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Deconstructing *Gordon* and Contingent Legislative Authority: The Constitutionality of Supermajority Rules

**Brett W. King†**

One of America's core democratic values is the concept of popular sovereignty, a notion that gains practical currency through the fundamental principle of majority rule. Indeed, majority rule almost always has been seen as the embodiment of this value, whether directly through referenda or more generally

† Ph.D. candidate in Political Science, the University of Chicago; J.D. and M.B.A. (Kellogg) 1990, Northwestern University; B.A. and B.S. 1986, the University of Minnesota. This paper is the third in a series on the interrelationship of supermajority requirements, democratic theory, and majority rule.

1. The use of the term “fundamental principle” is a deliberate reference to the Framers’ rhetoric on majority rule. See Federalist 22 (Hamilton) in *The Federalist Papers*, 146 (Clinton Rossiter, ed) (Mentor, 1961) (“Federalist Papers”) (declaring that a “fundamental maxim of republican government ... requires that the sense of the majority should prevail”); id at 361, Federalist 58 (Madison) (proclaiming majority rule “the fundamental principle of free government”). See also Thomas Jefferson, *Notes on the State of Virginia*, in *The Portable Thomas Jefferson*, 23, 171 (Merrill D. Peterson, ed) (Viking, 1975) (“Lex majoris partis [is] founded in common law as well as common right. It is the natural law of every assembly of men”) (citation omitted); *State v. Stacy*, 263 Ala 185, 82 S2d 264, 265 (1955) (“It is a fundamental principle of popular government that the legally expressed will of the majority must prevail in elections.”).

2. The extent to which notions of popular sovereignty and majority rule are theoretically intertwined is the subject of considerable debate in academic literature. See David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 Iowa L Rev1, 11-17 (1990) (discussing popular sovereignty and majority rule and concluding that “[n]either notion entails the other” and that “[a]lthough popular sovereignty can be understood as fifty percent plus one, it can also be understood as a plurality, a supermajority, or even the will of an appointed oligarchy of lawmakers”). Compare Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 Colum L Rev 457, 458 (1994) (“[M]ajoritarian popular sovereignty principles” are an integral part of the American constitutional structure); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U Chi L Rev 1043, 1044 (1988) (discussing popular sovereignty in the context of the “right of a majority of voters to amend the Constitution”).
through the election of local, state and federal representatives. However, to ensure democracy, minority rights must be protected by placing limits on the right of the majority to conclude certain decisions; hence constitutionalism. Because the Framers of the Constitution embraced structural limits on the rights of the majority while simultaneously asserting that majority rule was a fundamental principle of democratic government, an ongoing debate has continued over the extent to which a constitutional democracy must or should embody a spirit of majoritarianism. The paradox of democracy can be summed up in this way:

In the United States we believe in, and our political institutions reflect, majority rule. At the same time, we also believe that not everything ought to be subject to it. Following the majority because it is the majority is sometimes obligatory; resisting the majority even though it is the majority is sometimes required. Two competing principles constitute the essence of our political being, and this raises a terribly difficult question: How do we know which to follow when?

3. Democratic political theory generally holds that legitimacy has its origins in notions of consent, popular sovereignty and majority rule. See Willmoore Kendall, John Locke and the Doctrine of Majority-Rule, 133-5 (Illinois 1965).

4. For example, in an absolute majority rule regime, the winners of the first election would be free to restructure the political arrangements to ensure their perpetual empowerment, order the execution of their political opponents and seize all property owned by their adversaries. Few would argue such a system was “democratic.” Thus, without limits on the right of the majority to rule, the result would likely be tyranny in one form or another. See also Abraham Lincoln, First Inaugural Address, in Richard Hofstadter, ed, Great Issues in American History: A Documentary Record, Vol 1, 389, 393 (Vintage 1958) (“A majority held in restraint by constitutional checks and limitations, and always changing easily with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people.”); Alexis de Toqueville, Democracy in America, 246, n1 (J.P. Mayer, ed) (Harper Perennial 1988) (noting that the Framers of the Constitution intentionally sought to limit the “absolute sovereignty of the will of the majority”); A. F. Pollard, The Evolution of Parliament, 218 (Russel & Russel 1926) (“Freedom without sovereignty is the idle dream of anarchists; and sovereignty without freedom is the aim of bureaucratic despot...[n]either is safe without the other...”). This is not to say that there is a consensus on the definition of democracy. See Erwin Chemerinsky, The Supreme Court, 1988 Term: Foreword: The Vanishing Constitution, 103 Harv L Rev 43, 71 (1989) (“Political science theorists disagree greatly about what democracy means, and no one theory can claim axiomatic status”). But there is at least some consensus on constitutionalism. See, for example, Jon Elster and Rune Slagstad, eds, Constitutionalism and Democracy, 2 (Cambridge, 1988) (“Constitutionalism refers to limits on majority decisions; more specifically, to limits that are in some sense self-imposed.”).


7. Dow, 76 Iowa L Rev at 8 (cited in note 2) (citations omitted). See also Adams v. Ft. Madison Comm. Sch. Dist.,182 N.W.2d 132, 135 (1970), citing Drury and Titus, Legislative Reapportionment in Kansas: 1960, 9-10 (1960) (“Democratic theory rests on the assumption that the people are sovereign. From this fundamental tenet arise two corollary postulates of democracy. The first is that each person in the commonwealth is to count for one, and no more than one. This is the principle of numerical equality. The second is that decisions are reached by counting each person as one to determine which policies are sanctioned by the greater number of people. This is the principal of majority rule.”); Robert H. Bork, The Tempting of America: The Political Seduction of the Law, 139 (Free Press 1990) (discussing the Madisonian system of limited majority rule).
The failure to address this question is perhaps most surprising in the United States—at the same time one of the world’s most enduring democracies and prolific propagators of modern legal and political thought. In this country there has yet to be formulated a clear and cogent theory of majority rule that incorporates the concept of supermajoritarianism. If a foundational principle of democracy is that a majority has the fundamental right to rule, at what times and in which instances may that right be taken away from the majority? And on whose authority? That this theoretical vacuum remains to the present day is clear testament to the notion that circumscribing the limits of majority rule has proven to be one of the most intractable problems in modern democratic thought.

The absence of any consensus on the propriety of departures from majority rule is not without its costs. In 1994, the newly elected Republican majority in the House of Representatives broke with more than two hundred years of tradition and adopted a substantive supermajority requirement for bills raising taxes. For the first time in history, more than a simple majority of members is now required to vote in the affirmative before certain bills are considered as “passed” by a house of Congress. The adoption of the House Rule spawned a flurry of

8. See Lawrence Friedman and Neals-Erik William Delker, Book Review, Preserving the Republic: The Essence of Constitutionalism, 76 BU L Rev 1019, 1023-24 (1996) (“[Daniel] Lazare notes the tension between the Framers’ need to invoke popular sovereignty in the Preamble in order to legitimize the new Constitution, and the fear of majority rule, embodied in the two-thirds and three-fourths requirements in Article V’s amending clause. It is this conflict between popular sovereignty and limitations on majority rule that Lazare claims has confounded America for more than two hundred years.”); Richard B. Collins and Dale Oesterle, Structuring the Ballot Initiative: Procedures That Do and Don’t Work, 66 U Colo L Rev 47, 58-59 (1995) (“[T]he question is how ultimate majority rule should be tempered to protect minority interests and ensure deliberation.”); Robert A. Dahl, Democracy and Its Critics, 135 (Yale 1989) (describing strong and weak forms of majority rule: “virtually everyone assumes that democracy requires majority rule in the weak sense that support by a majority ought to be necessary to passing a law”). See generally, Comment, One Man, One Vote and Selection of Delegates to National Nominating Conventions, 57 U Chi L Rev 536, 551-56 (1970); Peter Bachrach, Interest, Participation and Democratic Theory, in Participation in Politics, 16 NOMOS 39, 41 (J. Roland Pennock and John W. Chapman, eds) (Lieber-Atherton 1975) (Democracy “is a process in which persons formulate, discuss and decide public issues that are important to them and directly affect their lives”); Randall Bridwell, The Scope of Judicial Review: A Dirge for the Theorists of Majority Rule?, 31 S C L Rev 617, 631-35, 653 (1980).

9. In this paper, the term “majority rule” will mean generally the right of 50 percent plus one of all those casting votes to conclude a decision. This definition presupposes a binary option set. It is not, however, inconsistent with majority rule when more than two options are offered, for example in a three person race, for a plurality decision rule to be used. This could result in the election of an official who received 40 percent of the vote when his or her opponents each received 30 percent of the vote. Such an outcome, while potentially sub-optimal, is not necessarily countermajoritarian.

10. Robert A. Dahl, A Preface to Democratic Theory, 4 (Chicago 1956) (A “preoccupation with the rights and wrongs of majority rule has run like a red thread through American political thought since 1789.”).

11. See, Rules of the House of Representatives, (104th Cong), Rule XXI(5)(c), reprinted in 141 Cong Rec H23-02 (Jan 4, 1995) (“No bill...carrying a Federal income tax rate increase shall be considered as passed...unless so determined by a vote of not less than three-fifths of the Members voting.”) (“House Rule”).

12. See note 212.
debate in both the popular\textsuperscript{13} and academic\textsuperscript{14} presses and an ultimately unsuccessful federal court challenge.\textsuperscript{15} Supporters of the House Rule generally assert the appropriateness, legitimacy and constitutionality of supermajority rules, while its detractors claim that it violates constitutional norms and the spirit of democratic majoritarianism. Against this backdrop, Congress has debated a number of other supermajority rules in the form of proposed constitutional amendments that would require a supermajority vote to raise federal taxes,\textsuperscript{16} authorize government debt,\textsuperscript{17} and approve all government spending.\textsuperscript{18} The debate has also focused attention on the Senate's revised rules on cloture, which according to many observers now have the practical effect of requiring a sixty percent level of support on most issues that come before the Senate.\textsuperscript{19} In the spring of 1997, the House leadership utilized supermajority rules to thwart the desire of a majority

\textsuperscript{13} See, for example, Bruce Ackerman, \textit{Gingrich vs. the Constitution}, NY Times A23 (Dec 10, 1994) (arguing that a House rule requiring a three-fifths vote to enact laws that increase taxes is unconstitutional); Benjamin Lieber and Patrick Brown, \textit{On Supermajorities and the Constitution}, 83 Georgetown L J 2347, 2347 n2 (1995).


