

2003

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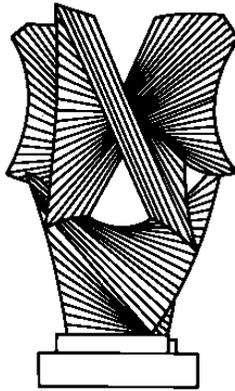
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Adrian Vermeule, "The Constitutional Law of Congressional Procedure" (University of Chicago Public Law & Legal Theory Working Paper No. 39, 2003).

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CHICAGO

PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 39



THE CONSTITUTIONAL LAW OF CONGRESSIONAL PROCEDURE

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THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

February 2003

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THE CONSTITUTIONAL LAW OF CONGRESSIONAL PROCEDURE

Adrian Vermeule*

The federal constitution contains a set of rules that I will describe as the *constitutional law of congressional procedure*. These are rules that directly regulate the internal decisionmaking procedures of Congress;¹ absent specific constitutional provision, they would be subject to the authority of each House to “determine the Rules of its Proceedings.”² The constitutional law of congressional procedure thus encompasses the long catalogue of procedural provisions in Article I, §4–5, which includes rules for assembling the legislature, selecting its officers, and disciplining its members; voting and quorum rules; rules governing the transparency of deliberation and voting; and a range of other provisions. It also encompasses other important rules scattered elsewhere in Articles I and II, such as the Origination Clause,³ special quorum rules for supermajority voting,⁴ and the special procedures for overriding a presidential veto.⁵ But I shall exclude questions about the structure and composition of the legislature—questions such as the choice between bicameralism and unicameralism, or the standing qualifications for federal legislative office. Drawing this boundary around the topic has both methodological and substantive justifications. Methodologically, it is impossible to talk fruitfully about the design of constitutional rules if everything is up for grabs all at once; there must be fixed points from which the analysis may proceed. Substantively, the composition and structure of Congress fall outside the Houses’ internal rulemaking powers, so they do not bear directly on the Constitution’s choice to prescribe some procedural rules while leaving others to legislative discretion.

The constitutional law of congressional procedure has rarely been analyzed as an integrated body of rules,⁶ largely because of historical quirks in the relevant sectors of political science and constitutional law. Political science has made the crucial point that Congress’ internal procedures are at least as important a determinant of policy outcomes and of the quality of legislative deliberation as are electoral rules, substantive legislative

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¹ The qualifier serves to exclude provisions that incidentally affect congressional procedure as a byproduct of other aims, as when the constitutional right of free speech is interpreted to restrict the scope of congressional investigations. *See, e.g.,* *Watkins v. U.S.*, 354 U.S. 178 (1957).

² U.S. CONST., art. I, § 5, cl. 2.

³ U.S. CONST., art. I, § 7, cl. 1.

⁴ U.S. CONST., art. II, § 1, cl. 3.

⁵ U.S. CONST., art I, § 7, cl. 2-3.

⁶ Specific topics discussed in the literature include voting rules, especially supermajority rules, see John O. McGinnis and Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002). There is also a strain of public-law scholarship concerned with “due process of lawmaking,” see, e.g. Hans Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976). This work, however, unfortunately tends to entangle itself in questions about how courts should conduct judicial review, and whether such review might be used to improve congressional performance. See, e.g., William W. Buzbee and Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87 (2001). My project here is to move decisively away from this court-centered discourse, instead analyzing the subject from the standpoint of constitutional design.

powers, and other subjects studied exhaustively by constitutional lawyers.⁷ The central tendency in recent political scholarship on Congress, however, has been to assume that all legislative procedure is endogenous, subject to alteration by sufficiently determined legislative majorities wielding internal rulemaking power.⁸ Against this picture, I will emphasize the rich and varied body of internal legislative rules that the Constitution prescribes directly, rather than delegating to future legislatures. The interaction between these rules and the endogenously-chosen rules studied by political scientists makes the constitutional design of the legislative process an essential topic in politics. Legal scholarship, on the other hand, has neglected internal legislative rules altogether, with honorable exceptions.⁹ Here the political scientists' emphasis on the importance of legislative procedure is a valuable corrective, one that I shall adopt and expand.

So my project is to examine this body of rules as a unified topic that is central to the constitutional design of legislative power. The project is neither positive nor radically normative, but instead instrumental and prescriptive. I shall ask whether and how the Constitution's rules of congressional procedure might be structured to promote a congeries of widely-shared aims: the relevant rules should, among other things, promote congressional deliberation that is well-informed and cognitively undistorted, minimize the principal-agent problems inherent in legislative representation, and encourage technically efficient use of constrained legislative resources, especially time. As we shall see, these aims were in large part also the framers' aims, or at least their professed ones. But the means that the framers chose to attain these aims, and the tradeoffs they struck, however enlightened or technically impressive at the time, have in some respects come to seem obsolete in light of the subsequent two centuries' worth of theoretical developments, experimentation and innovation in other jurisdictions. This is not to say, however, that the framers' views are irrelevant to the instrumental project of

⁷ See Gary W. Cox, *On the Effects of Legislative Rules*, in Gerhard Loewenberg et al., *LEGISLATURES: COMPARATIVE PERSPECTIVES ON REPRESENTATIVE ASSEMBLIES* 251-63 (2002).

⁸ See, e.g., David Epstein and Sharyn O'Halloran, *DELEGATING POWERS: A TRANSACTION-COST POLITICS APPROACH TO POLICYMAKING UNDER SEPARATE POWERS* 164 (1999) (treating "legislative organization" and "the types of procedures invoked in passing legislation" as products of "collective choice"); Keith Krehbiel, *INFORMATION AND LEGISLATIVE ORGANIZATION* 77-79 (1992) (treating the legislature's membership as exogenously fixed, but treating "organizational design" as an endogenous product of legislative choice); 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) (treating "legislative institutions" as endogenous products of legislators' goals and transaction costs). For important exceptions, see, e.g., Cox, *supra* note ---, at 248-49 (distinguishing rules exogenously fixed by the Constitution from endogenous rule subject to congressional alteration); John Ferejohn, *Accountability and Authority: Toward a Theory of Political Accountability*, *DEMOCRACY, ACCOUNTABILITY, AND REPRESENTATION*, Adam Przeworski, Susan C. Stokes, and Bernard Manin eds (1999) (analyzing the Journal Clause in light of principal-agent models); *infra* note --- (formal models of the Origination Clause). A great deal of formal modeling in political science takes various legislative procedures as exogenously fixed, but this is strictly a methodological move that reduces the scope of the relevant models in the interests of mathematical tractability. Such work typically pays no attention to the difference between (1) modeling stipulations that particular procedural rules are exogenously fixed and (2) fixation by virtue of constitutional command.

⁹ See, e.g., Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 *HARV. J. LEGIS.* 387 (1998). For links between legislative procedure and congressional constitutional interpretation, see Elizabeth Garrett and Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 *DUKE L.J.* 1277 (2001).

constitutional design and reform; far from it. If we wish to evaluate and improve the constitutional design in this area or any other, the ideas, arguments and pragmatic solutions that our own constitutional designers developed are a rich source of useful information, one that I will draw upon throughout.

I shall also draw upon two bodies of material that are typically neglected in modern treatments. The first is a rich utilitarian tradition of theorizing about the optimal design of legislative procedures, especially Bentham's great monograph.¹⁰ The second is comparative constitutional law, including state and foreign constitutions that contain a wealth of design possibilities and ingenious rules for minimizing legislative pathologies. To be sure, these sources of information and instrumental analysis often do not generate sharp deductive arguments with confident conclusions. There are too many design possibilities, too many margins on which tradeoffs must be made, and the fog of empirical uncertainty is too thick. The payoff, rather, is a horizontal study that links related design problems, analyzes their interaction, and supports plausible recommendations for improvement.

Part I surveys the methodological problems that constitutional framers designing legislative procedures must confront. One key problem is whether rules on particular subjects should be promulgated in the Constitution itself, or should instead be committed to the discretion of future congresses through a general grant of rulemaking power. Constitutional framers may, and our framers did, make this decision on any of several different grounds, including the idea that the Constitution should provide rules on subjects that a legislature is logically incapable of deciding for itself (such as the time of its first assembling); the more pragmatic idea that the framers should choose the rules on subjects as to which they possess a comparative advantage, cognitive or motivational, over later legislators; and, most pragmatic of all, the need to ensure that the proposed Constitution would be politically acceptable to ratifiers and the people. Another problem is the opposite of the preceding one: given a decision to proceed through constitutional rules rather than by delegation to future legislatures, and given the constraints of severely limited time, information, and political capital under which constitutional framers operate, how should the framers choose the content of the rules? Here a major problem is whether framers should simply copy or adopt provisions from the constitutions of other jurisdictions, without independent inquiry into the provisions' underlying mechanisms and political rationales, or should instead attempt a thoroughly independent inquiry into optimal design. Both of these polar views, as well as intermediate views of greater or lesser coherence, were represented at the federal constitutional convention.

Part II turns from method to substance. After introducing the major analytic themes, I shall consider in turn the timing of congressional sessions, the admission and expulsion of legislators, the selection of legislative officers, voting and quorum rules, the publicity or transparency of legislative deliberation and voting, the rule barring the Senate from originating revenue bills, and the question whether Congress may enact binding statutes that prescribe internal rules for the two Houses taken separately. I will also consider provisions that are surprisingly absent from the federal constitution—rules

¹⁰ Jeremy Bentham, *POLITICAL TACTICS*, Michael James, Cyprian Blamires, and Catherine Pease-Watkin eds. (1999).

of legislative procedure that appear in state and foreign constitutions, and whose absence from our own itself poses interesting puzzles. Examples are rules requiring three readings before a bill may be enacted, and rules that bar the introduction or enactment of bills at the close of the legislative session. Throughout Part II, the aim is to identify design defects, to evaluate valuable alternatives and innovations found in state and foreign constitutions, and to propose interpretive choices or constitutional reforms that might improve the constitutional law of congressional procedure.

I. DESIGNING CONGRESSIONAL PROCEDURES

In this Part I will examine the design of constitutional rules of legislative procedure, with a view to the methodological problems that the framers encountered and debated. In I.A. the question is why any rules of congressional procedure should be constitutionalized; why not simply leave all internal procedures to the discretion of future legislatures? I.B. poses the next question: given a decision to constitutionalize a rule or set of rules on a given subject, how should constitutional framers choose the content of those rules—by imitation of other constitutions, by independent ratiocination about optimal design, or by some mix of these strategies?

A. *Why Constitutionalize Congressional Procedure?*

An initial puzzle is why any rules of congressional procedure should be constitutionalized. Constitutions almost invariably grant some measure of discretionary power over internal rules to the legislatures created by the constitution. The federal constitution's Rules of Proceedings Clause,¹¹ which gives each House separately the power to enact internal procedural rules,¹² is, in effect, a delegation of rule-designing authority from constitutional framers in the initial period to legislators at subsequent periods. Given the baseline established by this constitutional delegation, the puzzle is why framers might want to select some rules to be elevated to a higher status in the legal hierarchy, and so made immune from alteration by ordinary legislative rulemaking.

At some risk of false precision, we can identify three (classes of) reasons to constitutionalize rules of legislative procedure. First, some procedural rules are logically impossible for a future legislature to create, at least as an initial matter; consider the question of where and when the legislature shall initially convene, a question that the legislature could not resolve without convening. Constitutionalizing such rules can eliminate the need for the future legislature to pull itself up by its own bootstraps¹³ and resolves coordination problems. Second, there are rules that a future legislature has the capacity to create, but as to which the framers have, or believe themselves to have, a comparative advantage over the future legislators who would otherwise choose the rule; the framers' (perceived) comparative advantage might stem from superior information, cognition or motivation. Finally, constitutionalizing some rules of legislative procedure may for political reasons improve the new constitution's chances of ratification, by

¹¹ U.S. CONST., art. I, § 5, cl. 2.

¹² On the question whether a statute can override the internal rules of each house, see *infra* II.G.

¹³ This is an idea of Jon Elster's, developed from his analysis of constitutional conventions. See Jon Elster, *Constitutional Bootstrapping in Paris and Philadelphia*, 14 CARDOZO L. REV. 549 (1993). My argument is that there is a parallel problem for the legislatures created by the constitutional convention.

accommodating the preferences of the ratifying legislatures or conventions. It is tempting to think that this reason is in a sense disreputable compared the first two, but the question whether framers should consider or ignore the political acceptability of their proposals turns out to be complicated; it is not at all clear that downstream ratifiers of the framers' proposed constitution are better off if framers make no effort to anticipate the ratifiers' political preferences.

Bootstrapping and coordination problems. Institutions are systems of rules. Where, as is often the case, an institution also possesses the second-order authority to make rules governing its own action, the question arises by what rules those second-order rules will themselves be determined. If the initial question, for example, is whether the institution's members will proceed by simple majority vote, an infinite regress threatens: is the first-order decision itself to be made by majority vote, or under some other voting rule? And what voting rule is to be used to make the second-order decision? Absent some higher source of law that blocks the regress, the conceptual problem is insoluble.

More precisely, the conceptual problem is insoluble in conceptual terms, but there are crudely pragmatic solutions. Faced with a regress problem, one expedient is for institutions to simply bootstrap themselves into existence. An example is the Philadelphia convention itself: because no outside institution had specified the voting rules the delegates would use, the delegates simply decided to proceed by simple majority vote (of state delegations, not of individuals). No delegate is on record as opposing this decision, probably because voting by simple majorities was standard practice in Parliament and contemporaneous state legislatures; the framers' decision to mandate supermajority rules in many settings in the new Constitution was, in the late 18th century, innovative constitutional design. In this example, bootstrapping succeeded because the underlying decision was not itself contentious.¹⁴ Although the convention's decision lacked coherent conceptual foundations, in fine pragmatic style the decision worked even without coherent foundations.

Bootstrapping of this sort, however, can only work when the members of the institution are already assembled. In addition to the infinite regress problem, a new institution may also face a coordination problem in convening at all. Consider the question when the first congress elected under the new federal constitution should convene—a decision that the new Congress itself could not possibly make. A pragmatic solution to this sort of problem is for an institution under the previous, outgoing constitution to specify a focal point on which the new legislature can co-ordinate. Thus the outgoing Confederation Congress specified that the new Congress would meet on March 4, 1789—a decision of dubious legality, given that the Confederation Congress lacked any obvious authority to make it, but also a decision that went unquestioned in practice.

¹⁴ The larger point is just that internal rules for deliberative bodies (constitutional conventions or legislatures) are never chosen in an historical and institutional vacuum. They are always chosen against the background, not only of exogenous constraints (constitutional or political), but also of previous rules, traditions and practices. For an argument to this effect in the congressional setting, see S.A. Binder, *Minority Rights, Majority Rule: Partisanship and the Development of Congress* (1997).

So regress problems and coordination problems are not fatal in practical terms. This does not mean, however, that constitutional framers should ignore them. That an institution has bootstrapped itself into existence, either in whole or in part, may provide future opponents or critics with grounds to question the institution's legitimacy. So constitutional framers may wish to provide rules that obviate the need for new legislatures, convened under the new constitution, to bootstrap rules into place. Likewise, constitutional framers may easily resolve coordination problems by supplying constitutionally-established focal points, which the new legislature may alter once the machinery of lawmaking is up and running.

These concerns were much in evidence at the Philadelphia convention; in particular, they animated the Convention's decision to adopt the provision that "The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."¹⁵ One coordination problem here involves the timing of the first meeting of the new Congress. As John Randolph put it, "some precise time must be fixed, until the Legislature shall make provision."¹⁶ A second and distinct coordination problem involved the question whether the Congress should meet at all in any given year. Unlike the first problem, this question applied not only to the initial meeting of the new Congress but to every subsequent meeting, because some of the convention delegates suggested that the legislature could meet episodically, only when the public business required it. A political line of response to this argument was that regular meetings of the legislature should be mandated to provide a check on the executive branch.¹⁷ A different, and devastating, response was given by Oliver Ellsworth: "The Legislature will not know until they are met whether the public interest required their meeting or not."¹⁸

The Convention, however, failed to anticipate other bootstrapping and coordination problems that afflicted the First Congress. One example involved the initial formation of a legislative quorum. Article I provides that "a Majority of each [House] shall constitute a Quorum to do business; but a smaller Number may adjourn from day to day, and may be authorized [i.e. by the rules of either House] to compel the Attendance of absent Members"¹⁹ The second clause was inserted to ensure that the absence of a quorum would not prevent either House from compelling the attendance of absentees. But the framers failed to anticipate that the *initial* convening of Congress might fail for lack of a quorum, as in fact it did in both the House and Senate. In those circumstances the provision for compelling absentees could not be invoked, since neither House had ever met to provide compulsion authority to a number smaller than the required quorum. In the event the House soon attained a quorum, but the Senate limped along, sending

¹⁵ The date specified in this provision has been superseded by the 20th Amendment, which provides that "The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day." U.S. CONST. Amdt. XX.

¹⁶ 2 THE FOUNDER'S CONSTITUTION, Philip B. Kurland and Ralph Lerner eds. 283 (1985). The date supplied in Article I would have fallen in December 1789, thus contradicting the date (March 4, 1789) supplied by the Confederation Congress -- another reason to question the legality of the latter provision.

¹⁷ 2 THE FOUNDER'S CONSTITUTION, *supra* note --- at 283.

¹⁸ 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, Max Farrand ed. 198 (1966).

¹⁹ U.S. CONST., art. I, § 5.

stern but toothless letters to absent members, until it finally convened on April 6, 1789, over a month after the assembly date.

Another, far more consequential example is the one with which we began: the framers failed clearly to specify the voting rules that would govern the new legislature. Although the framers specified supermajority rules to govern particular decisions, they failed to specify whether simple majority voting was a mandatory default rule in areas not governed by a supermajority provision, or instead whether the internal rules of each House may require supermajorities for particular decisions. In the latter case, the infinite regress problem reappears: why should the decision to institute a supermajority requirement in a particular area not itself be required to be made by supermajority? The Congress, however, like the Convention before it, has ignored the conceptual conundrum by assuming that simple majority voting is always the default setting, even for rules creating supermajority requirements.

Comparative advantage. Another ground for constitutionalizing rules of congressional procedure is that constitutional framers have some form of comparative advantage over later legislators in designing those rules. The framers' comparative advantage might take any of several forms: *informational, cognitive, or motivational*. The framers, that is, might possess superior information relevant to the design problem, might enjoy freedom from various cognitive quirks or disabilities that afflict the work of later legislators, or might act from public-spirited reasons where later legislators will act on the basis of rational self-interest or irrational passions.

