs of assembling the mirror-image supermajority. In small-group settings like the Supreme Court, these two costs will rarely diverge to any appreciable degree. But it is a mistake to generalize from small-group settings to large-number settings where the costs of assembling a submajority will be far lower than the costs of assembling a reciprocal supermajority.

The extreme case involves mass democracy; for concreteness, I will use the recall example again. Under current law, recalls occur when a submajority puts the question on the statewide ballot. Suppose that, contrary to what I have said above, we could imagine a conceptually coherent reciprocal rule under which a recall election would be held (at stated intervals?) unless recall opponents could muster a statewide supermajority to block the recall question from the ballot. But this scheme is silly; the difference between the two rules only matters if there are a sufficient number of abstentions, but it is predictable that there will be many. Put differently, if abstentions could be reduced to such a degree that a large supermajority of the whole statewide electorate could be mustered to oppose the recall, the recall issue would in substance already have been decided on the merits; at the very least a preliminary vote on the agenda, rather than the merits, would be otiose.

Numerically, and in terms of the costs of assembling requisite fractions of the whole voting pool, legislatures are an intermediate case between courts and direct democracy. Submajority rules will sometimes matter in legislatures, because the difference between the lower-bound cost and the upper-bound cost will sometimes be appreciable, in turn because absenteeism or abstention is a chronic condition both in committee and on the

floor. In a legislature that, like Congress at the beginning of the last century, is plagued by absenteeism, the difference between obtaining 145 signatures in favor of a discharge petition (under the pre-1935 submajority rule) and obtaining 291 signatures against a discharge petition (under the reciprocal supermajority rule) is highly consequential.

Under the latter rule, the greater costs of assembling the requisite coalition would create greater scope for strategic behavior. *Which* bills would be subject to possible discharge (unless a contrary supermajority could be assembled?) Note that a smaller minority than the fraction required by the submajority rule (here, 1/3 of the House) must, in such a regime, be entitled to force a supermajority to coalesce against discharge on any bill. In that case the opportunity for strategic abuse will be greater, and the resulting costs of delay higher, than under the submajority rule. If the submajority rule already strikes the right balance between the costs of delay, on the one hand, and the benefits of forcing accountability upon the majority, on the other, then the combination of a reciprocal supermajority rule with a lower-than-submajoritarian trigger will be nonoptimal.

The foregoing account does not quite explain the submajority trigger for the Journal Clause, under which the agreement of 1/5 <u>of those present</u> suffices to mandate a roll-call vote. If an extremely small number were present, the costs of assembling the 1/5 submajority or of assembling the reciprocal 4/5 + 1 supermajority (to deny a roll-call vote) would be similar. With small numbers, however, the minority will be able to allege the absence of a quorum in any event, so there may never be any vote on which a roll-call could be taken; while with large numbers the costs of assembling the requisite fractions is

significant.[77] So this wrinkle in the Journal Clause is a distinctly second-decimal issue.

D. Reversibility

I have left to the end the most conspicuous problem with submajority rules: the possibility that submajoritarian decisions are exposed to reversal by subsequent majorities, and are thus chronically unstable. If one hundred-odd legislators may discharge a bill from committee, why may not two hundred and eighteen just send it back again? If four Justices may grant certiorari, what happens if five dismiss certiorari as improvidently granted? And if a small plurality puts Candidate S into office in a recall election, may not the majority that split their votes among other candidates subsequently recall S in turn, with an endless cycle of recalls in prospect?