\textsuperscript{16} See, for example, \textit{Ashcroft Unveils Details Of Economic Plan}, The Bulletin's Frontrunner, (Aug 27, 1998) (Senator Ashcroft has "proposed a three-part constitutional amendment requiring Congress to pass balanced budgets each year, providing the president with permanent line-item veto authority and requiring a three-fifths supermajority vote in each house for raising taxes."). See also, Steve Forbes, \textit{Fact and Comment}, Forbes, 27 (Oct 13, 1997) (1996 Presidential candidate and noted magazine editor offering a proposal to overhaul the US tax code that would include a supermajority requirement in both the House and Senate to raise taxes).

\textsuperscript{17} See, for example, George F. Will, \textit{The Lively Debt}, The Washington Post C7 (Jan 26, 1997) ("The debate is about the proposed constitutional amendment to require a balanced budget—or, to be precise, to require supermajorities of 60 percent in both houses of Congress to authorize a deficit").


\textsuperscript{19} See Catherine Fisk and Erwin Chemerinsky, \textit{The Filibuster}, 49 Stan L Rev 181, 182 (1997) ("Filibusters are so ubiquitous in the contemporary Senate that it is now commonly said that sixty votes in the Senate, rather than a simple majority, are necessary to pass legislation and confirm nominations.") (citation omitted); \textit{Is the Senate Serious?}, The Economist 25 (March 28, 1998) (Senate rules basically require a bipartisan supermajority vote for passage of all bills); \textit{Tobacco Funding Disputes Bedevil Senate Budget Markup}, Congress Daily, (Mar 18, 1998) ("...any tobacco settlement will need a supermajority to pass in the Senate."). The United States District
utilized supermajority rules to thwart the desire of a majority of members in passing campaign finance reform legislation.\textsuperscript{20} And the proposals keep coming; one Senator has recently argued for a supermajority requirement to protect Social Security.\textsuperscript{21}

As part of the debate that erupted over the passage of the House Rule, a bevy of prominent constitutional law scholars published an open letter objecting to the new rule and urging its immediate repeal, lest it “serve as an unfortunate precedent for the proliferation of supermajority rules on a host of different subjects” that could cause an “erosion of our central constitutional commitments to majority rule.”\textsuperscript{22} But the authors of the Open Letter seemed to slight the degree to which such an erosion was already underway. While the House Rule and supermajority proposals at the federal level have garnered the lion’s share of attention in the press, the use of the supermajority has gradually been percolating through all levels of government.\textsuperscript{23} Numerous states now require a supermajority of one type or another to raise taxes,\textsuperscript{24} and there currently are concerted efforts in many other states to adopt similar restrictions.\textsuperscript{25} A brief review finds supermajority voting requirements at all levels of government, including procedures or proposals to increase property taxes,\textsuperscript{26} water taxes,\textsuperscript{27} gas taxes,\textsuperscript{28} and hotel-motel taxes.


23. See notes 24 - 49.


taxes;\textsuperscript{29} approve rezoning petitions;\textsuperscript{30} annex unincorporated land into city boundaries;\textsuperscript{31} approve school tax levies\textsuperscript{32} and bond issuances;\textsuperscript{33} approve development plans;\textsuperscript{34} amend city budgets;\textsuperscript{35} approve referenda concerning wildlife;\textsuperscript{36} waive the imposition of impact fees;\textsuperscript{37} approve city-county municipal service contracts;\textsuperscript{38} fund emergency medical services;\textsuperscript{39} utilize powers of eminent domain;\textsuperscript{40} overrule decisions of subordinate agencies;\textsuperscript{41} approve the appointment of

\begin{itemize}
  \item \textsuperscript{27} Arleen Jacobius, \textit{Nevada Agency's Tough Job: Fixing the Water System, Keeping the Peace}, The Bond Buyer, 1 (Dec 12, 1997) (three-fourths supermajority necessary for Nevada's Clark County Commission to approve an increase in local water charges).
  \item \textsuperscript{28} \textit{A Wasted Dividend}, The Ledger (Lakeland, Fla) A14 (Feb 12, 1998) (gas tax increase requires a supermajority vote of the Polk County Commission).
  \item \textsuperscript{29} Pat Wilcox, \textit{Bring Taxing Authority Home}, The Chattanooga Times A6 (May 26, 1997) (bill would require a two-thirds majority vote on a city council or county commission to enact or increase the hotel-motel tax.).
  \item \textsuperscript{30} Tom Bailey Jr., \textit{Developer Ends Plan On Mobile Home Site}, The Commercial Appeal NT1 (Apr 9, 1998) (commercial developer abandons development proposal after concluding it was unlikely to receive the required supermajority vote in local city council and county commission.);
  \item John Flink, \textit{Holding Pattern: Riverwoods Gives Assisted-Living Facility Fees Time To Prepare}, Chicago Tribune 7 (Mar 15, 1998) (local rezoning proposal requires 18 of a 23-member board to vote in favor of the rezoning in order to override a formal objection to such proposal.).
  \item \textsuperscript{31} \textit{Annexation, Subdivision Proposal to Get Public Hearing}, The Chicago Daily Herald 1 (Mar 18, 1998) (development plan to annex and build homes on three acres in unincorporated Palatine Township must be approved by the affirmative vote of six of seven (86 percent) council members.).
  \item \textsuperscript{32} Kris Sherman, \textit{The Area in Brief}, The News Tribune B8 (Mar 4, 1998) (local school district requires 60 percent supermajority vote in order to approve tax levy.).
  \item \textsuperscript{33} \textit{Amendment Would Ease School Funding; Proposal Would Allow Passage of Bonds With 60 Percent of Votes}, The Spokesman Review A1 (Nov 15, 1997) (reporting on efforts to change Idaho's two-thirds supermajority requirement for bonds to sixty percent, noting that "if only 60 percent voter approval were required for bond levies instead of 66 percent - more than twice as many bonds would have passed in the Idaho Panhandle since 1990").
  \item \textsuperscript{34} Lorilyn Rackl and Bill O'Brien, \textit{The Return of the Mall}, The Chicago Daily Herald 4 (Feb 20, 1998) (supermajority vote of village board required to annex land and approve development plan for a shopping mall).
  \item \textsuperscript{35} Tom Kertscher, \textit{Fresno Police Get Gun, Radio Money}, The Fresno Bee B1 (Jan 28, 1998) (describing a deadlock in the Fresno City Council, which requires the affirmative vote of five of its seven members in order to amend the city budget).
  \item \textsuperscript{36} Denise Laes, \textit{Don't Vote Away Control}, The Desert News A10 (May 12, 1998) (discussing "a proposed state constitutional amendment that would require a two-thirds 'supermajority' before a ballot initiative on wildlife could become law").
  \item \textsuperscript{37} \textit{Council Changes Impact Fees Law}, The Ledger (Lakeland, FL) F1 (Dec 11, 1997) (Lakeland City Council allowed to waive certain impact fees if four of the five council members agree).
  \item \textsuperscript{38} \textit{Downey Voters Approve Charter Reform on Police, Fire Contracts}, The Los Angeles Times B4 (May 7, 1998) (discussing the victory of Charter Amendment 11, "which requires that two-thirds of the voters approve the city [of Los Angeles] contracting with the county for fire and police services").
  \item \textsuperscript{39} David Schaefer, \textit{Suburbs Now Back Emergency-Medical-Services Levy}, The Seattle Times B1 (Nov 21, 1997) (sixty percent of voters failed to authorize taxes to continue medical emergency service.).
  \item \textsuperscript{40} Charles Etlinger, \textit{Officials Say Renewal Will Bring Safety to Residents, But Opponents Think Poor Will Be Driven Out}, The Idaho Statesman 4B (Oct 28, 1997) (under certain state granted powers
city officers; even such relatively mundane governmental approval processes as authorizing disabled persons to issue handicap parking tickets, amending a municipal weed control ordinance and altering the location of city street signs are now found to be subject to a supermajority vote of one sort or another.

While certain types of supermajority rules have existed since Colonial times, their increasing use for substantive matters of public policy raises profound
debates. In such cases, the balance of power is often tilted in favor of the minority, leading to a type of political paralysis that can stifle important decisions.

For a list of supermajority provisions in early State constitutions, see McGinnis and Rappaport's chart. Although the use of supermajority rules is increasing, departures from majority rule in state decision making in many instances are historically rooted and widespread, especially for approving municipal bonds and other fiscal matters. See, for example, Bauch v. City of Cabool, 165 Mo App 486, 148 SW 1003, 1007 (Mo App 1912) (two-thirds of voters...
constitutional issues that have seen little debate in the popular press and relatively scant commentary and analysis in either the legal or political science literature. Without at least some rudimentary consensus on supermajoritarian theory, that is, some agreement as to when and under what circumstances it is appropriate for political bodies to depart from simple majority rule, the notion of popular sovereignty itself becomes threatened, thereby beginning a slow but certain undermining of the ideological foundations of American democracy.