For two reasons, however, the possibility that framers will possess informational advantages over later legislators seems quite implausible. The first reason is Bentham's view that later generations always possess an informational advantage over earlier ones,²⁰ simply by virtue of knowing what has transpired since the earlier generation left the scene. Conversely, a stock theme of constitutional choice is that framers act behind a "veil of ignorance," more precisely a veil of uncertainty, that forces them to act impartially.²¹ The cost of this relative impartiality, though, is that the framers act in ignorance of post-enactment developments that might provide useful information in the choice of legislative procedures.²² The second reason is the relatively larger size of later Congresses as compared to the Convention. As Madison argued, increasing the number of legislators increases the legislature's stock of political information.²³ This second reason is specific to the American experience; it does not hold where, as in some nations, the constituent assembly that designs the constitution also functions as an ordinary legislature under the constitution.

²⁰ Jeremy Bentham, *HANDBOOK OF POLITICAL FALLACIES*, Harold A. Larrabee, ed. (1962).

²¹ Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 *YALE L.J.* 399 (2001).

²² On the general tradeoff between information and impartiality, see Saul Levmore, *Efficiency and Conspiracy: Conflicts of Interest, Anti-Nepotism Rules, and Separation Strategies*, 66 *FORDHAM L. REV.* 2099 (1998). On the connections between partisan activity and legislative procedure, see Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-In-Government*, 100 *COLUM. L. REV.* 702 (2000).

²³ The Federalist Papers, No. 55.

Perhaps for these reasons, no one at the Philadelphia convention suggested that the framers' information would be superior to that of later Congresses. At most they suggested that the framers' information was equally good, and then only with respect to the sort of coordinating rules that can equally well be settled one way or the other, so long as they are settled. Thus Oliver Ellsworth argued that the Convention might as well fix the date on which the Congress should annually convene, because "the Convention could judge of it as well as the legislature."²⁴ In such cases, the whole point is that the content of the rule is secondary to the sheer coordination benefit of choosing a rule, so that the informational advantage of later legislators is irrelevant to the design problem.

The framers did frequently suggest, however, that they possessed cognitive and motivational advantages over later legislators. In the contemporary terminology the framers assumed that future legislators would act on the basis of "interests" and "passions" that would skew their judgment of the public good or cause them knowingly to act against the public good for private benefit. And these cognitive and motivational deficiencies would be exacerbated by legislators' tendency to clump into "factions". An example involves the question whether future legislators should be allowed to expel by a simple majority or only by a supermajority. Madison argued for the latter position on the ground that "the right of expulsion was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused."²⁵ Gouverneur Morris opposed this, although with an argument that shared Madison's premise: "This power [of expulsion] may be safely trusted to a majority. To require more may produce abuses on the side of the minority. A few men from factious motives may keep in a member who ought to be expelled."²⁶ The disagreement here is over the expected frequency and gravity of false positives (expulsion of a member who should not be expelled) and false negatives (the failure to expel a member who should be expelled). Madison's supermajority position seeks to minimize false positives, while Morris' position in favor of a simple majority requirement seeks to minimize false negatives. Both views, however, share the assumption that the respective errors will occur because legislators act on private-regarding or factional motivations.

The example is typical of the debates in an important respect. The convention participants rarely questioned the assumption of comparative cognitive and motivational advantage. Rather, the most frequently heard grounds for opposing the constitutionalization of legislative procedures were that the collateral costs of some proposed safeguard would outweigh the benefits, or that other institutional structures and procedures that the framers had adopted rendered unnecessary the additional safeguard of constitutionalizing legislative procedures. Gouverneur Morris' argument above is an example of the former claim.

An important example of the latter claim involved the debates over the Journal Clause. Many participants desired to constitutionalize some version of a requirement that Congress publicize its deliberations and votes. Although the framers were sensitive to the potential for transparency to distort deliberation—the convention itself deliberated and

²⁴ 2 Kurland, *supra* note --- at 283.

²⁵ 2 Farrand, *supra* note --- at 254.

²⁶ *Id.*

voted secretly, partly in order to allow participants to change their minds without incurring a reputational penalty in the nation at large²⁷—many delegates believed that future legislators could not be trusted to weigh the costs and benefits of transparency in public-regarding fashion.²⁸ As George Mason summarized the point (at the Virginia ratifying convention, although similar arguments were made at Philadelphia), “[the legislators] may conceal what they please. Instead of giving information, they will produce suspicion. You cannot discover the advocates of their iniquitous acts.”²⁹

Against this view, however, was the claim that regular elections would force legislators to publicize their actions. As Ellsworth put it, “The Legislature will not fail to publish their proceedings from time to time—The people will not fail to call for it if it should be improperly omitted.”³⁰ The precise electoral mechanism that Ellsworth envisioned here is unclear. One possibility is that voters demand transparency because it reduces the costs of monitoring their elected agents. Legislators competing against each other and against potential candidates for the voters’ confidence might be responsive to that demand even if each legislator would prefer less transparency than voters would. Here secrecy might be viewed, from the standpoint of the whole group of legislators, as an unattainable public good. If all legislative action were secret, no particular legislator could be blamed for the practice. But if each legislator has the option to disclose deliberations or votes, and if such disclosures are verifiable when made, then legislators may defect from the cooperative behavior of secrecy-maintenance in order to better their position vis-à-vis other legislators or potential challengers, even if all legislators would be better off with secrecy.

To be sure, this mechanism assumes that voters care about transparency. Voters might simply use decision rules that are entirely insensitive to legislative procedures. Consider the idea that voters vote retrospectively in a simpleminded fashion, asking whether or not their personal economic position is better (in absolute or relative terms) at the time of election than it was at the time of the previous election.³¹ We will see below, however, that a principal-agent model, representing legislators as agents who offer ever-greater transparency to compete for the favor of voter-principals, captures useful truths about both the Journal Clause and about subsequent developments in congressional procedure.³² Whatever the details of the implicit model, however, Ellsworth’s argument supposes that constitutionalizing a transparency requirement is unnecessary, given that the institutional safeguard of regular elections is already in place.

Political acceptability. A final ground for constitutionalizing procedural rules was often invoked in the convention debates: the idea that some rules were indispensable to ensuring that the proposed constitution would be politically acceptable to the ratifiers, or to the people generally. This theme was especially prominent in the debates over the

²⁷ See *infra* note ---

²⁸ 2 Kurland, *supra* note --- at 290-91.

²⁹ 2 Kurland, *supra* note --- at 293.

³⁰ 2 Farrand, *supra* note --- at 260.

³¹ For an overview of the large literature on retrospective voting, see D. Roderick Kiewiet; Douglas Rivers, *A Retrospective on Retrospective Voting*, 6 POLITICAL BEHAVIOR 369 (1984).

³² See Ferejohn, *supra* note ---

Journal Clause and the Origination Clause. As to the former, James Wilson argued that, apart from the merits of the Clause, “as this is a clause in the existing [articles of] confederation, the not retaining it would furnish the adversaries of the reform with a pretext by which weak & suspicious minds may be easily misled.”³³ As to the latter, Gerry argued that the people “will not agree that any but their immediate representatives [i.e. in the House of Representatives] shall meddle with their purses. In short the acceptance of the plan will inevitably fail, if the Senate be not restrained from originating Money bills.”³⁴ This external political constraint should be distinguished from a different political constraint internal to the convention: the need to ensure that the proposed draft was politically acceptable to a majority of the state delegations. Obviously there are close linkages between the two constraints, because delegates might, and frequently did, shape their internal positions by anticipating the reactions and preferences of downstream ratifiers.

A tempting reaction to the external constraint is that it is undesirable for constitutional framers to consider the political preferences of downstream ratifiers. After all, if the framers’ politics-independent view of optimal design is correct, then to modify that design on political grounds is to propose a suboptimal constitution. Many of the framers saw their own political predictions in this light; they believed that the ratifiers’ or, especially, the people’s political preferences derived from irrational fears of aristocratic conspiracy, fears that opponents of the new constitution could exploit. This is the thrust of Wilson’s reference to “weak & suspicious minds [who] may be easily misled,”³⁵ and of John Dickinson’s argument, in the debates over the Origination Clause, that

all the prejudices of the people would be offended by refusing this exclusive privilege to the [House of Representatives] and these prejudices [should] never be disregarded by us when no essential purpose was to be served. When this plan goes forth, it will be attacked by the popular leaders. Aristocracy will be the watchword; the Shibboleth among its adversaries.³⁶

Dickinson’s argument, like Wilson’s, assumes that the framers possess privileged insight into optimal constitutional design. The argument that the framers should ignore political considerations is not, however, dependent upon this assumption. Whether or not the framers’ independent view of optimal design is correct, the ratifiers might believe that the best division of labor is for the framers to leave all political considerations to the ratifiers themselves, just as a legislator might desire staff technocrats to consider only matters of optimal policy design, leaving considerations of political acceptability to the expertise of professional politicians. This point is all the stronger if ratifiers’ political preferences can themselves be shaped, at least in part, by the framers’ proposals. In that case, the framers’ attempt to anticipate the ratifiers’ preferences is an unnecessary enterprise, for those preferences will be, in whole or in part, a product of the framers’ actions, rather than a constraint on their actions.

³³ 2 Farrand, *supra* note --- at 260.

³⁴ *Id.* at 275.

³⁵ *Id.* at 260.

³⁶ *Id.* at 278.

Yet there are also public-spirited reasons for constitutional framers to consider politics, and even for ratifiers to consider themselves better off if framers do so. The circumstances under which constitution-making typically occurs entail that the framers' relationship to ratifiers is fundamentally unlike the relationship of policy analysts to decisionmakers. Constitutional framing typically occurs under conditions of perceived political crisis, given the breakdown of the old constitutional order, and under a constraint of urgency, given the need to coordinate upon a new constitutional order. If framing and ratification must be completed under severe time constraints, ratifiers will be better off if framers attempt to anticipate their political preferences. The option to reject an initial, politically insensitive proposal and to send the framers back to the drawing board will often be practically infeasible. In these circumstances ratifiers will be worse off if they are constrained to accept a proposal that is marginally better than total failure of the constitution-making process, yet worse than any of the potential designs that take their preferences into account.

B. *Reason or Experience?*

Given a decision to constitutionalize rules of legislative procedure, another critical methodological question for constitutional designers is whether to adopt rules from other jurisdictions without independent inquiry into their institutional and political rationales, or instead to attempt a thoroughly independent assessment of optimal design, including sophisticated predictions about the interaction effects between provisions. In the framers' philosophical argot, this was the opposition between "reason" and "experience": the defining difference turns on whether the proponent who urges adoption of a particular rule conducts a full independent inquiry into the institutional and political mechanisms that cause the rule to produce the hoped-for effects, or instead eschews a full understanding of the relevant political forces. The latter approach amounts to a deliberate policy of adoption; the only question the adopter asks is whether the rule at issue has proven "workable," in some roughly pragmatic sense, in the polity from whose constitution it is to be adopted.

The convention debates over provide the Origination Clause provide many examples of both approaches, because the principal argument for the clause was that the delegates should imitate the firm rule of English law that money bills could only be originated in the House of Commons. As for ambitiously rationalist constitutional design, an example is Madison's initial sally against adopting the clause:

Mr. Madison observed that the Commentators on the [British constitution] had not yet agreed on the reason of the restriction on the [House of Lords] in money bills. *Certain it was there could be no similar reason in the case before us.* The senate would be the representatives of the people as well as the 1st branch [the House of Representatives]. If they [should] have any dangerous influence over it, they would easily prevail on some member of the latter to originate the bill they wished to be passed.³⁷

³⁷ 1 RECORDS OF THE FEDERAL CONVENTION OF 1787, Max Farrand ed. 233 (1966).

By contrast, a particularly pure example of the experiential, antirationalist stance is John Dickinson's famous speech urging the Philadelphia delegates to adopt the clause:

Experience must be our only guide. Reason may mislead us. It was not Reason that discovered the singular & admirable mechanism of the English Constitution. It was not Reason that discovered or ever could have discovered the odd & in the eye of those who are governed by reason, the absurd mode of trial by Jury. Accidents probably produced these discoveries, and experience has give[n] a sanction to them. This then is our guide. And has not experience verified the utility of restraining money bills to the immediate representatives of the people. *Whence the effect may have proceeded he could not say*; whether from the respect with which this privilege inspired the other branches of Govt. to the H[ouse] of Commons, or from the turn of thinking it gave to the people at large with regard to their rights, *but the effect was visible and could not be doubted.*³⁸

The choice between independent inquiry ("reason") and adoption ("experience") superficially resembles the standard distinction, in the literature on comparative constitutionalism, between interjurisdictional borrowing or copying, on the one hand, and innovation, on the other. The two distinctions, however, are merely overlapping, not coterminous. The rationalist and optimizing constitutional designer may "borrow" from other jurisdictions in the sense that he consults other jurisdictions' constitutions to obtain ideas and possibilities; the designer then treats those ideas as candidate options within the design space, to be assessed against other candidates in the optimizing calculus. Note also that adoption may draw upon unwritten as well as written constitutions, so long as the content of unwritten practices is sufficiently clear. Many American framers urged adoption of the unwritten practices of English constitutionalism, as in Dickinson's argument. It was also true, contrary to a common assumption, that the framers had many written constitutions on which to draw. Circulating compilations of written state constitutions, the Articles of Confederation, and important treaties provided models on which the framers drew, as did the history of the classical and early modern European polities.

What then is the best strategy for constitutional framers? At first blush, the circumstances of constitution-making would seem to entail that framers should mix imitation and innovation in eclectic proportions, not susceptible to general theorizing or extreme solutions in either direction. Constitutions, as we have seen, are typically designed under conditions of political crisis and urgency. To these we may add two factors: that the large-scale and long-term consequences of the choice of constitutional rules are exceedingly difficult to predict,³⁹ and that constitutional framers are properly risk-averse, designing institutions to minimize the downside risks of political and social disasters rather than to maximize the upside gain from political association.⁴⁰ These

³⁸ 2 Farrand, *supra* note --- at 278.

³⁹ Jon Elster, *Constitutional Choice: Reflections on Tocqueville*, CONSTITUTIONALISM AND DEMOCRACY, Jon Elster and Rune Slagstad eds. 81-102 (1988).

⁴⁰ See Seth Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PENN. J. CONST. LAW 640, 642 (1999) ("The American Constitution is, in many

factors militate in favor of imitation. Militating in favor of innovation, however, is the typical idea that provisions or rules adopted from other jurisdictions will prove maladapted to the local circumstances of the adopting jurisdiction. At the convention, Rutledge criticized the origination clauses in the state constitutions as “put in through a blind adherence to the British model. If the work was to be done over now, they would be omitted.”⁴¹ A complementary claim is that adapted provisions will fail to take root; only constitutions or provisions that are in some sense organic or indigenous will prove stable in the long term.

The optimum, then, would seem to be the banality that constitutional framers should imitate where appropriate to local circumstances. We may add a modicum of content to this conclusion in two ways. First, where many jurisdictions have converged on similar constitutional design(s), imitation is more prudent and less costly than innovation. The consensus across jurisdictions suggests that different polities have converged on a real constitutional optimum, one dictated by real institutional forces.⁴² Although in principle the consensus might also rest simply on an opinion cascade or herding effect,⁴³ in which a suboptimal rule is widely adopted simply because jurisdictions lacking information imitate others whom they (erroneously) take to have better insight, the cascade may, of course, also produce convergence on the optimal rule, so the risks of deviating from a widespread consensus are generally higher than the risks of copying it. Second, framers should distinguish between rules whose principal virtue is settlement of a question that can equally well be settled one way or the other, on the one hand, and rules whose content is independently significant, on the other. The former are better candidates for adoption, since the bare inquiry into stability or workability answers the only question that needs to be asked about provisions whose content is of secondary importance.

Even with these supplemental points, it is very hard to say anything in the abstract about the optimal mix of rationalist design versus adoption. Against this theoretically pessimistic conclusion, however, is an important dynamic that renders the mixed approach unstable, thereby pressing constitutional framers towards the extremes of global imitation or global innovation. An illustration of this dynamic appears in the debates over the Origination Clause. Gouverneur Morris argued that “We should either take the British Constitution altogether or make one for ourselves.”⁴⁴ As a normative matter, as we have seen, Morris’ position seems questionable. Yet we may reinterpret Morris’ point as a positive claim about the choices available to constitutional designers: for two reasons, the intermediate position that mixes reason with experience, independent evaluation with

dimensions, not an effort designed to achieve the best that government can offer. It is, rather, an attempt to avoid the worst, an attempt keyed to the peculiar pathologies that have been shown to be likely to afflict American democracy”).

⁴¹ 2 Farrand, *supra* note --- at 279.

⁴² See generally Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TULANE L. REV. 235 (1986).

⁴³ For an overview of information cascades and rational herding, see generally Abhijit V. Banerjee, A Simple Model of Herd Behavior, 107 Q. J. Econ. 797 (1992); Sushil Bikhchandani, David Hirshleifer, & Ivo Welch, A Theory of Fads, Fashion, Custom, and Cultural Change as Informational, Cascades, 100 J. Pol. Econ. 992 (1992).

⁴⁴ 1 Farrand, *supra* note --- at 545.

adoption, may prove infeasible. First, where the designers may draw upon the experience of multiple jurisdictions whose provisions on similar topics conflict with one another, the appeal to experience is indeterminate; some reason, other than workability, must be given for adopting one or the other approach. Second, to propose *partial* modifications of other jurisdictions' rules on rationalist grounds is an incoherent stance: if the designer can describe and predict the political mechanisms that make the modification valuable, including the interaction effects of the modification with the unmodified rules and with other provisions, then the designer necessarily possesses the capacity to conduct an independent evaluation of the unmodified provisions as well.

An example of the instability of the mixed approach is the very setting in which Morris' argument was made. The provocation was an important internal tension in Dickinson's position. The English practice was that money bills could originate only in the Commons and could not be amended by the Lords. Of the eight states that adopted origination restrictions, however, most allowed the nonoriginating branch to amend bills.⁴⁵ "This he [Dickinson] thought it would be proper for us to do."⁴⁶ The first problem here is that of indeterminacy: why should the modified state provisions on origination allowing amendments, rather than the unmodified package of English practices that barred amendment, provide the reference for the argument from experience? The second problem is the incoherence of partial modification: if the effects of conferring the power of amendment upon the upper branch can be assessed on nonexperiential grounds, why cannot the baseline origination provision be assessed on the same grounds? On this view, the normatively attractive approach is to mix reason and experience in a particularistic manner guided by situation-sense, yet the instability of that intermediate stance will tend to push constitutional framers to the extremes of wholesale redesign or wholesale imitation. It is unclear, in the abstract, how these opposing tendencies will net out in particular constitution-making episodes, but the federal convention in the end moved well towards the extreme of wholesale redesign. Compared to the existing models in England and the states, the federal constitution is strikingly original in important respects, most famously in the division of powers between federal and state governments and in the complex rules that parcel lawmaking power between a bicameral legislature and an independently-elected executive.