Buchanan and Tullock showed that majority rule is the lowest-decision-cost voting rule that guarantees stability,[78] but subsequent work slid towards, if not into, the casual assumption that submajority rules are therefore infeasible or even nonexistent.[79] But instability is just another institutional problem to be managed; it is a cost to be weighed against the benefits of submajority rules, rather than a hard constraint on the very possibility of such rules. The tempting mistake here is to assume that an institutional problem with a given voting rule can be solved only by adjusting the institution along the same margin, by using a different voting rule.[80] In fact there are at least two other

[77] See Tiefer, supra note ---, at 358 (noting that, with 300 members present, the required 1/5 (= 60 members) is difficult to assemble).
[78] James M. Buchanan & Gordon Tullock, THE CALCULUS OF CONSENT 211 (1962); see also Neal Reimer, *The Case for Bare Majority Rule*, 62 Ethics 16 (1951).
[79] See, e.g., Mueller, PUBLIC CHOICE III, at 76-77; see also the work cited immediately below.
[80] See, e.g., Matthias Messner & Matthias Polborn, *Voting on Majority Rules* (Aug. 19, 2001)(unpublished manuscript), at 10: "Of course, a 'submajority rule' (corresponding to a less than 50 percent majority) is difficult to implement for stability reasons, because both a proposal and its exact opposite could be passed. Therefore, the best society can do (given this stability constraint) is again to choose a simple majority rule." The second sentence does not follow from the first, even given the author's other assumptions, except on

margins on which institutions may act to cope with the potential instability that the reversibility problem creates. First, institutions may protect submajoritarian decisions from reversal through formal rules, or informal norms, that bar defeated majorities from reversing or undermining a submajoritarian decision—at least not right away, or not without intervening changes. Second, and more interestingly, institutions may use submajority rules for decisions that are costly or impossible to reverse. I will take up these possibilities in turn.

Institutions that use submajority rules may develop written rules or unwritten norms that preclude or limit reversals by subsequent majorities. A judicial example involves the conventions surrounding the Rule of Four:

> The Court has construed and applied the Rule of Four so as to require all Justices to consider the case on the merits, following the grant of certiorari on four votes. Most members of the Court have felt that the other five Justices who did not vote to grant are thereafter precluded from voting to dismiss the petition as improvidently granted in the absence of additional intervening factors which were not known or fully appreciated at the time certiorari was granted.[81]

The last clause is vague, and has occasionally given rise to intracourt controversies where five Justices dismissed a case over the dissents of four Justices, with the latter group complaining that no intervening circumstances warranted the action. At various points, therefore, Justices have claimed that the Court does or should adhere to a stricter practice in which no petition can be dismissed as improvidently granted, even given changed circumstances, unless one of the four Justices in the granting bloc switches her

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the additional and rather arbitrary assumption that the only choice variable for institutional designers is the voting rule itself. In a similar vein is Giovanni Maggi and Massimo Morelli, *Self-Enforcing Voting in International Organizations* (Dec. 10, 2002)(unpublished manuscript), at 9 & n.8.

[81] Robert L. Stern et al., SUPREME COURT PRACTICE 297 (8th ed. 2002).

vote.[82] There is inconsistency and variation in these practices over time; all of the relevant practices are politically fraught. But the general picture is that strong normative rules dampen the potential instability of the submajoritarian agenda rule; marginal fluctuations in the rules or norms should not impress us too much. It is quite clear that the ability of subsequent majorities to reverse a grant of certiorari is sharply constrained, relative to a hypothetical baseline in which no such rules or norms exist.

Legislatures may also develop rules or norms that dampen or control reversals. Crudely, we may distinguish formal rules from structural arrangements. To illustrate the first category, consider the problems arising when a submajority's discharge petition is brought to the floor. The majority that controls the bill's subsequent fate may well be the same majority that controls the committees whose jurisdiction has been ousted (depending upon the degree of agency slack between committees and floor); so a danger is that the floor majority will block the discharged bill through procedural subterfuges, or simply by refusing to take up the bill for a final substantive vote if it is not privileged business. Thus, under the submajority discharge rules obtaining in 1924, the Howell-Barkley bill for settling railway labor disputes was discharged by a submajority, but eventually died after its initial consideration; its supporters could never obtain a majority to move the bill out of the pile of "unfinished business" in order to force final consideration.[83] In 1931, therefore, a near-unanimous House adopted new rules that "explicitly provided for the consideration of discharged measures as privileged business

[82] Stern et al., supra note ---, at 298.