This Article will begin to address one important aspect of supermajoritarian theory: the constitutionality of supermajority rules. In particular, I will analyze the two most important developments in constitutional supermajoritarian theory that have occurred during the last fifty years. The first development was the Supermajority Taxpayer Protection, The Washington Times A14 (Apr 7, 1998) ("State level supermajority requirements [for raising taxes] are in fact sweeping the country. Fourteen states, covering one-third of the nation's population, already have such a requirement. Legislation to enact the requirement is pending in another 15 states.") See also, Tax Hikes May Need O.K. of Supermajority, The Arizona Republic B1 (Jan 14, 1998) (Arizona legislative committee approves proposal that future tax increases brought by initiatives, referendums and constitutional amendments require a two-thirds vote). 52. See, for example, Rubenfeld, 46 Duke L J at 74 (noting that the House Rule "raises profound constitutional issues that [past legal] commentary so far has not grasped") (cited in note 14). 53. See Open Letter at 1539 (asserting that the House Rule contributes to an "erosion of our central constitutional commitments to majority rule and deliberative democracy") (cited in note 14). Exactly what constitutes "American democracy" is not a point on which full consensus has been reached. See Martin Shapiro, Law and Politics in the Supreme Court, 218 (Free Press, 1964) ("[T]here is no unified theory of democracy, no historically central school of democratic thought, no single democratic philosopher par excellence. It is, therefore, impossible to construct a single a priori theory, model, or definition of democracy that will command universal support."). Accordingly, embedded in this Article are a multitude of implicit assumptions based on generally accepted notions of American constitutional democracy and representative government.
preme Court's 1971 decision in *Gordon v Lance*, a case in which the Court rejected an equal protection challenge to a state's constitutionally mandated supermajority requirement, thus giving the states broad latitude to depart from majority rule. The second was the adoption of the House Rule in 1994, which, if ultimately deemed constitutionally permissible, would allow Congress broad latitude in departing from majority rule in the legislative process. The first portion of this Article will offer an in-depth analysis of the Supreme Court's opinion in *Gordon* and will argue that the Court's reasoning in that case is so devoid of any principled legal theory relevant to a constitutional analysis of supermajority rulemaking that it has little to offer in the debate over the appropriate interrelationship between majority rule and supermajority requirements. The Article's second half will analyze the House Rule and recent arguments offered on both sides of the ongoing controversy over the constitutionality of Congressional supermajority requirements. In the case of the House Rule, I will argue that the text of the Constitution, the historical record and appeals to the Framers' intent are all to some extent indeterminate with respect to the constitutionality of legislative supermajority requirements, and that a principled resolution of the House Rule controversy actually rests on the degree to which one is willing to adopt a contingent (versus absolute) theory of Congressional legislative authority.

I. DECONSTRUCTING *GORDON*: WHY ARE STATE SUPERMAJORITY REQUIREMENTS CONSTITUTIONALLY PERMISSIBLE?

During the 1960's, as part of the expanded scope of equal protection in the area of voting rights that was initiated with the seminal case of *Baker v Carr*, the Supreme Court began invalidating electoral reapportionment schemes that gave more weight to votes cast in certain areas of a state than those in other areas. By the late 1960's, the Court's growing line of reapportionment cases was thick with rhetoric about the need for each person's vote to be "equally counted"—not subject to "debasement" or "dilution"—in order for the constitutionally protected principle of "one-person, one-vote" to prevail.

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A sampling of the Court's reasoning:

The right to vote includes the right to have the ballot counted....It also includes the right to have the vote counted at full value without dilution or discount....That federally protected right suffers substantial dilution...[where a favored group has full voting strength...[and] [t]he groups not in favor have their votes discounted.58

No one would deny that the equal protection clause would ... prohibit a law that would expressly give certain citizens a half-vote and others a full vote...


57. Merely designating the rhetoric as thick seems to be an understatement. For an additional sampling, see Gray v Sanders, 372 US 368, 379-380 (1963) (“The concept of we the people under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.”); Id at 382 (“Within a given constituency, there can be room for but a single constitutional rule – one voter, one vote.”) (Stewart concurring); Reynolds v Sims, 377 US 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”); Id at 563 (“Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids ‘sophisticated as well as simple-minded modes of discrimination’.”) (citations omitted); id at 565 (“Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result.”); Id at 566 (“Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.”); Id at 567 (“To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”); Avery v Midland County, 390 US 474, 480 (1968) (“[W]hen the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process.”); Lucas v Forty-Fourth Gen Assembly of Colorado, 377 US 713, 736 (1964), aff’d in part and vacated in part, 379 US 693 (1965) (“An individual’s constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State’s electorate . . . .”).

The constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.  

[A] government is republican in proportion as every member composing it has his equal voice in the direction of its concerns.

The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President ... But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded .... The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote.

Because supermajority voting rules are a form of weighted voting, the Court's growing body of anti-dilutional voting rhetoric was being read with peaked interest by those who were upset with various state provisions requiring that certain issues presented to voters must obtain a supermajority vote in order to pass. If the one-person, one-vote concept meant that each vote must be weighted equally, how could a simple majority rule not be mandated by equal protection? Armed with citations from the Supreme Court's voting rights cases, litigants began arriving at the courthouse demanding that judges require simple majority rule, asserting that the only alternative was constitutionally prohibited vote dilution. These arguments resonated in a number of courts, including the Federal District Court in Minnesota and the Supreme Courts of West Virginia and California; each of which ruled that supermajority voting rules were unconstitutional given the Supreme Court's expanded interpretation of the Equal Protection Clause. With similar arguments being rejected in the Federal District

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59. Reynolds, 377 US at 564 n40 (quoting Black dissenting, in Colegrove v Green, 328 US 549, 569-71 (1946)).
60. Id at n53 (quoting Thomas Jefferson, Letter to Samuel Kercheval, 10 Writings of Thomas Jefferson 38 (Ford, ed) (Putnam 1899)).
61. Gray, 372 US at 380-81. See also Lance v Board of Education, 153 W Va 559, 170 SE2d 783, 790-91 (W Va 1969) reversed on appeal, Gordon v Lance, 403 US 1 (1971). The Court's recognition of the concept of majority rule actually precedes the voting rights cases. See, for example, Ashton v Cameron County Water Improvement Dist, 298 US 513 (1936) ("Congress was petitioned ... to enact legislation under its bankruptcy powers, to substitute the democratic principle of majority rule for the virtual anarchy which then existed with reference to the adjustment of the debts ...."); NLRB v A J Tower Co, 329 US 324, 333 (1946) (The rule forbidding the eligibility of a voter to be challenged after the votes have been cast is in accordance with the National Labor Relations Act and the principle of majority rule.).
62. See note 98.
64. Lance, 170 SE2d at 790-91.
Court in Missouri\textsuperscript{66} and by the Supreme Courts of Idaho,\textsuperscript{67} New Hampshire,\textsuperscript{68} Washington,\textsuperscript{69} and Iowa\textsuperscript{70} the issue was ripe for Supreme Court review, and certiorari was granted in West Virginia's case of \textit{Lance v Board of Education}.\textsuperscript{71}

The facts of \textit{Gordon v Lance} are relatively straightforward. On April 29, 1968, the Board of Education of Roane County, West Virginia submitted to a vote the question of issuing municipal bonds for the purpose of improving educational facilities in the county.\textsuperscript{72} At the same time the voters also were asked to approve a proposal to lay additional tax levies in excess of the regular authorized levy for a period of five years.\textsuperscript{73} Although each measure received the support of over 50 percent of the Roane County voters, under the West Virginia Constitution and codified law, the measures were required to receive at least a three-fifths, or sixty percent, level of support in order to pass, which they failed to do. In the summer of 1968,\textsuperscript{74} a number of disgruntled Roane County voters, angry that the April election was the sixth election since 1964 in which educational funding proposals had received the support of over 50 percent of the voters—yet fallen short of the 60 percent threshold—demanded that the Roane County Board of Education nonetheless certify the election as valid. When the board refused to do so, and the county circuit court declined to intervene, the plaintiffs appealed to the West Virginia Supreme Court, which noted the expanded scope of the equal protection clause under the Supreme Court's voting rights cases and ruled that

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\item \textbf{68.} Tiews \textit{v Timberlane Regional Sch District}, 111 N H 14, 273 A 2d 680, 682 (N H 1971) (upholding supermajority voting provisions for issuance of local school district bonds).
\item \textbf{69.} Thurston \textit{v Greco}, 78 Wash 2d 424, 474 P 2d 881, 882-83, 888-97 (Wash 1970) (divided opinion upholding the constitutionality of Washington State's supermajority voting rules for the issuance of bonds and property tax levies with the dissent arguing that such supermajority rules unconstitutionally dilute votes in violation of equal protection).
\item \textbf{70.} Adams \textit{v Fort Madison Community School District}, 182 NW 2d 132, 133 (Iowa 1970). See also \textit{Waugh v Shirer}, 216 Iowa 468, 249 NW 246, 246 (Iowa 1933) (supermajority requirement for highway bonds). A similar case was also pending in South Dakota at the time. \textit{Hanson \textit{v Harrisburg Independent School District}, 86 SD 42, 190 NW 2d 843, 845 (S D 1971) (challenging the constitutionality of South Dakota's supermajority rule for bond referenda).
\item \textbf{71.} Lance, 170 SE 2d at 783. At the time of \textit{Gordon}, only four states required the relatively strict two-thirds level of voter approval for municipal bonds, and challenges to those rules had been brought in three of them; California (challenged in \textit{Westbrook}), Idaho (challenged in \textit{Bogert}), Missouri (challenged in \textit{Brenner}) and Kentucky. See also Note, \textit{Judicial Activism and Municipal Bonds: Killing Two-Thirds with One Stone?}, 56 Va L Rev 295, 331-34 (1970) (including a table listing the level of voter approval required for local bond referenda).
\item \textbf{72.} Lance, 170 SE 2d at 785 (the exact purpose was for "alleviating the overcrowded condition of school classrooms and facilities, removing fire hazards, providing for more adequate and more modern vocational and educational facilities, and for the purpose of meeting the needs of disadvantaged children.").
\item \textbf{73.} A portion of the additional revenue to be generated by this proposed tax was to be used for current expenditures and a portion for capital improvements. Id.
\item \textbf{74.} The plaintiffs may have been, in part, inspired by the general revolutionary air of that particular time period. See Ray Suarez, NPR News, Talk of the Nation, \textit{The Summer of 1968} (Aug 11, 1998) (discussing the revolutionary activities and events of that summer).
West Virginia's supermajority voting requirements were unconstitutional. The West Virginia Supreme Court concluded that the state's supermajority voting rules were a form of constitutionally impermissible vote dilution because they effectively gave certain voters more influence over the outcome of an election as compared to other voters. On appeal, the U.S. Supreme Court reversed, declining to find that supermajority voting provisions such as the ones present in the Roane County elections were in anyway a violation of the "Equal Protection Clause or any other provision of the Constitution."