II. THE SUBSTANCE OF CONSTITUTIONAL CONGRESSIONAL PROCEDURE

Part I examined the methodological problems facing the framers in deciding whether to constitutionalize rules of congressional procedure and in choosing the content of the relevant rules. This Part examines the substance of the rules that the framers adopted, as well as rules that they might have adopted but did not, where the failure to do so itself illuminates the constitutional-design questions. II.A. outlines the scope and limits of the enterprise, while II.B. introduces a few major substantive themes of the analysis. II.C. examines, in turn, the rules that determine when and by whom the Congress may be convened or adjourned; issues of membership in the legislature, including the procedures for disqualifying or expelling a (purported) member; the legislature's choice of officers; the quorum rules that accompany simple majority voting and supermajority voting; the

⁴⁵ 2 Story, *supra* note --- at §§ 875.

⁴⁶ 2 Farrand, *supra* note --- at 278.

transparency or secrecy of legislative deliberation and voting; the Origination Clause; and joint cameral rulemaking. Finally, I will supplement the analysis by considering missing provisions—rules of legislative procedure that might well have been constitutionalized, but were not. Examples include requirements that each bill address only a single subject, and that bills be brought up for reading or debate three times before a final vote can be taken; these and other rules are embodied in various state and foreign constitutions.

A. *Preliminaries*

My ambition in this Part is to examine the constitutional law of congressional procedure from the prescriptive standpoint of constitutional design. I will not ask positive questions about the genesis of the relevant constitutional rules in the hurly-burly bargaining of the convention. Nor will I discuss their positive effects, except insofar as anticipation of those effects would be relevant to the project of sound constitutional design. The prescriptive approach will, however, have useful implications for constitutional interpretation, to the extent that the prevailing theory of interpretation licenses interpreters to fill gaps and ambiguities in the constitutional text with normatively sensible rules.

Constitutional design presupposes some first-order account that specifies what the aims of design are, what will count as an instrumentally successful design. Yet such accounts are the province of political theory, not of consequentialist analysis. Here I will simply stipulate to a set of widely-shared criteria for evaluating congressional performance, criteria stated in rough form and at a relatively low level of abstraction. Congressional procedure should, among other aims, work to accomplish all of the following:

Minimize principal-agent problems inherent in legislative representation. Legislators are agents for their constituents. This need not imply that legislators should view themselves as mouthpieces for constituent preferences, should adopt the opposing, Burkean view that legislators are to exercise independent judgment about the common good, or should adopt some other view entirely. On any of these conceptions, legislator-agents are charged with tasks by citizen-principals, and the ever-present risk is that the agents will divert resources from public tasks to private gain. Time is a resource, so an important form of diversion is shirking, in which legislators consume leisure rather than attending to public business. An important aim of legislative procedure is to minimize the social costs of legislators' diversion and shirking, including the costs incurred to prevent those problems.⁴⁷

Contribute to well-informed and cognitively undistorted deliberation about policy. Legislatures are multi-member policymaking bodies (where policymaking includes the decision to delegate policymaking to others). In general, the performance of such bodies is a function of the information they possess and of the quality of their deliberations. Deliberation may, in turn, be distorted by a range of decisionmaking pathologies, including group polarization, rational and irrational herding behavior,

⁴⁷ See, e.g., Geoffrey Brennan & Alan Hamlin, Geoffrey Brennan and Alan Hamlin, *DEMOCRATIC DEVICES AND DESIRES* 99-104, 156-84 (2000); Dennis Mueller, *CONSTITUTIONAL DEMOCRACY* 148-49 (1996).

conformity and preference falsification, and other mechanisms.⁴⁸ Legislative procedure should encourage representatives to reveal the private information they hold while dampening deliberative pathologies.⁴⁹

Make technically efficient use of legislative resources. Congress, like other legislatures, operates under severe resource constraints. Perhaps the most important of these resources is time. The legislative agenda is extremely compressed, and no single legislator can spend enough time on policy analysis to comprehend more than a small fraction of the issues the legislature takes up. Modern legislatures have accordingly evolved committee systems, in part to promote a division of labor and specialization in the production of information and policies. In a similar vein, legislative procedure should, among its other aims, help to ensure that Congress uses scarce resources in the most efficient possible manner. Holding constant the quality and quantity of congressional output, attaining that output at unnecessarily high social cost is a pure loss.

Stipulating to a set of widely-shared aims in this fashion is a common procedure in the institutional-design literature, and for good reasons. First, the evaluative criteria I have posited are widely shared, in part, because they are the common denominator of the rival camps of political theory. Theoretical approaches may, from diverse starting-points, converge to an “overlapping consensus”⁵⁰ or “incompletely-theorized agreement”⁵¹ on mid-level institutional ideas, for example the idea that legislative representatives should be deterred from shirking or from diverting public resources for private gain. Second—this point is merely the converse of the first—disagreements at the level of high theory often fail to cut between concrete institutional-design choices.⁵² To prefigure a later example, the decision whether or not to require a minimum quorum for legislative business does not turn critically on rival conceptions of democracy, or of good legislation. Third, institutional arrangements of one sort or another must be devised and evaluated even if political theory has not (yet) achieved consensus on the aims of constitutionalism, and perhaps will never do so. “If we put off the questions of institutional design until the higher-order questions are settled, we will get to them at the time of Godot’s arrival. In the meantime, however, life goes on and we need grounds for preferring some institutional arrangements over others.”⁵³ Finally, and most pragmatically, discussing institutional design with only a rough picture of the underlying aims is a sensible division of academic labor. Theory specialists may usefully focus on principles, but that is not my project here.

As we will see, the difficult enterprise is not stating the aims to which well-designed legislative procedure should conduce, but rather negotiating the inevitable

⁴⁸ See *infra* ---.

⁴⁹ See, e.g., Cass R. Sunstein, CONFORMITY AND DISSENT (unpublished manuscript 2003) (evaluating legislative structure, particularly bicameralism, by its tendency to dampen deliberative pathologies and to promote the revelation of privately-held information).

⁵⁰ John Rawls, A THEORY OF JUSTICE 387 (1971).

⁵¹ Cass R. Sunstein, LEGAL REASONING AND POLITICAL CONFLICT (1996).

⁵² For an argument applying this point to the nondelegation doctrine, see Dan M. Kahan, *Democracy Schmemocracy*, 20 Cardozo L Rev 795, 797–800 (1999) (claiming that “the concept of democracy, by itself, doesn’t uniquely determine the structure of government institutions”).

⁵³ Ian Shapiro, DEMOCRACY’S PLACE 221 (2000).

tradeoffs between and among them. Because those aims cannot simultaneously be maximized, the devil is in the details, and good constitutional design requires detailed institutional analysis.

B. *Substantive Themes*

Before shifting to details, a brief preview of the major substantive themes may help to frame the analysis. Across a range of constitutional provisions and design problems, the constitutional law of congressional procedure displays important thematic regularities.

Congressional and cameral autonomy. A major theme involves the question whether and in what respects Congress enjoys procedural autonomy—the legal authority to structure its procedures without the de jure approval of other officials or institutions. In general, the relevant constitutional rules might allow Congress to structure its internal procedures with greater or lesser independence from (1) constitutional framers, (2) the President, or (3) the electorate. The first issue is the question, previously discussed, about which rules of congressional procedure the framers should constitutionalize, and why. The second issue is whether and when the executive would possess the power to structure or participate in the internal proceedings of Congress. This was among the most consequential decisions that the framers faced, and is today a major constitutional-design question in new democratic regimes that opt for an independently-elected executive.⁵⁴ Examples under the federal constitution involve the President’s powers to convene and adjourn Congress and the constitutional mandate that the Vice President, an executive officer, preside over the Senate (except in impeachment cases). The third issue is implicated when the electorate’s choice of representatives is given constitutional significance in ways that override congressional choices. An example of this last point involves provisions present in several state constitutions, but conspicuously absent from the federal constitution, to the effect that legislatures may expel a member (usually by supermajority), but not twice for the same cause.⁵⁵ The final proviso, seemingly a type of double-jeopardy guarantee, is better understood in structural terms: it allows the electorate to in effect override a congressional expulsion decision by reelecting a given representative.

A related question involves, not the autonomy or independence of Congress, as a body, from other institutions, but the question of cameral autonomy—the authority of each house of Congress to take procedural decisions and to set procedural rules without the agreement of the other house. Globally speaking, the Rules of Proceedings Clause enables “[e]ach House [to] determine the Rules of its proceedings,”⁵⁶ which suggests a high degree of (permitted or mandatory) cameral autonomy. In II.C.8 I shall examine whether the two houses acting jointly may enact a statute that binds the houses, when

⁵⁴ See John M. Carey et al., “Legislative Autonomy in New Regimes: The Czech and Polish Cases,” in *LEGISLATURES: COMPARATIVE PERSPECTIVES ON REPRESENTATIVE ASSEMBLIES* 352 (2002).

⁵⁵ See, e.g., Conn. Const., art. III, § 13; Ill. Const., art. IV, § 6(d); Ind. Const., art. IV, § 14; Kent. Const., § 39; Tenn. Const., art. III, § 12.

⁵⁶ U.S. CONST., art. I, § 5.

acting separately, to follow internal procedures specified in the statute itself. As we will see, similar issues arise in many other procedural settings.

The role of political parties. Our constitutional framers were essentially ignorant about political parties in the modern sense. Although the framers thought deeply about the vices of “faction,” the modern political party so greatly increases the formality and operative power of the 18th-century faction as to amount to a different kind of institution. So one of our principal tasks will be to reconsider the constitutional design of congressional procedure in light of the “party-in-government,”⁵⁷ meaning (for our purposes) the institutionalization of factions within the modern Congress. Methodologically, this development increases the informational value of constitutions designed after (and with knowledge of) the spread of political parties, such as state and foreign constitutions of the 19th and 20th centuries. Substantively, we need to consider how parties affect the 18th-century blueprint for congressional procedure. In II.C.4, to pick only one example, we will see that optimal quorum rules may be quite different for a legislature composed of unaffiliated individuals, on the one hand, or a legislature dominated by two major parties, on the other.

We will also see that the relationship between political parties and congressional autonomy is ambiguous, and will cash out differently in different settings. In some settings, the rise of parties will either increase or decrease the relative power of the executive and of legislators over congressional procedure. In II.C.3 we will examine these issues in the setting of the Vice-Presidency and its evolution, or devolution. On the other hand, to the extent that parties form cross-cutting linkages between their members in Congress, the executive and other institutions, then institutional power per se becomes less important. Partisan competition will take place across institutions, and parties will use institutions simply as arenas in which to stage conflict.

The evolution of quasi-constitutional norms. Another large theme involves the endogenous development, within Congress, of institutional norms that parallel, supplement or undermine explicit constitutional rules. In II.C.6 we will examine both the Origination Clause, which grants the House exclusive authority to originate revenue-raising measures, and also a parallel, endogenous norm that grants the House origination authority over appropriations measures as well. In II.C.5 we will examine norms of transparency for committee voting that, although not constitutionally mandated, supplement various constitutional mandates (or triggers) that require roll-call voting for the final passage of legislation.

Legislative norms raise important questions both for constitutional designers who might anticipate their development, and for later constitutional reformers who must reckon with their existence. Where a desirable norm exists, or might be predicted to develop, should it be explicitly constitutionalized? One intuition is no, because constitutionalization is unnecessary, and might disrupt the norm itself. Perhaps subtly nuanced norms are not easily captured in relatively crude constitutional language. The

⁵⁷ See V.O. Key, Jr., *POLITICS, PARTIES, AND PRESSURE GROUPS* 163-65 (5th ed. 1964). For application of the party-in-government idea to Congress, see Elizabeth Garrett, *The Congressional Budget Process: Strengthening the Party-in-Government*, 100 COLUM. L. REV. 702 (2000).

contrary intuition is yes: precisely because valuable norms are fragile and vulnerable to exogenous shocks, constitutional designers are imprudent to hope for their development or to rely on their persistence. Constitutionalization entrenches norms against future change. Where the norm already exists, that very fact provides evidence that a constitutional equivalent will not disrupt the legislature's functions.

Decision and error costs. Last, and perhaps most obviously, constitutional rules of legislative procedure should be designed to minimize (the sum of) the costs of reaching decisions and the costs of errors or mistakes. Here mistakes are defined by reference to whatever normative criteria are entailed by the designer's high-level account of good legislative performance, or—as discussed above—by reference to the common denominator or overlapping consensus among competing accounts of good legislative performance. The ambition to minimize decision and error costs follows from the idea that legislatures should make efficient use of scarce resources. Reaching good decisions in unnecessarily costly ways, or reaching erroneous decisions, both produce deadweight losses. These ideas are pervasively useful, and are applied throughout.

C. *Design Questions*

With the scope of the project delineated and the major themes introduced, we will proceed seriatim through the major constitutional rules of congressional procedure, including rules that are (surprisingly) absent from the federal constitution.

1. Convening and Adjourning the Congress

The Constitution structures the timing and location of congressional sessions in several ways. In addition to the mandate of Article I and of the Twentieth Amendment that “[t]he Congress shall assemble at least once in every Year,” Article I also provides that “[n]either House, during the session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.”⁵⁸ Article II gives the President the powers to “on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper.”⁵⁹ A residual provision exempts agreements between the Houses on questions of adjournment from presentment to the President. In part these provisions address concerns arising from the high costs of travel and information in the founding era, and the fierce sectional loyalties that hampered attempts to fix the seat of government. Those concerns are largely obsolete today. These provisions retain great significance, however, for they implicate and illustrate the central thematic issues of congressional independence and cameral independence.

As for the issue of congressional independence, the principal convention debates centered upon the twin questions whether rules about the timing and location of congressional sessions should be constitutionalized, and the extent to which the executive should be authorized to participate in the relevant decisions. The background of these

⁵⁸ U.S. CONST., art. I, § 5.

⁵⁹ U.S. CONST., art. II, § 2.

debates was a set of chronic complaints about executive influence over legislative procedure generally, and over the timing and location of legislative sessions in particular. The English monarchs possessed traditional prerogatives to convene and to prorogue, or dissolve, both Parliament and colonial legislatures. The Declaration of Independence, however, complained of George III that

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures. —He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people. —He has refused for a long time, after such dissolutions, to cause others to be elected; . . .⁶⁰

As the second clause hints, a widespread view in the founding era depicted frequent legislative sessions as an important safeguard against executive encroachments on political liberty, and Article I's provision mandating annual meetings of Congress was, as we have seen, justified principally on the grounds that frequent assemblies were necessary "as a check on the Executive department."⁶¹ One theme in the debate involved the costs of travel; although some state constitutions required even more frequent sessions, Story argued that the geographic scale of the new republic made such a system excessively costly for federal representatives, given "the distance of their abodes."⁶² The more important feature of the constitutional rules, however, was the great extent to which they minimized executive authority over the timing of congressional sessions, as compared to the English baseline. The basic asymmetry in the relevant rules is that they push Congress towards remaining in session. Congress is required to convene annually, as a check upon the freedom of executive action; the President may convene the Congress (on extraordinary occasions), but has no power to dissolve it against the joint wish of both Houses. The only circumstance in which the President may dissolve is where the two Houses disagree on the timing of adjournment; and the framers seem to have enacted this proviso only from inability to imagine that any other institution might be a plausible candidate to break deadlocks between the Houses (with respect to adjournment).⁶³

Taken as a package, these rules minimize the risk that the executive will aggrandize itself at Congress' expense by means of strategic dissolution. Participants in the relevant debates, however, were largely insensitive to the principal cost of maximizing congressional autonomy in this way. A major constitutional-design consideration, arising in contexts ranging from congressional procedure to official compensation to judicial review, is that minimizing interbranch encroachment or aggrandizement by guaranteeing autonomy to threatened institutions constantly trades off

⁶⁰ DECLARATION OF INDEPENDENCE, paras. 6-8 (1776).

⁶¹ 2 Kurland, *supra* note --- at 283.

⁶² *Id.* at 283-84.

⁶³ As it turns out, the houses of Congress have never failed to agree on an adjournment date, and the President has never exercised his power to break disagreements over adjournment. See Charles Tiefer, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 29-30, n.35 (1989).

against an increased risk of self-dealing by those (autonomous) institutions.⁶⁴ The constitutional rules that enable aggressor institutions to encroach upon competitors are the same rules that keep the competitor's strategic self-dealing in check; the risk of aggrandizement is a typical byproduct of a design choice to minimize self-interested official action through institutional competition. In the extreme scenario—a scenario that materialized at several points in English history—we might imagine that a legislature granted constitutional autonomy over the timing of its own dissolution might, for self-interested reasons, choose never to dissolve at all. As William Rawle observed,

[A] power in the legislature to protract its own continuance, would be dangerous. Blackstone attributed the misfortunes of Charles I to his having unadvisedly passed an act to continue the parliament, then in being, until such time as it should please to dissolve itself, and this is one of the many proofs that the much-praised constitution of that country wants the character of certainty.⁶⁵

To be sure, as Rawle also observed, the constitutional provision for limited congressional terms of course sets an outer bound on the size of this danger; “[n]o act of Congress could prolong the continuance of the legislature beyond the term fixed by the Constitution.”⁶⁶ Yet within that capacious limit Congress may manipulate adjournment with a view to maximizing its members' chances of retaining office or to imposing political costs on the President. In modern times examples of strategic use of the adjournment power are thick on the ground.⁶⁷

Nor is it difficult to imagine institutional-design alternatives that might attain the same degree of legislative independence from the executive while creating a reduced risk of strategic legislative behavior, thus producing a design improvement on any view of the necessary tradeoffs. Even if autonomy and self-dealing trade off against each other beyond some specified point, in other words, institutional-design proposals might produce gains along *both* margins if that point has not yet been reached. One possibility would be to randomly select the date of adjournment at the beginning of the legislative session; under this rule the adjournment date would be chosen for no reason at all, but it would at least not be chosen for self-interested reasons held by either legislators or the executive. Under this regime legislators anticipating the adjournment date might still engage in strategic behavior, using the confusion of the session's close to push through projects that would have failed earlier in the session. Here the intuition is that the sheer volume of business that always marks the end of legislative sessions increases the costs to other legislators and interest groups of detecting and blocking such legislation. But the same behavior is possible in the current regime so long as the adjournment date is announced in advance; and we shall subsequently examine state constitutional provisions

⁶⁴ For some earlier efforts to apply this point in various settings, see Adrian Vermeule, *The Constitutional Law of Official Compensation*, 102 COLUM. L. REV. 501 (2002); Adrian Vermeule, *Judicial Review and Institutional Choice*, 43 WILLIAM & MARY L. REV. 1557 (2002).

⁶⁵ William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1829).