[83] Historically, this is a rather ambiguous case, because it is not clear whether a majority of the whole House would have supported the bill on final passage. Although the motion to discharge the bill from committee prevailed 194 to 181, a later majority voted 144-134 to strike out the enacting clause (rendering the bill inoperative); a yet later majority defeated a motion to refer the bill back to committee, 201-181. See Hasbrouck, supra note ---, at 160-61.

after their initial consideration," effectively ensuring discharged bills an up-or-down vote.[84] Comparing Congress to the Supreme Court, the 1924 disposition of the Howell-Barkley bill is analogous to a dismissal of certiorari as improvidently granted over four dissents, while the 1931 rule is analogous to the rule, or norm, that bars dismissals by a five-Justice coalition who lost at the certiorari stage.

Structural arrangements may also shield submajority decisions from majoritarian reversal. This category is illustrated when submajority rules are created by a delegation from a higher-level majority, as in the case of House Rule XI. The submajority rule may be repealable by the higher-level majority, but unless and until that occurs the decisions reached under the rules by lower-level submajorities (say, a committee minority) are structurally immune from reversal by lower-level majorities (say, a committee majority). Given that submajority rules more easily cope with the reversal problem when they arise by delegation from a higher-level majority, we should not be surprised that submajoritarian voting rules are, in Congress, more common at the committee level than at the floor level.

Institutional rules and norms, whether formal or structural, are not the only way to safeguard submajoritarian decisions from reversal. Alternatively, some decisions might be costly to reverse or even intrinsically irreversible; and institutions might sensibly restrict submajority rules to that class of issues. We have seen that, as an empirical regularity, submajority rules often permit minorities to throw information into the public domain, by requiring roll-call votes that may be witnessed by spectators and later published in the legislative journals, by calling witnesses at committee hearings who will

[84] Binder, supra note ---, at 149 n.28.

submit facts or arguments that undermine the majority's preferred narrative, or by extracting documents or information from the executive. If there is a deep connection between submajority rules and information, the key to explaining it is that decisions about information are in some cases intrinsically irreversible.

The basic asymmetry arises when a decision to reveal information today precludes a decision to conceal the same information tomorrow. Once published, perhaps by a submajoritarian decision, the information circulates beyond the power of subsequent majorities to suppress, whether or not they possess legal authority to do so. This is a familiar idea in macrolevel political theory. Tom Paine mocked Burke's futile attempt to check the spread of popular enlightenment: "Ignorance is of a peculiar nature; once dispelled, it is impossible to re-establish it." This is the "irreversibility thesis"[85]: once the veils have been ripped away from obscurantist traditionalism, they can never be restored. The same mechanism operates at the microlevel of institutional design. Once the opposing witnesses have been heard in public session, or their testimony placed in the record; once the executive branch has been forced to divulge information to committee minorities; once the roll-call votes have been published in the newspapers; what is there for subsequent majorities to reverse? The general account, then, is that submajority rules often apply to decisions about information simply because natural asymmetries between decisional alternatives make the reversal problem less significant in these settings.

## IV. Conclusion

Submajority rules exist; they have, in some circumstances and at some cost, attractive normative properties; and they are not fatally enfeebled by the instability arising from the

[85] Don Herzog, POISONING THE MINDS OF THE LOWER ORDERS 86 (1998).

threat of later majoritarian reversals. Legal and political theory has obsessed over supermajority rules while dismissing their submajority reciprocals, or competitors, due to a widespread assumption that one or more of the foregoing claims must be false. Yet submajority rules appear to be a useful, and frequently-used, tool for institutional designers. Such rules entail both costs and benefits, and are on net appropriate only in special settings; but they ought not be entirely neglected.

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