A. THE RATIONALE OF GORDON

Although there certainly exists keen competition, the Supreme Court's stated justifications for its ruling in Gordon v Lance probably make this case one of the most poorly reasoned High Court opinions in the post-New Deal era. Admittedly, methodically discussing each part of a judicial opinion can be a tedious process—particularly so in the case of Gordon—but in this instance the task is necessary not only to appreciate my criticisms of the Court's reasoning, but more importantly, to understand why the case is wholly inapposite to any principled theory that attempts to synthesize supermajority requirements with the text and history of the Constitution.

While deciphering Gordon's cryptic prose is a difficult task, the Court seems to offer four broad rationales in support of its holding that supermajority voting provisions do not violate the Constitution. The most significant of these rationales is the conclusion that supermajority rules do not violate the Fourteenth Amendment's guarantee of equal protection because they do not discriminate against any "independently identifiable group" of citizens. Additionally, the Court seems to view the supermajority rules at issue as permissibly neutral because West Virginia subjected all types of bonds—not just educational bonds—to the more stringent voting requirements. The Court also reasons that the existence of supermajority rules in the Federal Constitution implies that not every governmental decision, whether state or federal, is required to be concluded by a majority vote. Finally, the Court states that because of the intergenerational nature of bonded indebtedness, states have a legitimate interest in ensuring a deeper consensus when committing "the credit of infants and of generations yet unborn." It is on these four rationales, sketched out rather briefly by

75. Lance, 170 SE2d at 791.
76. Id at 789-90.
77. Gordon, 403 US at 8.
78. My criticisms of Gordon offered in this Article are of its reasoning, not necessarily of its outcome. See discussion at note 166.
80. Id.
81. Id at 6.
82. Id.
briefly by Chief Justice Burger in his majority opinion, that the Court found supermajority voting rules are not violative of any constitutional provision. An in-depth consideration of each of these arguments is offered below.

1. No “Independently Identifiable Class” of Citizens

The most fundamental problem with the Court’s opinion in *Gordon* is that the Court continually seems to confuse—or fails to clearly distinguish—the application of precedent from its vote denial cases, vote dilution cases, and “political process equal protection” cases. Although the Court’s voting rights and reapportionment decisions have been exhaustively analyzed in the legal literature, a very brief summary of the state of equal protection law relevant to such cases is important in understanding the rationale of *Gordon*. Since *Baker v. Carr*, voting rights decisions have generally fallen into one of two categories: those that address voter eligibility and qualifications and those that implicate the integrity of votes actually cast, including restrictions on the time, place and manner of elections. Vote denial cases are those that address state eligibility restrictions; laws that deny or exclude certain individuals from voting based on extraneous characteristics such as race, ethnicity, lack of property ownership, duration of residency or military status. In such cases, the state is said to be impermissibly “fencing out” certain voters from the political process by denying them access to the ballot. The second line of cases addresses the fairness of the election process itself, such as the apportionment of districts, the composition of state legislatures and the establishment of at-large representation. These cases are seen as safeguarding the fundamental right of voters, once qualified, to enjoy a process that is fair and

83. Unlike many of the state supreme court opinions dealing with the constitutionality of supermajority voting rules, the Court’s decision in *Gordon* is relatively brief.

84. For an extended discussion of this tripartite see *Westbrook*, 471 P2d at 496-98.


86. See, for example, *Bremer*, 315 F Supp at 631 (“Two separate questions are presented in connection with every election (1) who are the eligible voters; and (2) what rules are to be applied to determine the result of the elections.”).

87. The time, place and manner decisions are not applicable to the cases discussed in this Article although they are obviously important in ensuring a free and fair election process. See generally Kevin K. Green, Note, *A Vote Properly Cast? The Constitutionality of the National Voter Registration Act of 1993*, 22 J Legis 45, 56-58 (1996) (discussing the history of time, place and manner restrictions).

88. See *Gordon*, 403 US at 5.
does not debase the votes actually cast by weighting or diluting the votes of some citizens as compared to others; these are the "one-person, one-vote" cases. A third class of cases is composed of what I term "political process equal protection" decisions, situations in which a state attempts to impose additional political process burdens on certain individuals. Such decisions are not voting rights cases per se because they do not deny individuals the right to vote or dilute a vote once cast, but instead utilize the political process to make it more difficult or costly for such rights to be enjoyed. These distinctions are important because how a case is classified will determine the analysis to be used and the controlling authority that is germane.

Clearly, Gordon is not a vote denial case, as no one was excluded from or denied access to the ballot. However, it is unclear whether it should more properly be considered a vote dilution case or a political process equal protection case. As a vote dilution case, supermajority voting rules would be seen as a method of diluting votes or weighting votes differently, and, as such, the propriety of such actions would need to be analyzed in light of the reapportionment cases. In particular, the focus would be on the Court's constitutionally mandated principle of "one-person, one-vote" and its rhetoric surrounding its declarations of a constitutionally protected right to have each vote that is cast be "equally counted" and "equally effective."

On the other hand, a case like Gordon could be seen as more akin to a situation where a state has adopted additional political process burdens; a more straightforward equal protection case where the analysis focuses on whether or not the government has singled out a particular group for unfair or discriminatory treatment, and if so, determining the government's interest in doing so. In Hunter v Erickson, an important case decided just one year before Gordon, certain fair housing legislation adopted by the Akron city council was singled out as requiring the vote of a majority of city residents before becoming effective, while no other city council legislation was subject to a similar requirement. The Supreme Court overruled the Ohio Supreme Court's finding that the referendum requirement was permissible, instead ruling that it violated the equal protection clause by singling out a certain class of individuals for inequitable treatment. That Hunter is a political process equal protection case, not a voting rights case, is clear; no individual alleged that his or her vote was diluted or that he or she was denied the right to vote. Rather, in Hunter a particular group of citizens was singled out for differential treatment in a way which made it more difficult—though by no means impossible—for such a group to achieve favorable legislative ends.

90. For additional analysis of voting rights and equal protection analysis, see Laskovits v Illinois Board of Elections, 400 F Supp 1005, 1010 (N D Ill 1975) aff'd, 424 US 901(1976).
91. Hunter, 393 US at 386-87.
Additionally, whether classified as a vote dilution case or a political process equal protection case, if supermajority voting rules are seen to infringe upon the right to vote, the appropriate level of review would be strict scrutiny in that the right to vote has previously been classified as a “fundamental right.” However, if supermajority requirements are more appropriately classified as mere procedural rules, then the state would need to have only a rational basis for enacting such requirements. Thus, the Court was initially presented with two fundamental issues in Gordon. First, whether Gordon should be considered a vote dilution case or a political process equal protection case, and in turn, what would be the appropriate level of analysis to employ when analyzing a state’s interest in adopting supermajority voting rules. Prior to Gordon, those state and federal courts that had concluded that supermajority rules were unconstitutional had generally viewed such cases as instances of impermissible vote dilution, while those courts concluding the opposite utilized more traditional forms of equal protection analysis. Thus, it was widely expected that the Court would adopt one of these two competing theories of constitutional interpretation when deciding Gordon.

Unfortunately, the Supreme Court’s analysis in Gordon is confusing in that the Court seems at various times to both reject and accept the notion that Gordon is a vote dilution case and a political process equal protection case. Since a plain reading of Gordon’s text is at best obscure, an analysis from each theory is necessary to understand what each application would assume and the results that would be expected. As a preface, it should be noted that the Court has ruled that a necessary prerequisite for Equal Protection Clause protection is the presence of an “identifiable class” of individuals alleging discrimination; thus the first level of analysis to be performed in any equal protection case is to answer the question “what class of citizens is asserting an equal protection claim?”


93. Both the California Supreme Court in Westbrook and the Supreme Court of West Virginia in Lance viewed the circumstances surrounding supermajority voting requirements as akin to vote dilution, and each heavily cited the Court’s reapportionment line of cases in holding its state’s supermajority rules were unconstitutional.