⁶⁶ *Id.*

⁶⁷ See, e.g., Richard Cohen, *Good Vibrations*, NATIONAL JOURNAL, Sept. 6, 1997 at 1732; Andrew Taylor, *A Strange Calm on Capitol Hill as GOP Opts for Unrushed Exit*, CQ WEEKLY, Oct. 14, 2000 at 2401.

that check this sort of strategic action by providing that no bills may be enacted or, alternatively, introduced within a specified time of adjournment. The time between the constitutionally-specified date and the date of adjournment is time in which public opprobrium may be brought to bear on legislators for their actions late in the session.

Alternatively, the randomly-chosen date of adjournment need not be established and announced in advance. Another possibility is sequential randomization, in which the legislative session is subject to a specified chance of ending abruptly on any particular day. The resultant uncertainty would force legislators to set the volume and timing of legislative business behind a partial veil of ignorance.⁶⁸ It is true, however, that both this possibility and the preceding one have an impractical air about them, if only because constitutional rules rarely employ randomization, even where randomization would have obvious benefits.⁶⁹

Cameral autonomy—the reciprocal independence of each House from the other, rather than the independence of Congress from the executive—was also an important consideration in the debates over the timing and location of congressional sessions. Here the principal debates centered on the Article I provision that barred either house from adjourning without the other’s consent. In the view of proponents, such as Madison, this provision minimized the chance that Congress would fail to be in session when “public exigencies” warranted legislative action.⁷⁰ (This rationale assumes that the false negative, the failure to be in session when the public interest so requires, is more damaging than the false positive, the occurrence of a legislative session when there is no real public business to conduct. By contrast, many state constitutions seek to minimize the false positive by providing, for example, that the legislature may convene only every other year.) In the view of Madison’s opponents, however, the vice of the Article I provision was to create an unacceptable risk that the Senate would dominate the House of Representatives. As George Mason put it in the Virginia ratifying convention,

The house of representatives is the only check on the senate, with their enormous powers. But by that clause you give them the power of worrying the house of representatives into a compliance with any measure. The senators living at the spot will feel no inconvenience from long sessions, as they will vote themselves handsome pay, without incurring any additional expences. Your representatives are on a different ground, from their shorter continuance in office. The gentlemen from Georgia are six or seven hundred miles from home, and wish to go home. The senate taking advantage of this, by stopping the other house from adjourning, may worry them into any thing.⁷¹

The argument of this confused passage seems to assume that federal legislative careers would always remain a part-time or even amateur pursuit. The greater the fraction of

⁶⁸ The foregoing addresses the timing of congressional sessions. Similar arguments about the independence of congressional procedure from executive control also arose with respect to the location of congressional sessions. As these are of little importance today, I do not discuss them here.

⁶⁹ See Vermeule, *Veil of Ignorance Rules*, *supra* note 18.

⁷⁰ 2 Farrand, *supra* note --- at 198.

⁷¹ 2 Kurland, *supra* note --- at 293.

representatives' income that is obtained from local business or professional pursuits outside the legislative session, the more the joint-consent rule for adjournment increases the relative leverage of senators. Today, however, the sharply reduced costs of travel and the professionalization of federal legislative careers has made Mason's particular concern anachronistic.

2. Membership: Disqualification and Expulsion

Article I provides that “[e]ach House may . . . punish its members for disorderly behaviour, and, with the Concurrence of two thirds, expel a member.”⁷² This short clause raises no less than three interpretive puzzles that we must clear away before addressing questions of optimal constitutional design. The first puzzle is whether the two-thirds supermajority vote requires two thirds of the whole expelling House, or merely two-thirds of a quorum (i.e. of a majority); this is a question about supermajority quorum requirements, examined below. A second and more fundamental puzzle involves the relationship between the Expulsion Clause and the power of each House to “be the Judge of the Elections, Returns and Qualifications of its own members.”⁷³ On one view, the distinction between these powers is temporal: disqualification by a simple majority can occur only before a member is seated, while after a member is seated the only recourse is expulsion by supermajority. A different view, which I will adopt, is David Currie's argument that the distinction between the powers turns solely on the ground on which each may be exercised. “A simple majority may determine at any time that a member is not qualified; expulsion of a duly elected member for any other reason requires stronger support.”⁷⁴ The final puzzle is whether the “disorderly Behaviour” that the same clause authorizes each House to punish refers only to behavior that disrupts legislative business, or whether expulsion instead lies for a broader category of conduct, including conduct occurring outside the legislature itself and conduct during a legislative recess. Here both congressional and judicial precedent have taken an expansive view of the expulsion power: following Story's analysis of early expulsion cases in the Senate, the Supreme Court has said that “[t]he right to expel extends to all cases where the offense is such as in the judgment of the senate is inconsistent with the trust and duty of a member.”⁷⁵

The framers' decision to lodge the powers of disqualification and expulsion in each House separately, without the participation of any outside institution, embodies two decisions, one in favor of cameral autonomy and one in favor of congressional autonomy. As to the first, it is hardly unimaginable that the power to disqualify or expel a member of either House (briefly, the power to make “membership decisions”) could have been lodged in the houses acting jointly. The obvious analogy is to the powers surrounding impeachment, which are partitioned between the two houses in complex ways: the House of Representatives possesses the “sole Power of Impeachment,” while the Senate

⁷² U.S. CONST., art. I, § 5, cl. 2.

⁷³ U.S. CONST., art. I, § 5, cl. 1.

⁷⁴ David P. Currie, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829* at 75 (2001). The “qualifications” of which each House may judge are, the Court has held, limited to the minimum constitutional qualifications set out in Article I, §2, cl.2 (Representatives) and Article I, §3, cl.3 (Senators). See *Powell v. McCormack*, 395 U.S. 486 (1969).

⁷⁵ *Burton v. United States*, 202 U.S. 344 (1906).

possesses the “sole Power to try all Impeachments,” and may convict by a supermajority of two-thirds of “the Members present.” Impeachment lies only against “civil Officers of the United States,”⁷⁶ but it is hardly obvious that federal legislators do not count as such officers. Early Congresses struggled mightily with the issue before apparently concluding that legislators are “officers” for purposes of the presidential succession provisions of Article II, but not for purposes of the impeachment provisions.⁷⁷

Analogously, we might imagine a constitutional division of labor in which one House brings a proceeding for disqualification or expulsion of its own members, with the merits of the charge judged by the other House. The framers’ choice in favor of cameral autonomy might, on this view, be condemned in the vocabulary of the common law on the ground that it makes each House the sole judge of its own cause in membership cases. The contrary instinct, a pervasive one in both the constitutional structure and in 18th-century legal theory, is to separate the power to prosecute from the power to adjudicate.⁷⁸ The point must be qualified in light of the Supreme Court’s quite recent assertion of power to review cameral disqualification decisions, discussed below, but of course that decision has not yet been extended to expulsion decisions; here the question is simply cameral autonomy, not the involvement of noncongressional institutions.

The argument for cameral autonomy in membership decisions is that the Houses are institutional competitors, so that cross-participation in membership decisions creates a risk of intercameral aggrandizement, with the reviewing House basing its decisions on partisan or institutional advantage rather than the constitutional merits. But here, as elsewhere, the basic cost of cameral autonomy is an enhanced risk of self-dealing by legislative factions, in the absence of any mechanism for external review. To be sure, the symmetry of the cross-participation alternative, in which each House reviews the other’s decisions, might produce a possible ameliorating mechanism: each House might refrain from patently self-interested review for fear of retaliation by the other. Yet if membership cases are rare (they are), and if retaliation on other margins entirely (say, by refusing to enact bills sought by the offending House) is a highly imperfect substitute, then the fear of retaliation will prove at best a weak deterrent, subject to domination by the political gains that might flow to the aggrandizing House from self-interested review in particular cases.

The framers’ second design choice—to lodge the powers of disqualification and expulsion in (the houses of) Congress alone, without the participation of other institutions—implicates similar considerations. If it currently seems unimaginable to lodge review or approval of expulsion decisions in an outside institution, consider the many analogies elsewhere in the constitutional structure. Many of the stock founding-era arguments for subjecting legislative lawmaking to presidential review, by means of the veto power, transpose comfortably to membership decisions; it is hard to see any a priori

⁷⁶ U.S. CONST., art. I, § 2, cl. 5.

⁷⁷ David P. Currie, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* at 279-81 (1997).

⁷⁸ See U.S. CONST., art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law will be passed”; see also Forrest McDonald, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 80-87 (1985).

reason for thinking that those decisions are any less or more susceptible to the sort of factionalized decisionmaking and legislative herd behavior that caused the framers to provide the presidential veto. It is irrelevant that the Article I lawmaking process contains a built-in status quo default (a successful veto prevents a change in the law), while membership decisions, especially qualification decisions, sometimes require a compulsory choice between alternative candidates, with no legal default position. Even in the latter case the President or other outside body might be given the power to review the grounds on which the choice is made, with a remand to the initiating House if those grounds are found to have been illegitimate. Beyond the possibility of review by the President, we must also consider the possibility of review of membership decisions by the Supreme Court. The Court has already undertaken a limited version of such review in disqualification cases, albeit only as to the legal question whether the asserted ground of disqualification is among those set out in Article I.

To set against the possibility of outside review by other federal institutions is the standard legislative-autonomy argument: authority over membership decisions should be vested solely in the legislature in order to minimize the risk of aggrandizement by competing institutions. Consider Story's argument for legislative autonomy in membership decisions:

It is obvious, that a power must be lodged somewhere to judge of the elections, returns and qualifications of the members of each house composing the legislature; for otherwise there could be no certainty, as to who were legitimately chosen members The only possible question on such a subject is, as to the body, in which such a power shall be lodged. If lodged in any other, than the legislative body itself, its independence, its purity, and even its existence and action may be destroyed, or put into imminent danger. No other body, but itself, can have the same motives to preserve and perpetuate these attributes⁷⁹

The fallacy here is by now obvious. Story's argument, which implicitly compares a well-motivated legislature with an ill-motivated reviewing body, amounts to an incomplete cost-benefit analysis. It ignores the potential costs of legislative autonomy, if ill-motivated legislative factions use membership decisions for partisan ends, and the potential benefits of external review, if well-motivated executive or judicial officials provide an impartial assessment of qualifications, the disruptive effects of legislators' behavior, and other relevant questions.

Given this structural tradeoff between legislative autonomy and legislative self-dealing, we may interpret the supermajority requirement for expulsion as an attempt to minimize the costs of the latter while maximizing the benefits of the former. Madison's idea, anticipating modern work on the economics of voting rules,⁸⁰ was to minimize factional abuse not by mandating outside review, but by raising the costs of assembling the necessary faction. Supermajority rules are close substitutes for bicameralism, so

⁷⁹ Joseph Story, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 831.

⁸⁰ James M. Buchanan and Gordon Tullock, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

requiring the former in effect compromises cameral autonomy over expulsion decisions without involving outsiders.

There are, however, two serious objections to Madison's design choice. First, as we have seen, the supermajority requirement creates costs on another margin, the one identified by Gouverneur Morris: the supermajority requirement minimizes false positives, unjustified decisions to expel, but increases false negatives, unjustified decisions not to expel.⁸¹ Second, and less obviously, the supermajority rule for expulsions does nothing to minimize abuse of the disqualification power, and that gap encourages legislative substitution from ill-motivated expulsion to ill-motivated disqualification; the attempted disqualification of Adam Clayton Powell may have been an example. To the extent that substitution from partisan expulsion to partisan disqualification occurs, it supports the Supreme Court's decision to limit the grounds for disqualification to the narrow lists set out in Article I.⁸² This is a nonoriginalist defense of the Court's disqualification jurisprudence, one that sounds strictly in functional terms and thereby improves upon the exhausting and inconclusive originalist debates about the exclusivity of the Qualification Clauses that fractured the Court both in *Powell v. McCormack*⁸³ and in *U.S. Term Limits v. Thornton*.⁸⁴

A promising alternative to the supermajority requirement is embodied in state constitutional provisions that bar legislatures from twice expelling a member for the same conduct.⁸⁵ The effect of the state provisions is to create a mechanism for outside review by lodging in the electorate a power to override the legislature's expulsion decision, so these provisions compromise legislative autonomy, vis-à-vis the electorate. On the most extreme version of legislative autonomy, one actually articulated by legislators during early expulsion proceedings, "the voters should not be able to elect anyone repugnant to two thirds of the House."⁸⁶ The response to this view is not an abstract argument from democratic theory, that the legislature ought to be bound to respect the voters' choice of representative; that argument would condemn any legislative power to expel a duly elected member, in any circumstances. The right argument for this sort of provision is simply that this form of outside review is, as a matter of institutional design, superior to any of the alternatives, either the supermajority requirement or the hypothetical

⁸¹ We might support Madison's view, as against Morris', by the additional claim that error costs here are nonsymmetric, because erroneous expulsions are more costly than erroneous failures to expel. The probability that a single bad legislator will cast a decisive vote are small, while the loss of legitimacy from an erroneous expulsion is large. But this reasoning might be incomplete; perhaps the legislator who would have been justifiably expelled, under simple majority voting, will have a more disruptive influence on deliberation and the conduct of legislative business than his fractional voting share would suggest.

⁸² See *Powell v. McCormack*, 395 U.S. 486 (1969).

⁸³ 395 U.S. 486 (1969).

⁸⁴ 514 U.S. 779 (1995).

⁸⁵ For representative state constitutional provisions, see *supra* note 35. In the House of Representatives, "policy considerations, as opposed to questions of power, have generally restrained the House in exercising the authority to expel a Member when . . . the conduct complained of occurred in a prior Congress when the electorate knew of the conduct but still re-elected the Member to the current Congress." Jack Maskell, CRS Report for Congress, *EXPULSION, CENSURE, REPRIMAND AND FINE: LEGISLATIVE DISCIPLINE IN THE HOUSE OF REPRESENTATIVES* (2002) (emphasis in original). The argument in text addresses the question of the House's ultimate power in such situations.

⁸⁶ Currie, *The Federalist Period*, *supra* note 46 at 265.

alternatives that would vest review of expulsion decisions in the other House or in the President. Unlike the supermajority requirement, the electoral-review mechanism carries no built-in skew in favor of false negatives; unlike outside review by other federal institutions, it does not place the reviewing function in the hands of a presumptively hostile institutional competitor.

The state-level rule barring a second expulsion for the same conduct might plausibly be interpolated into the existing constitutional text.⁸⁷ I have already sketched the consequentialist case for that reading, but it might be justified on originalist grounds as well. In the founding era, famous Parliamentary precedents arising out of the expulsion of John Wilkes were widely cited as establishing the bar on re-expulsion,⁸⁸ and early legislators suggested that a similar rule might itself be implicit in Article I's expulsion provision.⁸⁹ Under the current constitutional rules, however, an interpolated requirement barring re-expulsion would be cumulative with, rather than a substitute for, the supermajority requirement, so this is ultimately an argument for constitutional reform rather than simply a novel interpretation. Yet several state constitutions contain the same combination of supermajority rules with a ban on second expulsions.⁹⁰ Given the usual fog of empirical uncertainty that hovers around questions of optimal constitutional design, interpreters of the federal constitution might do well to mimic those jurisdictions, thereby assuming, until it is proven otherwise, that an interpolated ban on re-expulsion would produce a net improvement.

3. Legislative Officers

The Constitution grants the House of Representatives full authority to “choose their Speaker and other Officers.”⁹¹ Not so for the Senate; Article I specifies that “[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”⁹² Although the senators are authorized to “choose their other Officers,”⁹³ they must also choose “a President pro tempore, in the Absence of the Vice President, or when he shall exercise the office of President of the United States.”⁹⁴

Implicit in these provisions are a number of important design choices. Generally speaking, legislative officers may be chosen by the legislature itself or by some other body, such as constitutional framers or the executive; they may be members of the legislature in their own right, or else outsiders; and legislative officers may hold full voting rights, including the power to cast tiebreaking votes, may hold limited voting rights, such as the power to cast votes only to break ties, or may hold no voting rights at all. We will examine the framers' choices along these dimensions and compare them with Bentham's views about the optimal structure of legislative officeholding.

⁸⁷ 2 Kurland, *supra* note --- at 300.

⁸⁸ 2 Kurland, *supra* note --- at 285.

⁸⁹ Currie, *The Federalist Period*, *supra* note --- at 264.

⁹⁰ *See, e.g.*, Conn. Const., art. III, § 13; Ill. Const., art. IV, § 6(d); Ind. Const., art. IV, § 14; Kent. Const., § 39; W. Va. Const., art. VI, § 25.

⁹¹ U.S. CONST., art. I, § 2.

⁹² U.S. CONST., art. I, § 3, cl. 4.

⁹³ U.S. CONST., art. I, § 3, cl. 5.

⁹⁴ *Id.*

The convention's most important decision was the threshold choice to constitutionalize the Senate's presiding officer. Why should not the Senate, like the House, have been given discretion to choose all of its officers? In Part I we examined good normative reasons to constitutionalize rules of congressional procedure. As a historical matter the convention's decision does not seem to have been motivated, at least not in the main, by any such reasons. Rather the major impetus behind the decision was simply the desire to give the Vice President some official function, other than standing by in hopes of succeeding the President. Roger Sherman argued that "[I]f the Vice President were not to be President of the Senate, he would be without employment."⁹⁵ Oliver Williamson likewise observed that "such an officer as Vice President was not wanted. He was introduced only for the sake of a valuable mode of election which required two to be chosen at the same time."⁹⁶ The reference here is to the electoral scheme for President and Vice President adopted in Article II, §3, and later modified by the Twelfth Amendment.

This is not to say, however, that no normatively attractive reasons for the constitutional choice of the Senate's presiding officer existed; some were even discussed at the convention. Sherman buttressed his argument for Vice Presidential employment with the idea that, if the presiding officer were chosen from among the senators, "some member by being made President must be deprived of his vote, unless when an equal division of votes might happen in the Senate, which would be but seldom."⁹⁷ The premise of this argument was wrong; the member chosen to preside might be allowed both to vote in the ordinary course and given a tiebreaking vote. This alternative, however, would in effect give the presiding member two votes. Story's improved version articulated the dilemma:

If the speaker were not allowed to vote, except where there was an equal division, independent of his own vote, then the state might lose its own voice; if he were allowed to give his vote, and also a casting vote, then the state might, in effect, possess a double vote.⁹⁸

Unfortunately, however, both Sherman's original argument and Story's improvement rest on a non sequitur. At most the voting argument shows that the Senate should be constitutionally required to choose a presiding officer from outside the membership. It does not show that the constitutional convention should itself have decided who that outsider would be. To support that separate choice requires, in addition, some reason to believe that the framers have some comparative advantage over future Senates in choosing the outsider who should preside.