94. See Santa Clara County Local Transp Auth v Guardino, 11 Cal 4th 220, 258, 902 P2d 225 (Cal 1995) (“In equal protection analysis, the threshold question is whether the legislation under attack somehow discriminates against an identifiable class of persons. (Gordon v Lance …) Only then do the courts ask the further question of whether this identifiable group is a suspect class or is being denied some fundamental interest, thus requiring the discrimination to be subjected to close scrutiny.”). The Court has generally considered an identifiable group to consist of individuals with some immutable or overtly obvious condition. See, for example, Matthews v Lucas, 427 US 495, 497 (1976) (illegitimacy); Kramer v Union Free School District, 395 US 621, 622 (1969) (tax status); Harper v Virginia State Board of Elections, 383 US 663, 666 (1966) (wealth); Carrington v Rash, 380 US 89, 94 (1965) (military status); Gomillion v Lightfoot, 364 US 339, 341-42 (1960) (race); Yniguez v Aripans for Official English, 69 F3d 920, 923 (9th Cir 1995) reh’g en banc, vacated as moot, 520 US 43 (1997) (language); Romer v Evans, 517 US 620, 624 (1996) (homosexuality). The Court does not have a particularly good track record with the term “identifiable class.” See Joseph Avanzato, Section 1982 and Discrimination Against Jews: Shaare Tefila Congregation v. Cobb, 37 Am U L Rev 225, 254 (1987) (“Justice White’s failure to define the terms iden-
If Gordon is viewed as a vote dilution case, the initial questions are which group of voters is alleging that its vote is being “diluted” or “debased” by the state and whether or not such group of voters constitutes an identifiable class. In supermajority voting rule cases such as Gordon, the affected class is generally seen to be all those who had voted in the affirmative for the referendum in question because it is these voters who have had their votes debased or diluted. The California Supreme Court recognized this analysis in their Westbrook opinion when they ruled that certain of the state’s supermajority rules were unconstitutional because they “implicitly create[] two classes of voters: those who favor a proposed bond issue and those who oppose it,” which implicitly gives less weight to votes cast by the former class than to those cast by the latter. If such a group of affirmative voters cannot be considered an identifiable class of individuals, the case would be inactionable on equal protection grounds. The Gordon Court seems to reject the argument that such a group constitutes an identifiable class when it declared that the situation in Gordon was analogous neither to its vote denial nor its vote dilution cases because such cases were about vote.
denial or dilution based on "group characteristics – geographic location and property ownership...[and] the dilution or denial was imposed irrespective of how members of those groups actually voted." The idea here is that, for example, it is easy to identify whose vote is affected in a reapportionment case; all eligible voters who live in districts that are afforded less population than other districts. In Gordon, the argument goes, vote dilution occurs only if a voter casts his or her ballot in the affirmative; if that voter cast his or her ballot in the negative, the vote would be enhanced, thus, no independently identifiable group is discriminated against since all voters are subject to the same rule and it is impossible to discern, ex ante, which group or class of voters is being singled out for disparate treatment.

with a local election and the rights of voters in an election dealing with the issuance of municipal bonds as distinguished from an election to nominate or elect public officials." Lane, 170 SE2d at 789. Thus, the lower court, far from placing heavy reliance on Cipriano, was merely noting that the Court's electoral voting rights cases also were applicable to public referenda.

98. The Court did not deny that there was vote dilution present in Gordon, only that there was no identifiable group that was having its vote diluted. It is clear that supermajority rules are a form of vote dilution. See Altadena Library Dist v Bloodgood, 192 Cal App 3d 585, 591, 237 Cal Rptr 649 (1987) ("if the voter cast a ballot for a tax increase as to a certain proposition, his vote would be diluted by the supermajority requirement."); Thurston, 474 P2d at 888 (Rosellini, dissenting) (the assertion that supermajority voting rules do "not directly or indirectly result in the debasement or the dilution of the vote... distorts reality, defies all logic and rewrites the law of mathematics. Where a negative vote against a proposition counts one and one-half times as great as a positive vote, it results in the dilution and debasement of the positive vote"). See also John F. Banzhaf III, Weighted Voting Doesn't Work: A Mathematical Analysis, 19 Rutgers L Rev 317, 321 (1965).

99. Gordon, 403 US at 4. See also Gray v Town of Darien, 927 F2d 69, 72, 1991 US App LEXIS 3377 (2d Cir 1991) ("In Gordon, the 60 percent majority requirement served West Virginia's rational, non-discriminatory purpose of ensuring that tax increases and bonded indebtedness have extra public support."). The Second Circuit's summation in Gray, however, is not quite right. Certainly, West Virginia's supermajority voting rules have a discriminatory purpose; the question is whether such discrimination is forbidden by the Equal Protection Clause.

100. See Brenner, 315 F Supp at 636 n10 (Missouri's "extraordinary two thirds majority requirement obviously involves no possible classification until after all votes are cast and counted because no one can know who may have voted yes or no until that time. And even then, no one is supposed to know who voted which way."); Cooper v Warren, 27 Ohio St 2d 47, 271 NE2d 795, 796 (Ohio 1971) ("Here, as in Gordon, there is no identifiable class set out prospectively, and Gordon is determinative of the question."); In re Matter of a Contest of a Certain Special Election, 135 Ariz 149, 659 P2d 1294, 1298 (Ariz 1982) ("To the extent that the idea of classification is relevant at all to this kind of weighted voting [two-thirds voting requirement], the voter classifies himself, and only after he votes. A myriad of factors may have gone into his decision to vote yea or nay."); Altadena, 192 Cal App 3d at 591 ("The dilution of voting strength in the instant case...depends on which way a person voted in the election. True, if the voter cast a ballot for a tax increase as to a certain proposition, his vote would be diluted by the supermajority requirement. Yet if he voted against a tax increase in another election even on that same ballot his vote would not be diluted. Indeed his voting power would be enhanced. Thus, the very same person could see his voting strength both diluted and enhanced at the very same election by a supermajority requirement. Accordingly, in the view of the Supreme Court the group whose votes are diluted as to one proposition on the ballot does not represent an identifiable group of people."); Comment, Extraordinary Majority Voting Requirements, 58 Georgetown L J 411, 419 (1969) ("'Affirmative voters' do not constitute a consistent class of individuals dis-
The Court’s declaration that the facts in Gordon were not analogous to its vote dilution cases would seem to support the conclusion that Gordon should be seen as a political process equal protection case along the lines of Hunter. But the analysis becomes confused as the Court then proceeds to discuss Gordon as if it were a vote dilution case by attempting to distinguish it from Hunter.

[Unlike Gordon] The class singled out in Hunter was clear—‘those who would benefit from laws barring racial, religious, or ancestral discriminations.’ In contrast we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing. Consequently no sector of the population may be said to be ‘fenced out’ from the franchise because of the way they will vote.

The Court’s confusion is evidenced in the passage cited above when it discusses its previous holding in Hunter, and then declares that “[c]onsequently no sector of the population may be said to be ‘fenced out’ from the franchise.” The concept of ‘fencing out’ only arises in vote denial cases—instances where voters are not allowed to vote because of restrictions on voter qualifications. There was never any allegation of vote denial in either Hunter or Gordon; thus the entire concept of ‘fencing out’ is inapposite to the discussion, and certainly would not flow as a consequence from any summary of the Court’s holding in Hunter. Additionally, this is vote dilution rhetoric—an analysis of a class based on who might vote for or against a proposition. As a political process equal protection case the focus should be on the class of individuals affected by the statute in question. Thus, the failure of the Court to find an “independently identifiable class” in Gordon seems in large part the result of its abject confusion over vote dilution and political process equal protection analysis.

criminated against because of their status before an election. There is no prospective discrimination; the election must be held before the class of affirmative voters is fixed. In the reapportionment cases, dilution was obvious before any election, and the class subject to discrimination was defined. In extraordinary majority cases, however, an individual’s inclusion within the ‘affirmative voters’ classification depends only upon how he decides to vote on the substantive matter in issue.” (footnotes omitted). But see Jerry W. Calvert, The Popular Referendum Device and Equality of Voting Rights - How Minority Suspension of the Laws Subverts “One Person-One Vote” in the States, 6 Cornell J L & Pub Pol’y 383, 404 (1997) (‘‘[I]n Gordon, the Court erred. There is an identifiable class of citizens that [was] disadvantaged. The majority of voters who voted ‘yes’ had been disenfranchised because their votes were given less weight than those who had voted ‘no.’’


103. This was recognized by the Court in Gordon. Id at 5 (“West Virginia has not denied any group access to the ballot”).

104. Other courts have confused the notion of “fencing out” with supermajority dilution claims. See, for example, Armstrong v Allain, 893 F Supp 1320, 1334 (S D Miss 1994) (arguing that to prove a violation of the Constitution, it is not enough to claim that a 60 percent supermajority requirement “has the effect of ‘fencing out’ a sector of the population from the franchise.”).
Because the distinction between vote dilution analysis and political process equal protection analysis can itself become confusing, a brief example might clarify the difference. Suppose that "City" adopted a municipal ordinance requiring that all bonded indebtedness to be incurred for the construction of public housing units in an African-American section of the town first obtain the approval of two-thirds of all City voters, whereas bonds for public housing units to be built in the predominantly Caucasian areas of City need only obtain a majority vote. This hypothetical would appear to be an easy Equal Protection case if there ever was one, but once the analysis is performed the distinction between vote dilution and political process equal protection becomes clear. City's supermajority requirement could be challenged in either of two ways. First, any City voter who voted in favor of bonds in a referendum where the supermajority rule applied could initiate a post-electoral challenge to the statute arguing that it constitutes impermissible vote dilution because his or her affirmative vote for certain bonds was diluted vis-à-vis those who voted in the negative. As a vote dilution case, the relevant class of voters would be defined as "all those individuals who voted in favor of indebtedness to build public housing units in black neighborhoods." But can this group of voters be considered an "independently identifiable class"? Much like the circumstances of Gordon—where "no independently identifiable group or category" could be identified—attempting to find "independently identifiable" groups in supermajority vote dilution cases is inherently problematic and generally unfruitful because the class can only be defined by how citizens cast their votes.

However, such an analysis would generally not take place, since this hypothetical case would probably be viewed as one involving political process equal protection. As such, as in Hunter, the class definition for purposes of equal protection analysis would be relatively straightforward: "all those who would benefit from the construction of public housing units in African-American areas of City." Because race was involved, strict scrutiny would apply, and the City statute obviously would be struck down, but the question would remain whether the class in such a case was really "independently identifiable." Is it possible to identify, ex ante, the citizens of City who would benefit from additional public housing units in its predominately black areas? Although we could assume that some such individuals would be African-Americans living in City, do we really know who these persons are? In Hunter, the class identified by the Supreme Court was all "those who would benefit from laws barring racial, religious, or ancestral discriminations." While the Court noted that the effect of the Akron statute at issue in Hunter would fall disproportionately on minorities, because the statute applied to religious discrimination as well, it would have implicated, for example, a Catholic who might be denied rental housing by a Jewish landlord on the basis of the renter's Catholicism. As such, potentially any citizen of Akron could constitute Hunter's class of "those who would benefit from laws barring racial, religious, or ancestral discriminations" in Akron housing. Is such a class "independently identifiable"?
If *Gordon* is viewed as more of a political process equal protection case along the lines of *Hunter*,\(^{105}\) the focus cannot be on the voters since it would not be a voting rights case. The focus necessarily should be on the class of individuals affected by the supermajority rule, not on those casting ballots. If in *Hunter* the class singled out was "those who would benefit from laws barring racial, religious, or ancestral discriminations"\(^{106}\) then in *Gordon* the class should be equally easy to identify: those who would benefit from the educational expenditures afforded by the proposed issuance of bonds and levying of taxes. It would seem, a priori, objectively easier to identify those individuals in Roane County who would benefit from increased spending on educational infrastructure and additional school programs (that is, students enrolled in Roane County schools) than it would be to identify those citizens of Akron who might derive future benefit from its fair housing ordinance. If there is an independently identifiable class in *Hunter*, then there certainly is one in *Gordon*.

But even if *Gordon* is seen as neither a vote dilution case nor a political process equal protection case, I would argue that the Court in *Gordon* still got its analysis wrong. By viewing the relevant class of affected voters in terms of those who might favor "bonded indebtedness over other forms of financing" the Court seems to ignore the realities of the American educational finance system.\(^{107}\) Most school districts in America fund day-to-day operations from general tax revenues with investments in infrastructure usually financed by bonded indebtedness in order to amortize the cost of the improvements over time;\(^{108}\) the only other alternative often being very large tax increases in the early years of any capital expenditure. For Roane County voters, either scenario required a supermajority vote. Thus, if a majority of voters cannot raise taxes or incur indebtedness, what exactly were the "other forms of financing" the Court imagined were available to

\(^{105}\) This comparison of *Gordon* to *Hunter* is also supported by later cases in which the Court cites both cases together. See, for example., *Town of Lockport v Citizens for Community Action*, 430 US 259, 268 n13 (1977) ("We have held, however, that a referendum voting scheme that can be characterized in mathematical terms as giving disproportionate power to a minority does not violate the Equal Protection Clause, there being no discrimination against an identifiable class. *Gordon v. Lance* 403 U.S. 1.... Cf. *Hunter v. Erickson*, 393 U.S. 385.").

\(^{106}\) *Gordon*, 403 US at 5. The Court in *Hunter* did not identify the discriminated class in terms of voters but in terms of those affected by the legislation.

\(^{107}\) This is surprising in view of the Court's previous statements that it will not disembodied equality. See *Hilly Stone*, 421 US 289, 304 (1975) (Rehnquist dissenting) ("Since laws considered by this Court under the Equal Protection Clause are not abstract propositions subject to a requirement of disembodied equality which invalidates classifications without examination of the circumstances surrounding them, *Tigner v. Texas*, 310 U.S. 141, 147 ... (1940), we have without exception in passing upon governmental requirements affecting voting looked to the character of the classification challenged as denying equal protection and the individual interests affected by it.").

\(^{108}\) See also *Westbrook*, 471 P2d at 507 ("We are not persuaded that a decision to commit future tax revenues to the financing of projects whose scale and useful life make payment of their costs from current revenues impracticable or inequitable is so unique or so fraught with peril that it warrants this deprivation [a two-thirds supermajority rule] of voting rights.").
the majority?109 This is the most likely reason why there were no significant capital improvements to the Roane County schools in the twenty-two years leading up to the 1968 referendum, despite six different bond and tax referenda, each of which garnered more than a majority of voter support, none of which achieved the required 60 percent approval level.110 When referenda proposing bonded indebtedness and tax increases repeatedly failed, despite having the support of a majority of Roane County voters, that majority did not turn to “other forms of financing” to improve their schools because in reality no other forms of financing were practically available. Unless one assumes that the Roane County school board could craft some sort of non-tax, non-debt equity rights offering or leveraged-lease buy-back scheme to fund its infrastructure improvements, it is simply misguided to conclude that the class of individuals in Gordon should be defined as those voters who favor “bonded indebtedness over other forms of financing.”111 The reality in Gordon is that the case did not involve a dispute between citizens who favored bonded educational indebtedness and those who favored non-bonded educational indebtedness. The Roane County election at issue in Gordon was about citizens who favored increased educational spending versus those who favored the same or less educational spending in the Roane County school district. At a minimum, the Court’s reasoning should have proceeded from this simple observation. The fact that it did not makes the decision in Gordon that much more difficult to decipher.

Additional confusion has resulted after the Court’s decision in Gordon because, by denying the presence of any identifiable class of voters, the Court’s analysis was aborted at an early stage without a discussion of the appropriate level of scrutiny to be used had a class been found. The Court in Hunter utilized strict scrutiny in its analysis of the Akron statute, but Hunter also involved, in part, questions of race. This raises the fundamental question of whether the use of strict scrutiny in Hunter was because it was a case concerning racial discrimination or because it was a political process equal protection case.

2. Neutral Principles

The Court in Gordon indicated that one additional reason it upheld West Virginia’s supermajority voting requirements was that such rules did not single out any particular subject matter for special treatment; all types of bond issuances were subject to a similar requirement. As the Court stated:

109. This is not to say that there are no other alternatives to bonded indebtedness in other situations. To the contrary, in the face of supermajority requirements, many alternative forms of financing are possible. See Westbrook, 471 P2d at 505 n50 (discussing the “[m]any ingenious organizational and financing arrangements [that] have been devised to avoid the extraordinary majority barrier [of California’s two-thirds voting requirement]”). However, in light of West Virginia law, the options offered to Roane County voters seem limited.
110. See Lance, 170 SE2d at 788.
111. As one observer noted with respect to California’s supermajority voting rules for bonded educational indebtedness, “[i]n many school districts, [the supermajority vote requirement] is the difference between having decent facilities and not having them.” Education Proposals Top List of Bond Measures, California Public Finance 1 (Jan 12, 1998).
[The West Virginia Constitution singles out no ‘discrete and insular minority’ for special treatment. The three-fifths requirement applied equally to all bond issues for any purpose, whether for schools, sewers, or highways. We are not, therefore, presented with a case like Hunter v. Erickson, in which fair housing legislation alone was subject to an automatic referendum requirement.”112

The Court reiterates this neutrality argument in summarizing its central holding at the end of its decision: “[t]hat West Virginia has adopted a rule of decision, applicable to all bond referenda, by which the strong consensus of three-fifths is required before indebtedness is authorized, does not violate the Equal Protection Clause or any other provision of the Constitution.”113

This would seem, on its face, to be an arguably sound rationale for supporting a state’s right to impose supermajority rules. Such a rule would presumably be viewed as prohibiting state legislatures from discriminating against politically less popular groups while allowing a state to broadly mandate decision rules with respect to general areas of state operations and finance. This rule would be consistent with the core concept of equal protection, which “has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.”114 Supermajority rules would be presumptively valid if they were crafted as part of a framework “within which the diverse political groups in our society may fairly compete and are not en acted with the purpose of assisting one particular group in its struggle with its political opponents.”115

Although this may appear initially to be an intellectually defensible theory for the Court’s ruling in Gordon, on closer analysis this rationale seems more akin to hastily constructed post hoc justification. First, the Court in Gordon was upholding not only supermajority bonding requirements but also supermajority taxing requirements.116 Since at least some taxes in West Virginia can be levied by a simple majority vote of the legislature,117 the Court presumably would need to consider whether the taxation provisions it was upholding were as equally nondiscriminatory as the bonding provisions noted above. On this point the Court was silent.

Assuming arguendo that such a rationale could survive challenges internal to Gordon, the case could stand for the proposition that supermajority voting rules would be valid so long as they are broadly employed and do not single out any particular subject matter or issue to the exclusion of all others (that is, a requirement that educational bonds receive a 60 percent approval level, whereas sewer-

113. Id at 8 (emphasis added).
115. Hunter, 393 US at 393 (Harlan concurring).
116. The Gordon Court seems to ignore this fact a number of times in its opinion. See, for example, Gordon, 403 US at 5.
117. See, for example, Richard Grimes, This Issue Taxes Your Patience, Charleston Gazette and Daily Mail 1C (Jul 25, 1996) (discussing a proposed supermajority requirement to raise taxes in West Virginia and noting that “currently only a simple majority of each house” of the West Virginia legislature is necessary to raise taxes).
The distinction, of course, is both artificial and arbitrary, since in reality even a supermajority requirement for all bonds is not "neutral" but inherently disfavors groups that support increased government spending and higher levels of government services (and taxes) while preferencing groups who seek lower levels of government services and expenditures. As the Court itself observed in *Avery v Midland County*, "a decision not to exercise a function within [a local government's] power—a decision, for example, not to build an airport or a library, or not to participate in the federal food stamp program—is just as much a decision affecting all citizens ... as an affirmative decision." If the Court's language in *Avery* is to be taken at face value and local government action and inaction are each to be viewed as identical forms of state action, then presumably some sort of justification would be necessary for a state to preference inaction by use of a supermajority rule.