The same problem afflicts a second argument for constitutionalizing the presiding officer's identity, an argument articulated by early commentators but not in the convention itself. On this view, state jealousies made it imperative that the presiding office be held by an impartial outsider. Senators, elected by state legislatures, were to be

⁹⁵ 2 Farrand, *supra* note --- at 495.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Story, *supra* note --- at § 736.

national representative of the states; the Vice President, although a citizen of some state, was not elected from any state in particular, and would be able to preside over the Senate without the appearance of sectional favoritism. (On this view, the House could be given authority to choose officers from among its own membership, who represent districts, not states). The impartiality argument accords with Bentham's idea that "in a numerous legislative assembly, a president ought not be a member," an "exclusion" that is in part intended "to guarantee him from the seductions of partiality, and to raise him even above suspicion, by never exhibiting him as a *partisan* in the midst of debates in which he is required to interfere as a *judge*."⁹⁹

But the non sequitur problem remains: the argument from impartiality does not entail that the outsider should be chosen by constitutional framers. Bentham correctly distinguished the two points by stipulating both that the presiding officer should be an outsider, and also should be chosen "freely and exclusively by the assembly over which he is to preside."¹⁰⁰ It might be said that these two stipulations are inconsistent because the exclusion of members from the presiding office curtails the members' free choice of a presiding officer, but this is an implausible objection. Generally, choice is not made unfree by the presence of legal constraints, and under any imaginable design, the members would be forced to choose their presiding officer within some set of constitutional constraints, such as the requirement of Article VI that all federal officers take an oath to support the Constitution. A more respectable, because more pragmatic, argument for the convention's decision to choose the identity of the presiding officer is that the very state rivalries that require an outsider to preside would also prevent the Senate itself from reaching a consensus on the identity of that outsider. Yet we might also imagine that the necessity for compromise would have caused the Senate to choose the lowest common denominator from among the candidates presented, settling upon a presiding officer inoffensive to all concerned. That has historically been the pattern in the Senate's choice of the President pro tempore who presides in the Vice President's absence.

Even if the convention had good reason to choose the identity of the outsider given authority to preside, rather than leaving the choice to future Senates, it was a separate and equally contestable decision to mandate that the presiding outsider be a high official in the executive branch. The mandated choice of an outsider compromises legislative autonomy in the service of impartiality, but the mandate that the outsider be an executive officer adds the usual risk of aggrandizement by institutional competitors. As Elbridge Gerry put it at the convention, "we might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President and Vice President makes it absolutely improper."¹⁰¹ Morris' memorable response was that "[t]he vice president then will be the first heir apparent that ever loved his father";¹⁰² in general, many framers anticipated that the President and Vice President would be institutional rivals, rather than allies, in part because of the latter's perpetual hope of succeeding the former, in part because the two officers were to be selected independently,

⁹⁹ Bentham, *Political Tactics*, *supra* note --- at ch. V, § 2.

¹⁰⁰ *Id.*

¹⁰¹ 2 Farrand, *supra* note --- at 536.

¹⁰² *Id.*

and were each anticipated to be drawn from among the nation's leading politicians.¹⁰³ On this view, the Senate would have little to fear from the Vice President's status as presiding officer.

The risk of interbranch aggression created by the Vice President's constitutional role has indeed never materialized,¹⁰⁴ but not for the reasons the framers envisaged. The Vice President's structural rivalry with the President has become a minor theme, because the enactment of the Twelfth Amendment and the rise of joint party slates for the two offices made the Vice President a nonentity in the 19th century,¹⁰⁵ while the consolidation of presidential power to nominate the Vice President made the office a wholly-owned subsidiary of the Presidency in the 20th.¹⁰⁶ These developments might have posed a real risk of presidential domination of the Senate, if the Senate had not developed various means of self-defense, including Senate precedents suggesting that the Vice President may act only as directed by the Senate's own rules, and lacks any intrinsic constitutional authority to keep order or to make procedural rulings.¹⁰⁷ The framers were wrong about the political mechanisms that have dampened the risks created by their choice of the Senate's presiding officer; the benign outcome of their choices is in this sense best described as a lucky historical accident.

Finally, we need to consider Bentham's argument that an appropriately impartial presiding officer would possess no right to vote, even to break ties.¹⁰⁸ Indeed, for Bentham, the rule authorizing the presiding officer to vote only to break ties "is more opposed to impartiality than that of allowing him to vote in all cases."¹⁰⁹ On this view, the framers' decision to grant the Vice President a tiebreaking vote undermines the impartiality rationale that best justifies his status as a senatorial officer to begin with, and this is so whether the alternative is full voting rights¹¹⁰ or no vote at all. The mechanism that Bentham has in mind here is, however, obscure; why should voting only to break ties create a greater appearance of partiality than casting both tiebreaking votes and ordinary ones? Recall that on Story's view the latter regime in effect doubles the partisan import

¹⁰³ This rivalry of course was the impetus behind the rule that the Chief Justice, rather than the Vice President, would preside over the impeachment trial of a President. The concern was not that the Vice President would be biased in the President's favor, but that he would be biased against him.

¹⁰⁴ It is, however, a mistake to think that the Vice President's role is vestigial or a historical curiosity; recurrently, if infrequently, the Vice President's authority to make procedural rulings importantly affects legislative outcomes, and the tiebreaking vote is a significant power (Dole episode).

¹⁰⁵ Joel K. Goldstein, *THE MODERN AMERICAN VICE-PRESIDENCY* 5-8 (1982).

¹⁰⁶ *Id.* at 141.

¹⁰⁷ Tiefer, *supra* note 39 at 490 n. 61; Currie, *The Federalist Period*, *supra* note 46 at 316 n. 9.

¹⁰⁸ Hamilton argued that the Senate, necessarily composed of an even number of legislators, would be incapable of "definitive resolution" unless the Vice President possessed a casting vote. *THE FEDERALIST* No. 68, at 415 (Clinton Rossiter ed. 1961). This is just wrong. As Bentham points out, in case of a tie the decision may be relegated to a default rule; the typical default in assemblies is that in case of a tie the motion is defeated. *See* Bentham, *POLITICAL TACTICS*, *supra* note --- at ch. V, § 2. A tie vote may occur either where the presiding officer has no casting vote, and thus possesses less voting power than the Vice President, or where the presiding officer may vote not only to break ties but also to create a tie, and thus possesses greater voting power than the Vice President, who has no general power to cast a decisive vote. *See* Henry M. Robert, *ROBERT'S RULES OF ORDER* (10th ed.) (2000).

¹⁰⁹ Bentham, *POLITICAL TACTICS*, *supra* note --- at ch. V, § 2.

¹¹⁰ An intermediate alternative would have been to give the Vice President power to either break a tie or to create one, but not to cast nondecisive votes. *See* Roberts, *supra* note 73.

of the Vice President's vote. We may, however, save Bentham's argument by interpreting it in expressive rather than consequentialist terms, as a claim that the tiebreak-only regime creates an inconsistent symbolism. On this view, the abstention from ordinary voting in the tiebreak-only regime creates a pretense of impartiality that is violated whenever a tiebreaking vote is cast, whereas the regime that includes ordinary voting makes no pretense that the presiding officer is impartial in the first place.

The upshot of all this is that the framers' decisions to foist the Vice President upon the Senate and to give the Vice President (only) a tiebreaking vote both seem dubious from the standpoint of sound constitutional design. What is worse, the former decision may also have been unnecessary. The simpler solution to the problem of Vice Presidential unemployment, if it is a problem at all, would have been to mandate, not that he be given a legislative post, but that he be given additional executive duties¹¹¹—perhaps as one of the “Heads of Departments” or cabinet officers, perhaps as an “Ambassador, public Minister or Consul,” the existence of which are presupposed by Article II. Such an arrangement would have eliminated the institutional risks of cross-branch service. And, as it turns out, subordinate executive and diplomatic tasks are what Vice Presidents mostly do anyway.

4. Voting Rules and Quorum Rules

Article I sets the basic quorum rule for congressional voting by providing that: a Majority of each [House] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.¹¹²

In the ordinary case of simple majority voting this provision is straightforward enough. An important interpretive question arises, however, when the Constitution specifies that a supermajority vote is needed to execute some power vested in one or both Houses separately, such as the expulsion of a member or the approval of a treaty, or in the Congress jointly, such as the override of a presidential veto. Does the heightened voting requirement mean that a supermajority of the whole House is needed, or is only a supermajority of a majority needed? Although this question is sometimes thought to implicate the constitutional quorum rule,¹¹³ it doesn't. Whatever the voting rule, a quorum to do business is present if and only if a majority of the relevant House is present. The possibility that a supermajority requirement is satisfied only if a supermajority of the whole House votes in favor of a bill is an interpretation of the voting rule itself. Quorum rules, by contrast, are insensitive to whether votes are cast for or against a bill; a quorum can be composed of both aye votes and no votes. Nonetheless I will treat this question under the slightly misleading head of “supermajority quorum rules,” to follow previous discussions and as a useful shorthand.

¹¹¹ Richard D. Friedman, *Some Modest Proposals on the Vice-Presidency*, 86 MICH. L. REV. 1703, 1714 (1988). For a critical response to this proposal, see Joel K. Goldstein, *The New Constitutional Vice-Presidency*, 30 WAKE FOREST L. REV. 505, 556-57 (1995).

¹¹² U.S. CONST., art. I, § 5.

¹¹³ Currie, *The Federalist Period*, *supra* note --- at 208 n 13.

We will begin by examining the ordinary quorum rule from the standpoint of optimal legislative design, and will then show that the question of supermajority quorum rules has no independent significance; it collapses entirely into the question of optimal voting rules.

Ordinary quorum rules. Define a quorum rule as any rule that permits the legislature to conduct business with less than all members present; we will then ask what effects are produced as the quorum rule is decreased from the full number of members down to one member. In general, where the underlying voting rule is enactment by simple majority, there will be strong pressure to adopt a majority quorum requirement as well. If a minority cannot defeat an enactment on the merits, the intuition runs, why should the same minority be able to block an enactment by absenting themselves and thereby breaking the quorum? Conversely, with a high quorum rule, such as three-fourths majority, a handful of legislators may extract strategic concessions by threatening to prevent a majority from enacting its preferred policy. As Gouverneur Morris observed at the convention, “the Secession of a small number ought not to be suffered to break a quorum. . . . Besides other mischiefs, if a few can break up a quorum, they may seize a moment when a particular part of the Continent may be in need of immediate aid, to extort, by threatening a secession, some unjust and selfish measure.”¹¹⁴ The costs of organizing this sort of holdout faction to break the quorum rise as the quorum rule is reduced.

To be sure, empowering minorities to defeat legislation by breaking the quorum will in some cases also reduce majoritarian exploitation. George Mason “admitted that inconveniences might spring from the secession of a small number: But he had also known good produced by an apprehension of it. He had known a paper emission prevented by that cause in Virginia.”¹¹⁵ The combination of this point with the previous one just means that high quorum requirements display the same mix of costs and benefits as a supermajority voting rule. Given these considerations, the combination of simple majority voting rules with supermajority quorum requirements is a rare one in state and foreign constitutions.¹¹⁶ The prevalence of simple majority voting in most legislatures for most matters, that is, sets an effective upper bound on quorum requirements for those matters.

The harder question is why there should be a lower bound, why there should be any quorum requirement at all. Following Bentham, we may identify three principal costs that may be incurred when legislatures proceed with business despite high rates of absenteeism.¹¹⁷ The first cost is *outcome error*, defined as any difference between the outcomes that the legislature would produce with full attendance and the outcomes it produces with a bare quorum present. Low attendance increases the variance of legislative outcomes and thus the possibility of countermajoritarian results. One ambition of quorum rules is to minimize this form of error by ensuring that the legislature may not proceed with only a few in attendance. A second cost is the *loss of legitimacy* said to

¹¹⁴ 2 Farrand, *supra* note --- at 251.

¹¹⁵ *Id.*

¹¹⁶ Indiana Const., art. IV, § 11 (2/3 quorum requirement).

¹¹⁷ This compresses Bentham’s six; see POLITICAL TACTICS, *supra* note --- at 57-58.

result when the legislature proceeds without a full complement or even majority participation. As Bentham put it, “is the part absent greater than that which is present? The public knows not to which to adhere. In every state of the case, the incomplete assembly will have less influence than the complete assembly.”¹¹⁸ A third cost is the *deliberative deficit* produced by low attendance. On a Condorcetian interpretation of legislative deliberation, 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.¹¹⁹ 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.¹²⁰

To be sure, if attendance is optional then self-selection may ensure that the attending legislators are precisely those most informed and most engaged on the relevant subjects, and this may be the best subset of deliberators available. Yet against this optimistic story is the possibility that self-selected attenders will hold extreme preferences or biased views; legislators with lower stakes in outcomes may prove more dispassionate deliberators, albeit less informed ones. Conversely, legislators’ willingness to invest in the information needed to cast an intelligent vote may itself be a product of attending the legislature, so that legislators induced to attend by quorum rules or other institutional reasons, rather than by the stakes or intrinsic interest of the subject matter, might fear to be seen casting an obviously uninformed vote and might thus learn enough to form a reasonably defensible view, or at least to decide intelligently which other legislator’s position should be copied.

It is tempting to think that the outcome errors produced by low attendance are harmless. 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. As Bentham described parliamentary practice, “[I]f the decision taken by the small number be contrary to the wish of the majority, they assemble in force the day following, and abrogate the work of the previous day.”¹²¹ 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 convention that without a quorum minimum “the U[nited] States might be governed by a Juncto.”

¹¹⁸ *Id.* at 58.

¹¹⁹ The Condorcet Jury Theorem “holds that a majority vote among a suitably large body of voters, all of whom are more likely than not to vote correctly, will almost surely result in the correct outcome.” Paul Edelman, *Legal Interpretations of the Condorcet Jury Theorem* 31 J. LEGAL STUD. 327 (2002). For applications of the Theorem to legislative deliberation and voting, see Jeremy Waldron, *Legislators’ Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY (Andrei Marmor ed. 1995).

¹²⁰ See Cass R. Sunstein, *Deliberative Trouble? Why Groups Go To Extremes*, 110 YALE L.J. 71, 108 (2000) (showing that heterogeneity of views in the deliberating body dampens group polarization). Several European constitutions do not require a quorum for deliberation, as opposed to voting. See, e.g., But establishing a quorum for voting may nonetheless have valuable indirect effects on deliberation, and it is far easier to monitor compliance with quorum rules for voting than for deliberation.

¹²¹ Bentham, *POLITICAL TACTICS*, *supra* note --- at 62.

Yet the constraint is a weak one, and may fail on either *de jure* or *de facto* grounds. If the legal regime permits the legislature to enact entrenched statutes, irrepealable by later legislative enactments (although not by constitutional amendment), then the legislative minority's initial act may stand. Moreover, in Parliament and in some states, constitutional or quasi-constitutional traditions or rules bar reconsideration of rejected bills within the same legislative session, based on a general rule that "the same question should not be twice offered" within that session.¹²² If these rules are interpreted expansively, so that the earlier enactment is deemed a rejection of the opposite proposal, they may preclude intra-session reversals. Even if the legal regime neither permits entrenchment nor bars reversals within the session, it may 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, perhaps because they desire to use that portion of the legislative agenda to pursue other business entirely. An implication of these considerations is that constitutions that permit entrenching statutes or that bar reconsideration of enactments within the same legislative session should, all else equal, have higher legislative quorum requirements than constitutions that do not—subject to a qualification to be discussed below.

Bentham also goes wrong by saying that "every proposition the success of which has resulted from absence, and which would have been rejected in the full assembly" should be counted as a "surprise."¹²³ With rational expectations, however, absentees will anticipate that diminished attendance increases the variance of legislative outcomes and thus the possibility of results that contradict the preferences of the legislative majority. The result may, however, come as a surprise to the public, if monitoring of absenteeism is imperfect. Moreover, in two-party systems error in Bentham's sense occurs only when there is asymmetrical absenteeism, such that the absentees from the party that would prevail with full attendance are sufficiently more numerous than the absentees from the minority party as to reverse the outcome. The modern Senate has evolved a complex norm that reduces the error costs of asymmetrical absenteeism: the pair system, under which senators form agreements with members of the other party not to vote. Although the pair system makes the senators immediately concerned better off by permitting symmetrical absences, it might be said to create an externality by increasing absenteeism and thereby detracting from legislative deliberation. We will return to this concern below.

Against the foregoing benefits of quorum rules must be set their principal cost, which is to block legislative action. Here too quorum rules resemble supermajority rules, in their common bias in favor of the status quo. A less obvious complication is that attendance may itself be an endogenous effect of the quorum rule, at least in part. As Gouverneur Morris brilliantly argued at the convention, "fix the [quorum] number low and they [i.e. legislators] will generally attend knowing that advantage may be taken of their

¹²² Erskine May, *MAY'S PARLIAMENTARY PRACTICE* 558 (19th ed. 1976); *see, e.g.*, Tennessee Const., art. II, § 19 ("After a bill has been rejected, no bill containing the same substance shall be passed into a law during the same session).

¹²³ See Bentham, *supra* note --- at 58.

absence.”¹²⁴ To the extent that this rational-expectations account is persuasive then increasing, rather than decreasing, the harms that legislative minorities may inflict by opportunistic action in the legislative majority’s absence will maximize the expected costs of failure to attend and thereby maximize attendance. On this view, legal regimes that permit entrenching statutes, that bar intra-session reversals, and so forth should have lower quorum requirements, not higher ones. But the flaw in this position is that maximizing attendance is an implausible aim; some absences are strategic, but some are justified, so the right maximand is not attendance *simpliciter* but attendance-without-good-excuse.

Quorum rules are not, of course, the only rules that affect attendance. Two other variables that have indirect effects on attendance are the transparency of legislative proceedings and the permissibility of proxy voting, either in committee or on the floor. The publication of roll-call votes encourages attendance if there is a political cost to absenteeism; there is some empirical evidence for this.¹²⁵ I examine transparency and its effects below. As for the second issue, proxy voting has never been permissible on the floor of either house; it was largely abolished in House committees in 1995, although it continues in Senate committees and in intercameral conferences.¹²⁶ Although the permissibility of proxies affects attendance, it does not follow that the proxy rules can or should be calibrated with the sole aim of optimizing attendance. Although proxies lower the costs of absenteeism, and thus reinforce the deliberative externality we have discussed, proxy voting also serves or (in the House) served as an instrument of majoritarianism, “ensuring that political control could not slip away to a well-organized minority that might concentrate its strength at a single location for a ‘sneak attack’ on the majority.”¹²⁷ Maximizing attendance prevents countermajoritarian surprise, but if less than full attendance is a given, a ban on proxy voting may undermine majoritarian control.