Putting aside the issues raised by the inherent bias contained in preexisting legal and political structures and the distinction between state action and inaction, a neutral application rule would in any case quickly run afoul of the Court's initial requirement that equal protection claims affect an identifiable class. For example, assume that West Virginia's supermajority requirements were directed solely to educational funding, while all other types of municipal bonds required the approval of only a simple majority of voters. If Roane County litigants challenged such a West Virginia law, how should they be classified when they appeared before the Court? Would the class be all those who would benefit from increased expenditures on education versus those who would benefit from increased expenditures on other governmental services? Or perhaps it would be

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118. See J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 Va L Rev 945, 974 (1975) ("The supermajority requirement [sic] in *Gordon v. Lance*, however, predictably and repeatedly benefits one side of a political issue. It invariably dilutes the votes of those supporting capital improvements in public services, be they schools, sewers, or highways, and invariably magnifies the votes of those opposing the higher taxes and bonded indebtedness necessary to pay for them."); *Westbrook*, 471 P2d at 507 ("This justification for the extraordinary majority requirement rests on the premise that a decision to undertake a project such as the construction of schools and playgrounds is qualitatively different from a decision not to do so. This, in turn, is based on the assumption that spending money is a more serious matter than not spending it and, consequently, must be justified whereas frugality is self-justifying. A predisposition to thrift may serve a man well. It does not, however, justify governmental inertia, especially when government is faced with critical social problems demanding urgent and sometimes costly remedies. There is no presumption in favor of inaction....").

119. *Avery*, 390 US at 484 (The local government powers at issue are the powers of the Commissioner's Court, a branch of the local government).

120. That is, an independently identifiable class as defined by the Court in *Gordon*.

121. See, for example, *Altadena*, 192 Cal App 3d at 591-92 ("Likewise, in the instant case, if [California's] Proposition 13 [supermajority requirements] had singled out education and imposed a supermajority requirement solely on tax increases to be used for that purpose the library supporters might well have had a valid equal protection claim under *Hunter v. Erickson*. Under this assumption, the proposition would have drawn the legislative classification on the basis of membership in an 'independently identifiable' class—"those who would benefit from" increased expenditures on education as opposed to those who would benefit from increased expenditures..."
all those voting in favor of educational bonds but opposing sewerage treatment plant bonds? No matter what nuance is given to the definition, linguistically or otherwise, it seems almost impossible to define an independently identifiable group in the instant case that would not work equally well if applied to the original facts in *Gordon*.

However, a more extended discussion of this point is moot, for to the extent *Gordon* could be seen to stand for such a “neutral principles” requirement for supermajority rules, such a proposition was essentially overturned by the Court when it vacated a federal district court’s decisions in *Rimarcik v. Johansen*.122 In *Rimarcik*, a Minnesota state law required all amendments to municipal city charters be adopted upon the approval of a majority of the votes cast, with the sole exception of amendments affecting the sale of intoxicating liquor, which required a 55 percent approval level.123 Prior to the Court’s ruling in *Gordon*, the lower court had invalidated the statute, ruling that it constituted a form of vote dilution (constitutionally impermissible under the Court’s reapportionment cases) and that the distinction itself violated the equal protection clause by unfairly singling out one particular group for unfavorable treatment (without the presence of a compelling state interest).124 *Rimarcik* would have been an ideal test of the neutral principles discourse employed by the Court in *Gordon* because the state had clearly and explicitly singled out one and only one group for supermajority treatment, while allowing all other issues to be settled by majority rule. However, by vacating the lower court’s decision in *Rimarcik* without even remanding the case for further equal protection analysis (such as whether or not there was even a rational basis for the Minnesota statute), the Court rejected its own “neutral principles” argument offered in *Gordon*. Given that the Court’s decision in *Rimarcik* was handed down just one week after its decision in *Gordon*, the Court’s neutral principles theory in *Gordon* might be seen to have one of the shortest conceptual half-lives in Supreme Court history.125

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123. Id at 62-63.
124. Id at 63-64, 69.
125. Even after the decision in *Rimarcik*, lower Courts cited *Gordon* for the proposition that differential subject matter treatment in supermajority cases could be the basis for an equal protection claim. See, for example, *Cohen v. Hoye*, 280 A2d 778, 779 (Me Sup Jd Ct 1971) (*Gordon* seems clearly to say that vote dilution is not cognizably under the Fourteenth Amendment unless it discriminates between groups on the basis of some a priori characteristic unrelated to how they vote and to the subject matter of the election.). But a neutral principles rule is clearly not in place today. See, for example, *Tacoma Voters Shine In Levy Vote*, The News Tribune A8 (Feb 5, 1998) (discussing Washington State’s supermajority rule for approval of educational bonds “[t]he 60 percent supermajority for school levies ought to go the way of the dodo. When voters can approve jails and sports stadiums with ordinary majority votes, it makes no sense to set the bar higher for a levy that typically provides a quarter of a school district’s operating budget.”).
3. The Federal Analogy

Yet another rationale for allowing supermajority rules offered by the Gordon Court was the “federal analogy.”\(^{126}\) Because the U.S. Constitution provides for supermajority voting in certain instances, the Court reasoned that such provisions must therefore be available for use by the states as well.\(^{127}\) This argument is either theoretically weak or ideologically opaque depending on the level of analysis employed. First, attempting to draw a comparison between supermajority provisions embedded in the U.S. Constitution that address fundamental aspects of the structure of the national government—such as the impeachment or election of the President or amending the Constitution itself—to provisions governing the ordinary funding of educational expenses in local school districts would seem to strain the definition of an “analogy.”\(^{128}\) Arguably, if the federal analogy has any merit, it would be used to justify state constitutional rules mandating a supermajority for the impeachment of a Governor, the choice of Governor in the event the election is decided in the state legislature,\(^{129}\) the legislative override of a Governor’s veto, or the expulsion of members from the state legislative bodies.\(^{130}\) It would be these instances where the federal Constitution’s superma-

\(^{126}\) Analogy, in a sense, meaning that interpretations of the rule that would be informed by the presence of supermajority provisions in the Constitution. See generally Ludwig Wittgenstein, \textit{Philosophical Investigations}, (G.E.M. Anscombe trans) (Basil Blackwell & Mott 2d ed 1958) (noting that there are fundamental parallels and similarities between rules and analogies).

\(^{127}\) \textit{Gordon}, 403 US at 6 (“The Federal Constitution itself provides that a simple majority vote is insufficient on some issues; the provisions on impeachment and ratification of treaties are but two examples. Moreover, the Bill of Rights removes entire areas of legislation from the concept of majoritarian supremacy.”). Id at 8 (Harlan, dissenting) (as published in \textit{Whitcomb}, 403 US at 166 (Harlan, dissenting)) (the Court’s reasoning in “\textit{Gordon v. Lance} relies heavily on the ‘federal analogy’…”).

\(^{128}\) This point has drawn some notice in the past. See, for example, Wilkinson, 61 Va L Rev at 974 (“Supermajority requirements on matters of impeachment, executive veto, constitutional amendments, and cloture are…very different in kind from the provision challenged in \textit{Gordon v. Lance}.”) (cited in note 118); Bill Hall, \textit{Batt Questions Idaho’s Dictatorship Of The Minority}, Lewiston Morning Tribune 1F (Oct 26, 1997) (“there is precedent in government for supermajorities in exceptional cases. But the routine construction and maintenance of classrooms in this state is hardly an extraordinary matter in the same sense as actions like amending the federal Constitution, for instance, where the supermajority rationality comes into play.”).

\(^{129}\) Interestingly, when faced with the perfect opportunity to use the federal analogy, the Court did not. See discussion at note 135.

\(^{130}\) The original Constitution contains six supermajority requirements. See US Const Art II, § 2, cl 2 (two-thirds concurrence of the Senate necessary to conclude a treaty); US Const Art I, § 3, cl 6 (two-thirds vote of the Senate needed to convict individuals tried for impeachment by the House); US Const Art I, § 5, cl 2 (two-thirds vote of the Senate or House to expel a member); US Const Art I, § 7, cl 3 (two-thirds vote of each house necessary to override a Presidential veto); US Const Art V (two-thirds of each house needed to approve an amendment to the Constitution, or alternatively, two-thirds of the states may call a Convention for proposing amendments, with approval of three-fourths of the states); US Const Art II, §1, cl 3 (two-thirds quorum requirement during selection by the House of the executive, subject to absolute majority voting rule).
majority provisions were "analogous" to state actions.\textsuperscript{131} The Court's use of the federal analogy in \textit{Gordon} seems to use the Framers' inclusion of first order supermajority requirements implicitly to legitimize supermajority voting requirements at all levels of government; thus creating a link between the Framers' provision of a supermajority requirement when the Senate is voting on the impeachment of a sitting President, and a local city council's action requiring a supermajority vote to amend its municipal weed control ordinance.\textsuperscript{132}

The federal analogy is also inherently weak in the context of \textit{Gordon} because supermajority requirements that control internal procedures of legislative bodies (such as those contained in the U.S. Constitution) are not necessarily the same—in design or effect—as those that dilute citizen voting rights in initiatives and referenda.\textsuperscript{133} Legislators have far more information about the votes they cast, have the opportunity for log rolling with other legislators in order to build support for or against legislation and can amend and reword proposed bills to suit evolving majority coalitions.\textsuperscript{134} Thus, it is questionable how "analogous" legisla-