Jiggering the quorum rules, transparency rules and rules about proxy voting so as indirectly to maximize or optimize attendance thus looks like a difficult and potentially counterproductive enterprise. It might seem that the more straightforward procedure is simply to establish penalties for nonattendance by statute or internal rule. Almost all jurisdictions thus permit a minority smaller than a quorum to enact rules and set penalties to compel attendance by other legislators, and Bentham proposed an intricate system under which absentees would suffer an automatic deduction from salaries or deposited funds. Yet in many jurisdictions such rules go largely unenforced, not or not only because of collusion between the enforcing legislative officers and the offending legislators, but because of the undesirable side effects of a compulsory regime. Mandating a fine for nonattendance may implicitly announce that “a fine is a price” and thereby undermine, rather than reinforce, social norms that support legislative attendance. Moreover, if legislators differ widely in personal wealth, as they do in the House of Representatives, then a system of fines might produce (in Bentham’s words) “two classes in the assembly—those who were paid for their functions, and those who paid for not fulfilling

¹²⁴ 2 Farrand at 252.

¹²⁵ See *infra* note ---.

¹²⁶ Congressional Quarterly’s Guide to Congress Vol. I 552 (5th ed. 2000).

¹²⁷ *Id.*

them.”¹²⁸ Bentham fell back on the idea that attendance might be enforced by criminal sanctions, but this seems implausible, given quasi-constitutional traditions of legislators’ personal immunity and the high procedural costs of disproving legislators’ stock excuses. Finally, compelling attendance is inadequate to prevent strategic quorum-breaking if the quorum is determined by the number of votes cast on a roll call (the traditional practice), and if the minority may attend the legislature without casting votes. In the 19th century strategic refusal to vote was frequently used as a delaying tactic, and was suppressed only in 1890, thanks to a ruling by the Speaker of the House that members physically present but not voting counted towards a quorum.¹²⁹

Given that optimizing attendance through direct regulation is as problematic as the indirect regulation that animates quorum rules, most jurisdictions parallel (or copy) the federal constitution by adopting a mix of the two strategies, using quorum minima within a narrow range (typically a majority, occasionally two-thirds) and adding legislative authority to compel attendance. On this score the framers seem to have gotten things about right, at least if we ignore their failure to anticipate strategic refusals to vote, and at least in the sense that no strikingly superior alternatives to their major design choices exist.

Supermajority “quorum” rules. The framers, however, blundered by leaving open the critical interpretive question whether the express majority quorum for ordinary majority voting still obtains where the Constitution requires a supermajority of the votes cast. The constitutional text is ambiguous on the question of supermajority quorum rules. In several places, including the supermajority rules for treaties and impeachment, the framers pointedly provided that a supermajority vote “of the members present” would suffice; this suggests by negative implication that in other settings, such as the supermajority requirements for veto overrides or constitutional amendments, two-thirds of the whole membership of each House is required. Against this is the idea that where the framers wanted to vary the ordinary quorum rule, they did so expressly. An example is the Article II procedure by which the House of Representatives chooses the President; the framers provided that “a quorum for this Purpose shall consist of a Member or Members from two thirds of the States,” even though (only) “a Majority of all the States shall be necessary to a Choice.”¹³⁰ That the framers required a supermajority in any particular setting need not entail an implicit decision to require a supermajority of the whole body, rather than simply a supermajority of a majority quorum. In settings that expressly require a supermajority vote yet are silent about quorum rules, “the Framers expressly changed the multiplier for determining the requisite majority; there was no reason to think they had also changed the multiplicand.”¹³¹

The stakes of the issue are high. In a house comprising 100 legislators a majority of a majority (the ordinary quorum rule) requires only 26 votes, a two-thirds supermajority of a majority requires 34 votes, and a two-thirds supermajority of the whole requires as many as 66 votes. The difference between the second and third

¹²⁸ Bentham, *supra* note ---, at 59.

¹²⁹ William H. Riker, *THE ART OF POLITICAL MANIPULATION* 131-34 (1986).

¹³⁰ U.S. CONST., art. II, § 1, cl. 3.

¹³¹ Currie, *The Federalist Period*, *supra* note 46.

thresholds is far greater than the difference between the second and first. In light of the foregoing analysis, however, this interpretive question is easily resolved on consequentialist grounds. The principal constraint on supermajoritarian quorum rules is the ubiquity of the simple-majority voting rule, and this constraint disappears when the underlying voting rule is itself supermajoritarian. Nor, of course, is the indirect effect of quorum rules on legislative attendance an important consideration here. A quorum must be present whether supermajority requirements are interpreted to require a supermajority of the whole House, or just a supermajority of a majority. In the absence of those considerations, the topic of the optimal multiplicand for supermajority voting rules collapses entirely into the topic of optimal voting rules themselves. Increasing the multiplicand upwards is in principle equivalent to altering the requisite supermajority upwards. So from the consequentialist standpoint the issue is parasitic on the familiar debate over the costs and benefits of supermajority rules,¹³² a topic that I need not rehash here.

5. Transparency (of deliberation and voting)

Among the most significant of Article I's provisions regulating congressional procedure is the Journal Clause, which provides:

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.¹³³

This provision makes a number of fundamental design choices: 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;¹³⁴ for a default obligation to publish a journal of proceedings; and for an optional override of the transparency obligation in defined circumstances. Equally 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 committees¹³⁵ and a public right of physical access to legislative proceedings.¹³⁶ 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

¹³² See McGinnis et al., *supra* note 6.

¹³³ U.S. CONST., art. I, § 5, cl. 3.

¹³⁴ 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 39 at 530-33.

¹³⁵ 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.

¹³⁶ See, e.g., Idaho Const., art. III, § 12; Iowa Const., art. III, § 10.

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. The transparency of legislative deliberation and voting is in broad historical compass a recent design innovation, and a normatively controversial one, or so I shall argue. There are many good reasons for citizens and legislators to fear the effects of transparency on legislatures, and if we ultimately approve of the major thrust of the framers' design choices along this margin—as I will—we should do so with full awareness of the institutional costs of those choices.

I will break down this complex topic into three parts. The first sketches briefly the general tradeoffs inherent in legislative transparency; the second turns to the question of open versus secret voting, examining the purposes, scope and mechanics of the Journal Clause's roll-call provision; and the third examines constitutional mandates that require roll-calls for certain votes (rather than merely allowing a set fraction of legislators to require them).

Transparency, deliberation, and bargaining. At a general level, the institutional-design tradeoffs inherent in transparency are well understood,¹³⁷ 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 will see below that agents may even compete among themselves by offering principals institutional arrangements that provide for ever-greater transparency.

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.¹³⁸ 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

¹³⁷ For discussions, see Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345 (2000); Saul Levmore, *The Anonymity Tool*, 144 U. Pa. L. Rev. 2191 (1996); David Luban, *The Publicity Principle*, THE THEORY OF INSTITUTIONAL DESIGN, Robert E. Goodin ed. 154-98 (1996); Adrian Vermeule, *Judicial History*, 108 YALE L.J. 1311 (1999).

¹³⁸ 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).

positions from hardening prematurely.¹³⁹ The pressure to take a principled public stand also dampens explicit bargaining.

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,¹⁴⁰ and that help to appease 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.

So transparency is a mixed boon; not coincidentally, the historical and political record concerning legislative transparency presents a mixed picture. It is best to examine that record in the focused setting of particular constitutional questions, however. I shall begin with the baseline roll-call provisions applicable to ordinary voting, and then move to constitutionally mandated roll-calls for supermajority votes and other special circumstances.

¹³⁹ See Elster, *Arguing and Bargaining*, *supra*, 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)).

¹⁴⁰ 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 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).

(Open) voting and (secret) ballots. An intuitive and widely-held view is that, in a representative democracy, legislative voting must be publicized if citizen-voters are entitled or obliged to judge the performance of their representatives through periodic elections. In principal-agent terms, 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 better off. Secret voting, on this view, confines principals to monitoring or judging outcomes alone, rather than both actions and outcomes. Rather than knowing both how elected representatives voted and what the political and economic outcomes of the votes were, voters are relegated to making reelection decisions solely on crude outcome-based proxies for successful government, such as the state of the economy or the voter's personal finances at the time of election (or changes in either of those variables between the last election and the current one). Secret voting, it might be said, simply throws away information about legislators' actions, or legislative inputs, that is of value to citizen-principals.

The framers were quite aware of this principal-agent account, at least in its simplest outlines. Wilson argued in the convention that “[t]he 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.” Formally, of course, the Journal Clause does allow a sufficient supermajority of the legislature (four-fifths plus one) to do just that, by refusing roll-call votes and by closing the legislative journals to public scrutiny (the latter simply on a majority vote).¹⁴¹ Yet we may surmise that the framers anticipated that competition between legislative factions would routinely produce public voting, as indeed it has done. Congress as an institution (although not voters) might be better off if all legislators, in both houses, could agree to enforce strict secrecy provisions, but competition among legislators and candidates produces socially beneficial transparency.

As this last point emphasizes, where present or would-be legislators compete to achieve or retain office, modern accounts of the principal-agent relationship between voters and legislators have emphasized the benefits to legislator-agents themselves of reducing the costs of monitoring to principals.¹⁴² 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. They also increase the discretionary power with which principals will entrust them; the lower the costs of monitoring, the lower the risk that the agent will shirk or will divert power to his own ends rather than the principal's, and the more power the agent will receive. These effects may of course operate through the mediation of political parties, rather than through the decisions of individual legislators. Parties will oppose secret voting to the extent that it

¹⁴¹ An ingenious, or diabolical, interpretation might emphasize that the roll-call provision merely requires that “the Yeas and Nays . . . shall, at the desire of be entered on the Journal” – and that a bare majority might subsequently decline to publish that “Part” of the Journal at all, deciding that “in their Judgment [it] require[s] Secrecy.” But this would essentially nullify the submajority one-fifth requirement for forcing a roll-call, in violation of standard canons of textual interpretation that bar interpreting one proviso to swallow or negate another. See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994). So the better interpretation is that the roll-call provision trumps the secrecy option provided in the Clause; roll-calls must be published. To my knowledge neither House has ever refused to publish a roll-call vote.

¹⁴² This paragraph and the next draw heavily upon the important account in Ferejohn, *supra* note ---

reduces their ability to monitor their members' behavior and thus to credibly offer the electorate attractive policy packages. Consider the Italian Parliament, which uniquely among major liberal democracies had a regular, although complex, practice of secret voting until 1988, when the major political parties cooperated to abolish the practice as a means of asserting greater control over their own rank-and-file.

In historical terms, we may interpret these points as suggesting two hypotheses: (1) that constitutional framers who wish to strengthen government power will propose constitutionally-mandated rules of governmental transparency to induce popular ratification; (2) that subsequent elections under the new constitution may bring about increased transparency through voluntary legislative action, as competing candidates and competing houses of the legislature bid for popular support by proposing institutional policies that reduce the voters' monitoring costs. Both suggestions resonate with the historical evidence. As to the first, framers who advocated mandatory transparency of congressional deliberation and voting did so with the explicit recognition that encoding transparency in the constitutional bargain would help to dispel antifederalist concerns about the power of the new national government. Wilson, after arguing that the people had a right to know the actions of their legislative agents, added that "as this is a clause in the existing confederation, the not retaining it would furnish the adversaries of the reform with a pretext by which weak & suspicious minds would be easily misled." As to the second, the Senate's decision to proceed behind closed doors for the first years of its existence, and to limit publication of its debates and votes, caused popular interest to center on the House; by 1801 the Senate was bidding for popular attention by opening its proceedings to the public. Subsequent developments in congressional procedure extend the story. Modern legislators have imposed transparency obligations on themselves, such as roll-call voting in congressional committees, with a view to encouraging attendance and dispelling popular suspicion of legislative corruption. And there is some empirical evidence suggesting that transparency obligations do at least hamper shirking by allowing opposing candidates to publicize incumbents' attendance records.¹⁴³

So far the story is a happy or at least a straightforward one. We may complicate it by examining reasons that might give legislators good reason to fear the consequences of the transparency of legislative voting, and that might even cause their voter-principals to agree that public voting has important costs as well as benefits. From the legislators' point of view, a major historical concern is that the executive branch will punish them for voting contrary to executive interests; the fear of monarchical influence animated Parliament's elaborate attempts to maintain the secrecy of its proceedings during the 17th and 18th centuries. From the social standpoint, voter-principals might well approve of the legislature's attempts to shield itself from executive-branch coercion. If the constitutional design seeks to minimize agency costs in part by creating institutional competition between branches, than executive aggrandizement and consequent domination of the legislature increases those costs.

¹⁴³ See, e.g., David M. Olson, *THE LEGISLATIVE PROCESS: A COMPARATIVE APPROACH* 392-3 (1980); Ferejohn, *supra* note ---, at 139. Cf. Bruce Bender & John R. Lott, Jr., *Legislator Voting and Shirking*, 87 *PUB. CHOICE* 67 (1996) (members in their final congressional terms have higher rates of absenteeism).

Yet legislative secrecy may itself be an unnecessarily costly response to the threat, because it also deprives voters of valuable information about their agents' behavior. We might then understand the Speech and Debate Clause as an institutional-design device that promises an alternative, and less costly, means of dampening executive aggrandizement. The Clause provides that "for any Speech and Debate in either House, [legislators] shall not be questioned in any other Place";¹⁴⁴ its historical purpose and most important function is to prevent the executive from using its control of prosecutorial power to punish or, better yet, threaten to punish noncompliant legislators for their words and actions. Whereas legislative secrecy protects legislators from executive coercion by constricting the executive's information, the Speech and Debate Clause does so by constricting the executive's opportunities, thus allowing voter-principals to use the information themselves while denying their executive agents the ability to use it coercively. The Clause is an incomplete substitute for secrecy, because the executive may use carrots as well as sticks, bribes as well as threats. Yet bribes are more expensive than threats, since a credible threat that deters its targets from disobedience is costless if the threatener never has to incur the costs of actually punishing those targets. Moreover, the constitutional design independently restricts the executive's ability to bribe legislators along the most obvious margins. Consider the Emoluments Clause and the Incompatibility Clause, which together constrain, although they do not eliminate, the form of executive bribery most familiar to the framers, the offer of executive places or offices. The latter bars legislators from simultaneous service in the executive branch, while the former limits the President's ability to appoint a legislator to a newly-created or newly-augmented executive posts during the legislator's term of service.

The fear of executive influence is a special case of a more general problem: 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.¹⁴⁵ 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'.¹⁴⁶ 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 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

¹⁴⁴ U.S. CONST., art. I, § 6, cl. 1.

¹⁴⁵ Luban, *supra* note 94 at 187 (citing Sen. Robert Packwood).

¹⁴⁶ 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.

legislator may claim to be marginal in order to win an interest-group payment, but no such claims will be credible.

There is an illuminating comparison here to voting in general elections, which was usually open during the 19th Century but is today almost invariably secret. The switch produced important debates between advocates of open voting, who thought that secrecy produced irresponsibility and corruption, and advocates of the secret ballot, who argued, among other things, that secrecy would diminish electoral corruption and extortion by rendering noncredible voters' promises to sell votes to party bosses or local grandees for implicit payments, thereby reinforcing legal bans on explicit vote-selling. The response to this latter claim by advocates of open voting was and is that the sheer number of voters in general elections, and the infinitesimal chance of casting a decisive vote, ensure that the value of particular votes is too low to be worth buying; and no voter can deliver a bloc of votes as such. Whatever its merit, the argument emphasizes the far greater value of legislative votes, and the far more serious worry about third-party corruption in legislatures; after all, there are far fewer votes to buy in a legislature, and each has a far more direct effect on policy outcomes than general-election votes do.¹⁴⁷ Ignoring the loss of information to voters that legislative secrecy produces, we might even be surprised to find the pattern of secret voting in general elections and open voting in legislatures; the theory that produced the former militates even more strongly against the latter.

To be sure, the principal-agent-problem is not the same in the two cases, if we see voters as agents for no one but themselves whose only task is to express a preference to be aggregated socially. But then it takes a complex collective-action account to explain the ordinary legal ban on vote-selling.¹⁴⁸ On a more elevated but also more straightforward account, we may see voters as agents for all citizens, and see elections as aggregating voters' judgments about the social good rather than their preferences.¹⁴⁹ On this view, to allow voters to sell their judgments to third parties inflicts the same type of agency cost on society that legislative vote-selling inflicts on the electorate. This view straightforwardly justifies both the ban on explicit vote-selling and the accompanying practice of the secret ballot.

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

¹⁴⁷ "Consider some of the differences between a legislature and the populace: (1) Votes are cast by secret ballots in direct democracy, not so in legislatures. So, votes can hardly be bought and sold since there is no chance of adequate policing; (2) voters are not "repeat players" in the sense that they interact with one another on a statewide level such that their allegiances and behavior can be watched by others; (3) voters have no continuing oversight mechanisms to enable them to secure influence over interest groups, regulated industries or others; their only redress is an initiative that is considered at the next appropriate election." Daniel Rodriguez, *Turning Federalism Inside-Out: Intrastate Aspects of Interstate Regulatory Competition*, 14 YALE J. REG. 149 (1996).

¹⁴⁸ See Russell Hardin, *Morality Within the Limits of Reason* (Chicago, 1988); Saul Levmore, *Voting With Intensity*, 53 Stan L Rev 111 (2000).

¹⁴⁹ See Bernard Grofman & Scott L. Feld, *Rousseau's General Will: A Condorcetian Perspective*, 82 American Political Science Review 567-76 (1988); Jeremy Waldron, *Rights and Majorities: Rousseau Revisited*, in NOMOS XXXII: Majorities and Minorities 44 (John W. Vhaphman & Alan Wertheimer eds. 1990).

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, so if our task is to evaluate Article I's mandate for public roll-call voting from the standpoint of normative institutional design we should take comfort in the fact that open voting is ubiquitous in the representative assemblies of liberal democracies, often by constitutional prescription. If there is even a weak tendency for institutions, specifically constitutions, to evolve towards rules that minimize agency costs, we should infer from this strong uniformity that the loss of information to voters produced by secrecy outweighs the agency costs produced by an open market in legislative votes.

This is not to say, however, that we should uncritically approve of the roll-call provisions in the Journal Clause. If the empirical regularity of open voting in legislatures suggests that the Clause does not go too far, we might believe, on precisely the same grounds, that the Clause does not go far enough. Although the constitutional text provides for roll-call voting on "any question," early interpretations settled that the rule extends only to final votes on enactments, not to voting in standing or ad hoc committees, even the Committee of the Whole that the House uses to process amendments.¹⁵⁰ Many state and foreign constitutions, however, mandate (or permit a small minority to require) roll-call voting in committee as well as on floor passage.¹⁵¹ Given the major 19th-century shift that made congressional committees, rather than the floor, the dominant locus of legislative dealmaking, we might wish *ex post* that the federal Constitution had indisputably provided the same thing. More recent Congresses have attained the same result by voluntary rulemaking, but instead of taking this to suggest that an updated interpretation of the Clause is unnecessary, we might equally take it to suggest that an updated interpretation would not prove infeasibly disruptive. On both textual and functional grounds, then, the prevailing interpretation of Article I's roll-call provisions is underinclusive; Congress should recognize a constitutional, not merely self-imposed, obligation to reinterpret the Journal Clause to cover voting in all legislative fora.

Mandatory roll-call voting. A striking empirical regularity across state constitutions is that they frequently provide for constitutionally mandated roll-calls—in contrast to roll-calls that, as with the Journal Clause, must be triggered by a set fraction of legislators. State constitutions typically mandate roll-call voting for the final passage of any bill¹⁵² and for supermajority votes.¹⁵³ Although by tradition the Senate always uses roll-calls to vote on treaties, the Constitution expressly mandates roll calls in one case only: where the Houses vote by two-thirds supermajority to override a presidential veto.

¹⁵⁰ See Walter J. Oleszek, CRS Report for Congress, HOUSE VOTING PROCEDURES: FORMS AND REQUIREMENTS (1998).

¹⁵¹ See, e.g., Ark. Const., art. IV, § 12; Fla. Const., art. III, § 4(c); Ga. Const., art. IV, § 5.6; Ill. Const., art. IV, § 8(c); Md. Const., art. III, § 22.; N.C. Const., art. II, § 19; Wisc. Const., art. IV, § 20.

¹⁵² See, e.g., Alaska Const., art. II, § 14; Del. Const., art. II, § 10; Ill. Const., art. IV, § 8(c); La. Const., art. III, § 10; Mich. Const., art. IV, § 18; Minn. Const., art. IV, § 15; Mont. Const., art. V, § 11, cl. 2.

¹⁵³ See, e.g., Ga. Const., art. IV, § 5, cl. 6; Kan. Const., art. II, § 10; Tenn. Const., art. III, § 21; Va. Const., art. III, § 10.

“In all such Cases,” the provision runs, “the Vote of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively.”¹⁵⁴ The difference between mandates and trigger provisions at first seems less than dramatic, at least where the fraction needed to trigger a roll-call is as small as the Journal Clause’s one-fifth, but the striking consequence of such provisions is that even unanimous consent cannot dispense with the need for a roll-call, something that is very rare for constitutional transparency rules.

On the account offered here, it is straightforward to evaluate the marginal effect of such provisions, over and above the baseline roll-call rules. The mandate for roll-call voting increases the information available to citizens about legislators’ behavior on the most consequential votes, those involving final passage and the extraordinary circumstances in which supermajority voting is required. Because the stakes are so high in such situations, it might be a plausible concern that even legislators who otherwise compete to offer transparency to constituents would develop mechanisms to overcome their collective-action problems and collude to prevent the roll-call procedure from being triggered. Alternatively (although this point is compatible with the last one), it might be thought that citizen-principals should most suspect that their legislator-agents have fallen prey to deliberative pathologies, or are engaging in self-dealing, precisely when those agents are unanimous, or sufficiently near unanimous that even the small number of votes needed to trigger a roll-call cannot be found. The ambiguity of unanimity is always with us. Unanimity might suggest, along the lines suggested by the Condorcet jury theorem, that there is a right answer and everyone has figured it out. It might also suggest that a legislative mob is stampeding towards a dubious policy, or that a legislative gang has passed out sufficient side payments to all participants.

The flip side of the coin, of course, is that the mandated transparency also enhances the monitoring of bargains between legislators and other actors. The mandated roll-call on veto override votes probably enhances presidential power on net, by permitting the President to strike marginally-more enforceable bargains in anticipation of veto showdowns, and this might or might not be thought positive taken by itself. But the magnitude of this effect is probably rather small, and the widespread and consistent use of roll-call mandates by state constitutions suggests that the background evolutionary or institutional pressure to monitor supermajority votes and final-passage votes more closely than other votes ought to be deemed more important than a loss of legislative autonomy that is marginal in both the colloquial and formal senses. By the same logic, however, it is plausible to criticize the Journal Clause yet again as being too narrow: a mandated roll-call vote on all bills up for final passage would incorporate what is plausibly a valuable state-level innovation.

¹⁵⁴ The literal-minded will note that this provision appears to draw a distinction between “yea and nay” votes, on the one hand, and votes that match votes with the names of particular legislators, on the other – perhaps suggesting that the yea-and-nay voting required by the Journal Clause requires only a formal count of those supporting and those opposed (in contrast to methods like voice voting and division voting, which allow the speaker or presiding officer to judge the result based on an imprecise estimate of which side has the majority. In congressional tradition, however, this distinction has never been drawn; roll-call voting always matches votes with names. See Oleszek, *House Voting Procedures*, *supra* note 103; Tiefer, *supra* note 39 at 536-37.

6. The Origination Clause

The Origination Clause provides that “[a]ll Bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”¹⁵⁵ The Clause presents a variety of important historical issues. We have seen that the convention was riven by struggles over the Clause, a question intertwined with the all-important question of the basis of representation in the Senate. The principal rationale for origination restrictions was typically that the upper house, where hereditary (as in England) or elected on a geographic rather than proportional basis (as in the Senate) was remote from or unrepresentative of “the people,” a rationale that would disappear if the Senate were elected on a proportional basis. Accordingly Pinkney initially proclaimed the question of the Origination Clause “premature[:] If the Senate [should] be formed on the same proportional representation as it stands at present, they [should] have equal power [i.e. to originate money bills,] otherwise if a different principle [should] be introduced.”¹⁵⁶ After much maneuvering the Clause was inserted as compensation to large states in consideration for their acquiescence in the state-based, rather than proportional, composition of the Senate. I shall not explore this background in any more detail,¹⁵⁷ however, as my project is not to trace the provenance of the constitutional law of congressional procedure, but to evaluate it prescriptively.

In the origination setting, the framers faced a superficially simple menu of design choices: to have no origination restriction, to create a category of bills subject to exclusive House origination with no Senate amendments permitted (remitting the Senate to an up-or-down vote), or to make House origination exclusive while permitting Senate amendments. The no-amendment regime roughly describes the traditional practice of Parliament, in which the Lords were not permitted to amend fiscal measures originating in the Commons, while the regime permitting amendments had been adopted in several state constitutions.¹⁵⁸ The framers were divided on the question whether the various possible versions of the Clause would have any effects at all, and if so what those effects would be. I shall suggest that, contrary to conventional wisdom, the Clause indeed has effects, and that they are largely beneficial from Congress’ point of view—so much so that exclusive privileges of origination tend to evolve endogenously. The best criticism of the Clause, then, is not that it is ineffectual or a nullity, but instead that (putting aside the need to make the proposed constitution acceptable to the ratifiers) it was unnecessary for the convention to constitutionalize the Clause; a similar norm might well have evolved in its absence.

More than a few framers argued that the third option, an origination clause with Senate amendment power, would have no effect at all. James Wilson put the argument metaphorically:

¹⁵⁵ U.S. CONST., art. I, § 7.

¹⁵⁶ 1 Farrand, *supra* note --- at 234

¹⁵⁷ For an full account, see Medina, *infra*.

¹⁵⁸ See, e.g., Md. Const., art. III, § 27(a); Nev. Const., art. IV, § 16; N.H. Const., art. II, § 19; N.J. Const., art. IV, § 6.1; N.Y. Const., art. III, § 12; Ohio Const., art. II, § 15.

With regard to the pursestrings, it was to be observed that the purse was to have two strings, one of which was in the hands of the H[ouse] of Rep[resentatives], the other in those of the Senate. Both houses must concur in untying, and of what importance could it be which untied first, which last.¹⁵⁹

The proposal that Wilson was addressing would have required House origination of both revenue bills and appropriations bills, while the enacted version of the Clause limits the restriction to revenue bills alone, so the metaphor of pursestrings may be slightly misleading; I shall take up the question of appropriations bills below. Nonetheless Wilson's basic point is an important one. The Senate can, and not infrequently has, simply stricken out the whole substance of a bill enacted by the House and inserted its own proposal (as an "amendment"). The resulting bill, if approved by the subsequent conference committee, will have nominally originated in the House, but will in substance have originated in the Senate;¹⁶⁰ indeed some major tax-reform legislation, such as the reworking of the tax code in 1986, has just this provenance.¹⁶¹ So either origination regime—the one barring amendments and the one permitting them—in effect allows the Senate to make counteroffers, and it is unclear in what respect the House's exclusive power to originate revenue bills makes any difference.¹⁶²

But this argument is overblown. Even where counteroffers are permitted, in the form of *de jure* or *de facto* amendments, standard bargaining models suggest that the first-mover may obtain a disproportionate share of the gains. The essential intuition is that the first player will benefit from its ability to make an initial offer that gives the second player only an iota more than the second player would obtain at the end of the sequence of offers and responses; the second player can do no better than to accept.¹⁶³ To be sure, this advantage is of uncertain magnitude, and much depends on the precise specifications of the model. The more quickly the value of obtaining agreement later (rather than now) declines, the greater the first-mover advantage is,¹⁶⁴ but the relative impatience of the players—the rate at which they discount future gains—is also a critical factor,¹⁶⁵ and of course either House may anticipate future or unrelated negotiations and thus decide to invest in a reputation for obstinacy. Informally, however, softer considerations support the idea that the House gains something from its origination privilege. Even where the Senate enjoys amendment power, the House might enjoy an

¹⁵⁹ 2 Farrand, *supra* note --- at 275.

¹⁶⁰ *Id.* at 277.

¹⁶¹ This point is emphasized by the important institutional detail that most current tax legislation is reviewed by the expert staff of the standing Joint Committee on Taxation before funneling through House Ways and Means or the Senate Finance Committee.

¹⁶² An unexplored issue, tangential to the discussion in text, is the effect of the Clause on tax-related treaties. The Clause might bar the President and Senate from creating a self-executing agreement with foreign nations to change revenue rules, as the Clause requires the House to initiate the statutory changes needed to bring the treaty into force. Thanks to Julie Roin for this point.

¹⁶³ See Bruce Lyons, "Bargaining," in Shaun Hargreaves Heap et al., *THE THEORY OF CHOICE* 136-37 (1992).

¹⁶⁴ See *id.* at 136, 141; Avinash Dixit & Susan Skeath, *GAMES OF STRATEGY* 531-41 (1999).

¹⁶⁵ If the players have equal discount rates, the first-mover retains an advantage. If the second-mover discounts less steeply than the first, however, that advantage may dissipate or even be reversed, depending on the players' specified traits. See Dixit & Skeath, *supra* note 161 at 537-38.

intangible but real form of first-mover advantage from its ability to set the policy agenda in ways that structure both legislative and political debate. The question is empirical, and the literature suggests that there is indeed an appreciable first-mover advantage in the legislative game.¹⁶⁶

A related argument suggests, more broadly, that the Clause is a nullity because any origination restriction can be circumvented through intercameral contracting, whether or not the Clause permits Senate amendments. At the convention, several delegates advanced some version of the following argument of Madison's:

Experience proved that it [“the exclusive privilege of originating money bills”] had no effect. If seven States in the upper branch wished a bill to be originated, they might surely find some member from some of the same States in the lower branch who would originate it. The restriction as to amendment was as of little consequence. Amendments could be handed privately by the Senate to members in the other house.¹⁶⁷

In modern terms, the Origination Clause may be transacted around, at low cost, by the two Houses,¹⁶⁸ whose repeat-play relationship has produced elaborate institutions for intercameral bargaining (such as conference committees and the Joint Tax Committee). But this Coasean analysis ignores the distributive effect of the initial specification of constitutional entitlements. Even if the same revenue levels are produced with or without the Clause, the House's ability to demand a payment for the renunciation of its origination privilege with respect to particular bills will skew the distribution of political benefits between House and Senate in the House's favor, relative to a world with no Origination Clause at all.¹⁶⁹ The flawed assumption underlying the argument must be that there is in effect no constitutionally-specified entitlement to begin with, because there is

¹⁶⁶ “The chamber that acts first on a bill tends to have the greatest impact on the content of a bill.” Gerald S. Strom and Barry Rundquist, *A Revised Theory of Winning in House-Senate Conferences*, 71 AM. POL. SCI. REV. 448, 451 (1977); see also Donald A. Gross, *House-Senate Conference Committees: A Comparative-State Perspective*, 24 AM. J. POL. SCI. 769 (1980) and Dennis S. Ippolito, *House-Senate Budget Conferences: Institutional and Strategic Advantages*, 11 AM. POL. Q. 71 (1983).

¹⁶⁷ 2 Farrand, *supra* note --- at 273.

¹⁶⁸ See Donald Wittman, “The Constitution as an Optimal Social Contract,” in Bernard Grofman and Donald Witman, *THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM* 75-76 (1989).

¹⁶⁹ The point here is not, of course, that the outcomes in either case would be socially efficient. As one possible source of inefficiency among many, note that the Origination Clause will at the margins increase the inefficiency of redistributive measures by Congress. Under certain assumptions, it can be shown that redistribution is more efficiently handled through taxation than through regulation. Compare Louis Kaplow and Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) with Chris Sanchirico, *Taxes versus Legal Rules as Instruments for Equity: A More Equitable View*, 29 J. LEGAL STUD. 797 (2000). But if there is a cost to the Senate in making a side payment to the House (to buy off its constitutional objection) whenever the Senate wishes to redistribute by originating a revenue bill, then the Senate will shift marginally from redistributive revenue projects to less-efficient regulatory projects, and the total output of Congress will contain more regulation and less taxation (holding constant overall redistribution) than in a regime with the revenue-origination rule.

no external mechanism for enforcing the Clause. This assumption is, under the Supreme Court's current doctrine, simply false; the Clause is fully justiciable.¹⁷⁰

Indeed, the best analysis of the Clause's behavioral effects flips all of these arguments on their head. Far from being ineffectual, origination restrictions of greater or lesser formality may be predictable or inevitable, in the sense that they tend to evolve endogenously as norms governing the behavior of bicameral legislatures. Here the basic intuition is that a lower chamber with more members, such as the House, may obtain policy-relevant information at lower cost than an upper chamber with fewer members, such as the Senate. Over time, the two Houses may attain an equilibrium arrangement in which the lower House specializes in information in return for the distributive advantage of having the first move. The House receives a larger share of the larger pie, but the Senate too benefits on net from the House's informational expertise.¹⁷¹

Obviously many other variables and forces may vitiate or drown out this effect; it is strongest, for example, when the two Houses are dominated by the same political party (and thus have similar preferences). But the quasi-constitutional traditions surrounding appropriations legislation provide a fine confirmatory example of the general model. The convention, as we have seen, rejected a proposal to include appropriations measures in the Origination Clause. Nonetheless a longstanding norm has evolved within Congress to the effect that the House has the exclusive prerogative of initiating appropriations measures.¹⁷² Much about this norm is contested, and its scope and weight are uncertain; the Senate takes it to be a subconstitutional "custom" rather than a tradition of constitutional stature; the House insists that the "immemorial practice" has been constitutionalized by prescription.¹⁷³ But the norm's persistence in the face of uncertainty about its precise constitutional status testifies to the persistent benefits of cameral specialization.

¹⁷⁰ The Supreme Court has never invalidated a statute on Origination Clause grounds. But the Court has consistently said that the Clause is justiciable, and it has several times considered Origination Clause challenges on the merits, in each case finding that the statute under review was not a "Bill for raising revenue" within the meaning of the Clause. *See, e.g.,* *United States v. Munoz-Flores*, 495 U.S. 385 (1990); *Twin City Bank v. Nebeker*, 167 U.S. 196 (1897). On one account, the Court has strained to deny that the challenged statutes were revenue measures, presumably in order to avoid the difficult questions of judicial capacity that would be posed by any effort to determine whether a bill originated in the House or Senate. *See* *Hubbard v. Lowe*, 226 F.135, 141 (S.D. N.Y. 1915), appeal dismissed mem., 242 U.S. 654 (1916) (invalidating a federal statute under the Origination Clause, and opining that "[the Supreme Court] sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate was not a 'bill for raising revenue'"). Part of the historical picture, however, was the possibility that the enrolled-bill rule of *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), might bar the Court from looking behind Congress' formal certification of a bill's House of origin. The Court firmly rejected the enrolled-bill rule in *Munoz-Flores*, saying that the rule does not apply when "a constitutional provision is implicated." *See* 495 U.S. at 391 n.4.

¹⁷¹ *See* James Rogers, *Bicameral Sequence: Theory and State Legislative Evidence*, 42 AM. J. POLI. SCI. 1025 (1998).

¹⁷² James V. Saturno, *THE ORIGINATION CLAUSE OF THE U.S. CONSTITUTION: INTERPRETATION AND ENFORCEMENT*, CRS Report for Congress 1 (2002).

¹⁷³ *See* J. Michael Medina, *The Origination Clause in the American Constitution: A Comparative Survey*, 23 TULSA L.J. 165, 186-87 (1987).

The upshot, then, is that origination privileges may often evolve endogenously. While this point undermines the claim that origination restrictions are ineffectual, it does suggest a different criticism of the Clause: it may have been unnecessary to constitutionalize the revenue-origination privilege in the first place. The large states, like North Carolina, that demanded the Clause as compensation for accepting an equal basis of representation in the Senate might have been better off with a different form of side-payment. It is true, however, that in an *ex post* sense the social harm of the convention's normatively questionable decision to constitutionalize the Clause has been quite small; in this sense the Clause's critics are pointed in the right direction, albeit for the wrong reasons.

7. Cameral Autonomy and Congressional Rulemaking

May Congress enact an ordinary statute, presented to the President, that prescribes binding internal rules for the houses of Congress acting separately? An internal rule means, as always, a rule that could otherwise have been enacted by the houses alone under the Rules of Proceedings Clause. A notable and little-explored feature of the public-law landscape is the prevalence of statutory law that bears on internal congressional procedure. Consider the Alaska Natural Gas Transportation Act,¹⁷⁴ which barred consideration by either House of Congress of certain resolutions concerning energy policy, or the recent Congressional Review Act,¹⁷⁵ which establishes special internal legislative procedures for disapproving proposed agency regulations.

It is critical, however, that Congress often inserts a proviso that subjects the statute to override by a subsequent internal legislative rule of either House, in the ordinary course.¹⁷⁶ These qualifiers create a positive puzzle. Rule-prescribing statutes that contain such a proviso are essentially hortatory or directory; they have no legal effect on the rule-prescribing power of the houses. Why then does Congress enact the underlying statute in the first place? An obvious possibility is that the statute serves a coordinating function between the two houses, announcing focal points (such as numerical deadlines) so that legislators from one house may shape their behavior in conjunction with legislators from the other. Yet the aim of coordination could be equally well served by a concurrent resolution, not presented to the President. Why use the ordinary statutory form, exposing internal congressional business to executive involvement and a potential veto?

A more plausible conjecture is simply that the procedural alternative to such statutes is unappealing.¹⁷⁷ Instead of enacting a statute that contains both substantive policy directives and (hortatory) internal rules, Congress might split the substantive questions from the procedural ones, enacting the former in the ordinary manner and

¹⁷⁴ 15 U.S.C. §719 et seq.; *see also* *Metzenbaum v. FERC*, 675 F.2d 1282 (D.C. Cir. 1982) (holding that alleged violations of the Act's procedural requirements are nonjusticiable).

¹⁷⁵ 5 U.S.C. §801 et seq.

¹⁷⁶ *See, e.g.*, Congressional Review Act, 5 U.S.C. §802(g)(2): "This section is enacted by Congress . . . with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House."

¹⁷⁷ Thanks to Elizabeth Garrett for this conjecture.

enacting the latter through each House's separate rulemaking process. Such a course of action, however, requires at least two votes (in each House) rather than one, and thus creates more opportunities for strategic behavior. By bundling substantive with procedural provisions, the rule-prescribing statute achieves the effect of an omnibus bill, allowing enforceable deals to be struck where the alternative of sequential voting would permit defection in later votes. Moreover, in both the House and Senate mid-session rule changes are difficult to accomplish; by tacking what is in effect a rule change to a statute already under consideration, each House conserves agenda time and minimizes decision costs.

As to the normative questions: the first task is to set the constitutional baseline. Are genuine rule-prescribing statutes, lacking the typical proviso, valid or invalid under the current constitution rightly understood? An example is the Electoral Count Act, which "puts strict time limits on the electoral count: when the two Houses separate to debate an objection to an electoral vote, each Member of each House may only speak once on the objection for a maximum of five minutes, and total debate in each House is limited to two hours."¹⁷⁸ Here, in contrast to statutes whose prescription of internal rules is merely hortatory, the positive value of the enactment is easy to understand. First, the power to make binding rules in advance of particular controversies allows legislators to proceed as though behind a veil of ignorance, or uncertainty, and thus helps to ensure the impartiality of the resulting rules. The procedures mandated by the Electoral Count Act fit this picture nicely; much better to settle the management of contested presidential elections before competing parties and factions know who the candidates will be. Where binding statutory prescription of internal rules is impossible, rules are always subject to ex post adjustment when the substantive valence of the rules has become apparent.

Second, statutes of this sort entrench procedural rules as against future Houses, and this is a policy instrument with potential value to both the enacting Congress and later congresses. Entrenchment permits credible commitments to be made, both among legislators and between legislators and outside actors, such as the executive, constituents, or foreign nations, in situations where a nonentrenched rule would be exposed to subsequent opportunistic change by one party to the deal. By making commitment possible, entrenchment allows all concerned to strike a range of bargains that are otherwise unattainable. On this view, the constitutional authority for the rule-prescribing component of these statutes is, simply, whatever substantive legislative power authorizes the statute, in conjunction with the Necessary and Proper Clause.¹⁷⁹

One constitutional objection to such statutes is the hoary anti-entrenchment maxim that one legislature may not bind its successors. That objection is, however, untenable, for reasons explained at length elsewhere.¹⁸⁰ But there are other, more

¹⁷⁸ Vasan Kesavan, *Is the Electoral Count Act Unconstitutional?*, 80 N.C. L. REV. 1653 (2001). The author concludes that this provision violates the Rules of Proceedings Clause.

¹⁷⁹ See Steven G. Calabresi, *The Political Question of Presidential Succession*, 48 Stan. L. Rev. 155, 160 n.31 (1995); see also *Michel v. Anderson*, 14 F.3d 623, (D.C. Cir. 1994) (suggesting, in dictum, that a procedural rule created by statute would "trump any authority of the House to change its rules unilaterally to grant that power.").

¹⁸⁰ Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002). For a contrary view, see McGinnis & Rappaport, VA. L. REV. (forthcoming).

formidable objections as well. First, it is plausibly the best reading of the Rules of Proceedings Clause that the power of each House to “determine the rules of its proceedings” is exclusive as well as permissive; the Clause, that is, not only authorizes internal one-house rulemaking, but also bars internal rulemaking through other instruments. (Note that this objection is entirely distinct from the anti-entrenchment objection; the latter concerns the legal authority of Houses over time, while the former addresses the question of which legal instruments—rulemaking alone, or both rules and statutes—a given House can use to make internal rules). On this view, the claim that the “Necessary and Proper Clause empowers Congress to carry into execution its own powers, including the rule-making powers of both Houses”¹⁸¹ is mistaken; the rule-making powers of the Houses taken separately are not powers of Congress as a joint body, and thus cannot be exercised by statute. A second important objection sounds in the separation of powers; quite apart from the Rules of Proceedings Clause, it might be said that presidential involvement in Congress’ internal rulemaking poses an unacceptable risk of executive invasion of core legislative functions. On this view, Congress might be able to enact rules by concurrent resolution,¹⁸² but not by statutes subject to presentment.

If statutes that prescribe binding internal rules are unconstitutional, is this good constitutional design? Probably not. In these settings the Constitution deprives Congress of its first-choice instrument, thereby imposing discernible costs for uncertain benefits. The costs are the inability of earlier Congresses to commit to future rules behind the veil of ignorance, and the foregone bargains made possible by entrenching instruments that codify binding commitments. The benefits of prohibiting Congress from seizing such opportunities are obscure. The bare insistence on cameral autonomy—the insistence that each House simply must make rules to govern itself and itself alone—just restates the conclusion, rather than explaining it. After all, an instrument that prescribes binding internal rules is simply another policy tool at Congress’ disposal. It is hard to see, in general, why such an instrument should be thought any more dangerous, or more susceptible to abuse, than a myriad other instruments that Congress uses routinely, such as the many varieties of taxation, spending, and delegation. The structural problem of presidential encroachment, if it is one, might be obviated by providing a constitutional mechanism for binding concurrent resolutions in areas also subject to the Rules of Proceedings Clause. All in all, it is a flaw in the current Constitution that, correctly interpreted, it bars Congress as an institution from prescribing internal rules binding on the Houses taken separately.

8. “Missing” Provisions

Finally, I shall briefly analyze some legislative-procedure rules that might, with the benefit of two centuries of hindsight, be described as “missing” from the federal constitution. These are provisions that have, since the founding era, come into wide use in other jurisdictions’ constitutions. I shall make no attempt at a comprehensive survey of the terrain, nor shall I discuss important state constitutional innovations that are

¹⁸¹ Calabresi, *supra* note 125.

¹⁸² The Kansas constitution creates such a mechanism; it allows the two legislative houses to adopt joint rules on certain matters, and to provide the “manner” in which those rule may be changed in the future. Kans. Const., art. II, § 12.

substantive rather than procedural in my sense. Examples in this last category are single-subject rules, which typically prohibit enactments that contain unrelated provisions, and prohibitions on special or local bills, which bar enactments for the benefit of geographically or socially confined interests, as opposed to the public interest. In both cases, the prohibitions look to the enactment's content and substance, ruling out certain legislative outcomes, rather than addressing the mode of the bill's enactment; in this respect they are closely analogous to the federal equal protection clause. The examples I shall discuss here, by contrast, are genuinely procedural, in that a bill of given content may either satisfy or violate them in light of the history of its passage through the legislature.

Three-reading rules. A striking feature of the legislative procedure mandated by state and foreign constitutions is the widespread presence of “three-reading rules.” Such rules typically require that “[n]o bill shall become a law unless the same shall have been read on three several days in each house previous to the final vote thereon.”¹⁸³ In most jurisdictions, however, the three-reading requirement may be overridden by a supermajority vote, at least in cases of “urgency.”¹⁸⁴ In the national Congress, each House early adopted three-reading rules; although the Senate rules required three readings on three different days, and the Senate retains its rule today, the House rules currently allow a bill to be read three times and enacted all in a single legislative day.¹⁸⁵

Bentham's argument for three-reading rules, which is the standard argument, illustrates their justifications and their characteristic problems. Bentham argues, chiefly, that the three-reading rule operates as a self-binding mechanism that allows the legislature to guard against the consequences of its own future passions, myopia, or herd behavior. By requiring that bills be read and debated on successive days, the legislature may anticipate and forestall future occasions on which it will be seized by deliberative pathologies. “The more susceptible a people are of excitement and being led astray, so much the more ought they to place themselves under the protection of forms which impose the necessity of reflection, and prevent surprises.”¹⁸⁶

Bentham is aware of the most obvious counterargument: delay, reflection and deliberation amount to inaction, and inaction produces opportunity costs. By preventing legislators from acting in a passionate frenzy, the three-reading-requirement minimizes the risk of false positives—occasions when the legislature should not have acted but did. Yet the requirement also increases the risk of false negatives—occasions when the legislature should have acted expeditiously, yet, stewing in its own deliberative maturity, failed to do so. Bentham responds as follows: “It may be objected, that this plan [the three-reading requirement] occasions great delays, and that circumstances may imperiously require that a law should be passed with rapidity. To this it may be replied,

¹⁸³ For state constitutional provisions, see Idaho Const., art. III, § 15; Ind. Const., art. IV, § 18; S.C. Const., art. III, § 18; Alab. Const., art. III, §63; Col. Const., art. V, § 22. For foreign constitutional provisions, see Constitution of France, art. 45-46 (2-reading requirement).

¹⁸⁴ See, e.g., Alaska Const., art. II, § 14; Col. Const., art. V, § 22; Fla. Const., art. III, § 7, Md. Const., art. III, §27(a); Or. Const., art. IV, § 19; W. Va. Const., art. VI, § 29.

¹⁸⁵ House Rule VXi, cl. 8; Senate Rule XIV, cl. 2.

¹⁸⁶ Bentham, *supra* note --- at 131.

that in cases of necessity the Houses of Parliament can suspend their usual orders, and that a bill may be made to pass through all its stages in both houses in one day.”¹⁸⁷ But this view collapses under its own weight unless the three-reading rule is entrenched, perhaps by constitutionalization. Without entrenchment, the very same decisionmaking pathologies that produce hasty and ill-considered substantive legislation will produce hasty and ill-considered suspensions of the three-reading rule. Bentham has overlooked that nonentrenched procedural rules are endogenous products of the legislature, and are thus subject to the control of the same majorities that Bentham seeks to restrain.

So the key design problem here is that three-reading rules must be constitutionalized or otherwise entrenched to achieve their intended effects. The necessary entrenchment of three-reading requirements might be constitutional or cameral, and, if it is cameral, either formal or informal. In many states, as we have seen, three-reading requirements are formally entrenched in the constitution. In the Senate the requirement is cameral only, but it is also formal. A motion to change or suspend the Senate rules, including the three-reading rule, is subject to filibuster and thus requires 60 votes to attain cloture; and the cloture rule is itself formally entrenched.¹⁸⁸ (Here the Senate is using a supermajority rule to protect its ordinary processes; I shall return to the relationship between three-reading rules and supermajority rules momentarily). In the House, however, the barriers are more porous. We have seen that the current House rules allow all required readings to occur in a single day, and even the requirement of three readings can itself be dispensed with. Although there is an appreciable *de facto* cost to changing the House rules after their biannual readoption at the beginning of a new Congress, there is no formal barrier to intrasession rule changes or, more commonly, suspensions by simple majority.¹⁸⁹ We might, then, plausibly see it as a defect in the federal constitutional law of legislative procedure that it failed to codify and entrench the three-reading requirement, a device that was well known to the framers from parliamentary practice, and that they in fact adopted, in slightly diluted form, to govern the business of the convention itself.¹⁹⁰

The entrenchment of three-reading requirements, however, reanimates the concern that deliberative delay will produce costly inaction. Most states have sensibly attempted to maximize the net benefits of three-reading requirements through design devices that sort occasions for swift action, on the one hand, from legislative frenzies on the other. A common technique is to use supermajority requirements, sometimes combined with a substantive trigger that permits the supermajority override only in case of “emergency” or “urgency.” It is tempting to condemn such provisions on the ground that supermajority rules allow legislative minorities to hold out for side payments, and that the existence of an emergency will exacerbate this concern, forcing the legislative

¹⁸⁷ Bentham, *supra* note --- at 130-131.

¹⁸⁸ See Posner and Vermeule, Legislative Entrenchment, *supra* note 126 at 1694-95.

¹⁸⁹ Enactment of a bill using the suspension procedures of House Rule XXVII does require a two-thirds vote. See House Rule XXVII, § 1. However, “[I]f a suspension motion fails to receive the required two-thirds vote, the House can consider the bill in question again and under procedures that require only a simple majority vote to pass it.” Stanley Bach, CRS Report for Congress, SUSPENSION OF THE RULES IN THE HOUSE: PRINCIPAL FEATURES (1998).

¹⁹⁰ 1 Farrand, *supra* note 29 at 9; Robert Luce, LEGISLATIVE PROCEDURE: PARLIAMENTARY PRACTICES AND THE COURSE OF BUSINESS IN THE FRAMING OF STATUTES 207 (1922).

majority to acquiesce in the minority's extortionate demands. Yet a holdout threat will not be credible under such circumstances.¹⁹¹ If a genuine emergency is at hand, so that the result of inaction will be worse for all concerned, including the minority, than will passage of the necessary legislation without side payments, then the minority can do no better than to acquiesce. The majority, knowing this, will ignore the minority's demands entirely, and the necessary supermajority will support the bill even without payments.

Temporal restrictions on proposed legislation. In the national House and Senate bills may be introduced at any time during the legislative session, and the Constitution contains no restrictions on this practice. Many state constitutions, by contrast, restrict the period during which bills may be introduced, typically by counting either forward or backward from the beginning or end of the session. Thus the Washington Constitution prescribes that “[n]o bill shall be considered in either house unless the time of its introduction shall have been at least ten days before the final adjournment of the legislature,”¹⁹² subject to a supermajority override; while the Missouri Constitution bars nonappropriations bills from being introduced “after the sixtieth legislative day,”¹⁹³ subject to an override by simple majority. In some states the class of legislation subject to timing requirements is more narrow—appropriations bills, or bills relating to official salaries—but most states that have timing restrictions parallel Washington by permitting a supermajority override.

Here, as with the case of three-reading requirements, I shall suggest that the absence of a similar provision from the federal constitution is cause for regret. The point of such provisions is straightforward. Timing limitations, whether of the forwards or backwards variety, protect the end of the legislative session from overcrowding, and with good reason. First, the multiple delays built into the structure of legislative procedure routinely creates a press of business at the end of the legislative session. By creating a period in which no new business can be added while old business is being processed, timing limitations help to minimize the costs of legislatures' complex internal structure. Second, timing limitations reduce the likelihood that ill-considered or technically maladroit measures will pass during the end-of-session flurry, measures that might not obtain majority approval in calmer moments. Finally, in many states timing provisions were enacted as progressive reforms in response to episodes in which legislatures finished the session with a flurry of quasi-corrupt, or simply corrupt, spending legislation or special bills. The massive volume of business that always marks the end of legislative sessions increases the costs to other legislators and outside groups of monitoring and blocking such legislation; timing limitations create a buffer period in which public outrage may be turned against sitting legislators, permitting the most inefficient legislation to be repealed or reversed in the current session. Without timing limitations, on the other hand, legislators may hope to weather the political storm after the legislature has recessed and public attention has receded.

To be sure, some of the relevant problems might be dampened by more precisely-targeted provisions, such as constitutional restrictions on special-interest legislation. But

¹⁹¹ Elster, *Arguing and Bargaining*, *supra* note 94 makes a similar point about the Origination Clause.

¹⁹² Wash. Const., art. II, § 36.

¹⁹³ Mo. Const., art. III, § 25.

the sponginess of such provisions, resulting from the notorious difficulty of identifying special-interest measures or even understanding the “public interest” at a conceptual level, means that a quantified rule such as a timing restriction is easier to enforce, and thus a valuable prophylactic device. Another stock objection to timing restrictions is the possibility of circumvention. In most states the relevant provision is held not to bar amendments offered outside the permissible window for introduction, so that legislatures have sometimes introduced “skeleton” bills within the window and then tacked on sweeping amendments. But this, like the gambit of thoroughgoing amendments that the Senate occasionally uses to circumvent the Origination Clause, presents an ordinary form-and-substance problem. Officials charged with enforcing constitutional rules must constantly resolve similar questions; the threat of circumvention is rarely thought such an insuperable problem as to condemn the underlying rules entirely. Note that this point does not assume that judges are the ones enforcing the provision, so the point holds even in jurisdictions where the enrolled bill rule prevents judges from examining the timing of the bill’s introduction to check compliance with the restriction. Legislatures vigorously enforce many such restrictions, as we also saw in the Origination Clause setting; in general, it is a mistake to assume that constitutional prohibitions are somehow unreal unless backed up by judicial review, although it is a mistake that routinely seduces court-centered constitutional lawyers.

In both the case of three-reading requirements and the case of timing restrictions, then, other jurisdictions have pioneered innovations in the constitutional law of congressional procedure that the federal Constitution would do well to imitate. That it has not done so is a special case of a more general problem: the higher cost of federal constitutional amendment works for both good and, in this case, ill, by creating a status quo bias that blocks both misguided experiments and valuable innovations. But it is not far-fetched to imagine that a political coalition might arise to support procedural requirements whose substantive political valence is, as in these cases, uncertain *ex ante*; many constitutional amendments, especially in the modern era, have just this procedural and structural character.¹⁹⁴ So it is a plausible recommendation, or aspiration, that the constitutional law of congressional procedure should be supplemented in these respects.

III. CONCLUSION

In the framers’ view, and in ours, the constitutional law of congressional procedure should accomplish a range of laudable aims. The relevant rules should promote well-informed, and cognitively undistorted legislative deliberation; ameliorate the principal-agent problems inherent in legislative representation; and make technically efficient use of the legislature’s resources, especially its compressed agenda space. Unfortunately these aims cannot all be simultaneously attained in full, as the framers were well aware. The Constitution’s eventual choices aimed to optimize the inevitable tradeoffs between and among these goods, alleviating legislative pathologies without cramping the self-governance of future legislative institutions. Yet there is no guarantee that the framers’ instrumental choices were successful ones, and I have refused to take it

¹⁹⁴ See, e.g., Amdts. XX (addressing congressional terms and presidential succession), XXII (addressing presidential term limits), XXV (addressing presidential succession), XXVII (addressing legislative compensation).

on faith that they were. Centuries of subsequent experimentation and innovation in Congress and in state and foreign constitutions provide rich resources with which to evaluate and improve the Constitution's fundamental provisions that structure the legislative process.

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