\begin{footnotes}
\item[131.] See also Lawrence G. Sager, \textit{The Incorrigible Constitution}, 65 NYU L Rev 893, 900-09 (1990) (arguing that the supermajoritarian ratification of the original Constitution and its subsequent amendments does not ensure its fidelity to principles of supermajority rule).
\item[132.] See Matt Smith, \textit{City Council Delays Rewrites of Ordinances}, The Montgomery Advertiser 1B (Oct 17, 1995) (discussing supermajority proposals for changes to certain city ordinances, including the municipal weed control ordinance, and noting that one of the backers of the proposals seemed to justify his support by noting that "the measures are legal" because of the use of supermajority rules in the U.S. Constitution).
\item[133.] See \textit{Westbrook}, 471 P2d at 511 ("Many of the extraordinary majority provisions to which we are referred [those in the U.S. Constitution] are readily distinguishable in that, since they apply solely to the internal procedures of legislative bodies, they involve no dilution of the individual exercise of the franchise..."); Comment, \textit{Extraordinary Majority Voting Requirements}, 58 Georgetown L J at 419 ("The consequences of electing a representative differ significantly from those of a bond referendum... .") (cited in note 100). Despite the logic of treating referendum and legislative voting rules differently, this approach has been rejected by the Supreme Court. See \textit{Gordon}, 403 US at 7 ("We see no meaningful distinction between such absolute provisions on debt [60 percent referendum voting rule], changeable only by constitutional amendment, and provisions that legislative decisions on the same issues require more than a majority vote in the legislature.").
\item[134.] But see \textit{Felix v Milliken}, 463 F Supp 1360, 1375 (E D Mich 1978) ("In passing upon legislation adopted as a result of the power of initiative, the courts have never specifically and directly addressed the question whether the same presumption of constitutionality attaches to the actions of the electorate as to the actions of the legislature. Nevertheless, what scanty authority there is does suggest that the constitutionality of this initiatory amendment should be assessed as though it were enacted by the legislature.") (citations omitted). See also Rappaport, 13 J L & Pol at 712-13 ("the Framers distinguished between a majority of the people and a majority of the legislature. They feared that an influential minority would gain control of the legislature and pass legislation that would exploit the majority of the people. Because supermajority rules deter such behavior, they operate to protect the will of a popular majority. . . . Thus, fiscal supermajority rules are entirely consistent with the republican nature of our Constitution. These supermajority rules rely on elections and do not grant special privileges to any group. They simply make it more difficult to pass legislation in areas where the political process functions poorly. Moreover, they are designed to protect both individual rights and the will of the majority of the public, values that the Framers believed to be entirely consistent with republican government.") (citation omitted) (cited in note 18). This analysis is fundamentally flawed. The notion that
ative voting rules are to decision rules employed in popular initiatives and referenda.

However, even if one is willing to consider the federal analogy in the broadest possible light and ride its slippery slope all the way down to municipal weed control ordinances, it nonetheless should have been rejected by the Court in light of its then recent voting rights decisions. In the years preceding Gordon, the Court had explicitly, and in no uncertain terms, rejected state arguments that at least one branch of a state legislature could be apportioned by geography (for example, giving each county in the state the same number of state senators irrespective of a county’s population) because the U.S. Senate was similarly apportioned by geography. In rejecting the federal analogy in redistricting cases, the Court stated that

We…find the federal analogy inapposite and irrelevant to state legislative districting schemes...the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted....The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government.
The rejection of the federal analogy in the redistricting cases allowed the Court to overturn electoral apportionment schemes in almost every state\textsuperscript{138} and force an unprecedented restructuring of nearly every state legislature, many of whose districting configurations had existed for over a hundred years.\textsuperscript{139} Yet in \textit{Gordon}, the Court conveniently asserts that one rationale for allowing supermajority provisions is the federal analogy. Interestingly, the Court rejected the federal analogy in redistricting cases by dismissing it as no more than post hoc justification for malapportionment.\textsuperscript{140} By opportunistically choosing to utilize the federal analogy in supermajority cases after rejecting it out-of-hand in the reapportionment cases—without even proffering some sort of theory or basis for distinguishing the differential application—the Court seems to view theoretical constructs such as a federal analogy more as conveniences to be employed on an as-needed basis rather than as some sort of grounding to support a coherent theory of constitutional interpretation.\textsuperscript{141}

Finally, given the unique composition of Congress and the federalist structure of the American government, it is unclear if the federal analogy is even relevant in many state supermajority cases. The unique apportionment of the U.S. Senate on the basis of state geography raises certain issues of popular sovereignty recognized by the Framers because certain actions could be passed by a majority of states even though such states represented a significant minority of the population. Of the six supermajority rules inserted by the Framers into the original Constitution, three appear to be aimed at addressing this issue of state versus popular representation.\textsuperscript{142} Additionally, because the American government is a federalist system with a separation of powers structure, action may from time to time be required by more than one “majority rule entity.” The other three of the

\textsuperscript{138} See \textit{Reynolds}, 377 US at 589 (Harlan dissenting) (noting the decision in \textit{Reynolds} will require the reapportionment of “all but a few” of the 50 states).


\textsuperscript{140} \textit{Reynolds}, 377 US at 573 (“Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements.”).

\textsuperscript{141} Interestingly, the Court missed an ideal chance to use the federal analogy in an earlier case. In \textit{Fortson v. Morris}, the Court upheld a provision of the Georgia Constitution that allowed the Georgia legislature to select the Governor if no gubernatorial candidate received a majority of the vote in a state-wide election. 385 US 231 (1966). Under the US Constitution, if no Presidential candidate receives an absolute majority of votes in the electoral college, the selection of the President is made by the House of Representatives, subject to a supermajority requirement for the quorum (requires “a member or members from two-thirds of the States...”) US Const Amend XII. Despite these similar constitutional default mechanisms for choosing an executive in the face of electoral failure, the Court failed to make any reference at all to the federal analogy in upholding the Georgia provision in its \textit{Fortson} opinion. The failure of the Court to even mention the federal analogy in \textit{Fortson} supports the view that the inclusion of the federal analogy in \textit{Gordon} was merely post hoc justification.

Constitution’s supermajority requirements each seem to address instances where the Congress has been given a “trump card” over actions previously taken by voters, states or the popularly elected President. Since the Court’s own reapportionment decisions forbid a geographic basis for state legislative representation, the only situation where state supermajority rules would be analogous to the use of supermajority provisions in the federal Constitution would be where one majority rule entity is being given a veto over the actions of another majority rule entity, such as where a state legislature is impeaching a governor (overruling a majority of the voters in the last gubernatorial election) or expelling a member of the legislative body (overruling the voters in that member’s district). By not considering why the Framers inserted supermajority rules into the Constitution, the Court ends up applying a federal analogy to a case whose circumstantial facts are in no way analogous to the issues raised in the federal Constitution, which seems to make the use of a federal analogy in *Gordon* as inapposite and irrelevant as the Court found it to be in the reapportionment cases.

4. The Intergenerational Justification

Chief Justice Burger also offered an intergenerational argument in *Gordon*, noting that it “must be remembered that in voting to issue bonds voters are committing, in part, the credit of infants and of generations yet unborn, and some restrictions on such commitment is not an unreasonable demand.”\(^{143}\) Here again, a somewhat plausible justification is offered that might seem initially defensible but whose logic deteriorates in light of the realities of the case. First, while such a justification would be acceptable for long term bonds and might be acceptable for medium term bonds, under West Virginia’s law all bonds were subject to the three-fifths supermajority requirement. Additionally, although a point that seems to be forgotten in the latter portion of the opinion, the Court in *Gordon* upheld both tax and bond provisions. The tax provision at issue in *Gordon* would have assessed taxes for five years, a time period hardly long enough to implicate unborn generations of Roane County citizens.\(^{144}\) Finally, in the abstract, it is difficult to understand what the Court is attempting to accomplish by adopting this rationale. Since the Court did not overrule the five year tax provision, clearly the

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144. Despite the weakness of this argument, it has been cited with approval. See *Citizens for Community Action at Local Level, Inc v Ghezzi*, 386 F Supp 1, 8 (W D N Y 1974), rev’d 423 US 808 (1975) (“The rationale of *Gordon* is that a state has the right to protect minority interests and those of unborn generations, in certain substantive areas, by requiring a greater than majority vote.”); *San Francisco v Farrell*, 32 Cal 3d 47, 52-53, 648 P2d 935 (Cal 1982) (“...while the requirement for a two-thirds vote as a condition for adoption of a tax is not unconstitutional (see *Gordon v. Lance*), [statutes requiring such a vote] must be strictly construed and ambiguities therein resolved so as to limit the measures to which the two-thirds requirement applies. In this connection, we reasoned that the two-thirds vote requirement...is inherently undemocratic; the requirement was imposed by a simple majority of the voters throughout the state upon a local entity to prohibit a majority (but less than two-thirds) of the voters of that entity from taxing themselves for programs or services which would benefit largely local residents; and the sales tax in issue in that case unlike the levy in *Gordon*, did not result in 'committing...the credit of...generations yet unborn'” (citations omitted).
intergenerational argument is not necessary for supermajority rules to be utilized by a state. In that many states approve the issuance of long term bonds by majority vote, a supermajority vote is also not necessary when intergenerational concerns are undeniably present. This leaves Gordon with a rationale that sounds good (let's protect unborn generations of citizens) but one that has no real effect on the use of supermajority rules by the states or any bearing on the legal appropriateness of constitutional departures from majority rule.

B. THE POLITICS OF GORDON

After Gordon the state of equal protection law with respect to supermajority voting rules was all but indecipherable. The Court had seemed to reject the notion that Gordon was a vote dilution case, arguing instead that the focus should be placed on the presence of identifiable groups along the lines of more traditional equal protection analysis (but not along the lines of Hunter, a traditional equal protection case). Additionally, the Court was silent on whether supermajority voting rule cases concerned the fundamental right to vote and thus required strict scrutiny or whether such rules were mere procedural restrictions that need only meet the rational basis test. The Court's justification for its holding in Gordon and the discussion of its reasoning in light of past voting rights and equal protection cases is so addled that lower courts often cite Gordon's reasoning without a clear understanding of its shortcomings, which often leads to confusion over the application of its rationale to cases at bar.\(^\text{145}\) The logic of the decision is often so misunderstood that lower courts have cited Gordon in support of propositions wholly unrelated to its subject matter,\(^\text{146}\) and almost thirty years after Gordon was decided, both the courts\(^\text{147}\) and legal scholars\(^\text{148}\) are still arguing

\(^{145}\) See, for example, Armstrong v Allain, 893 F Supp at 1334 (district court confusing the concepts of "fencing out" and vote dilution in Gordon).

\(^{146}\) See, for example, Whalen v Heimann, 373 F Supp 353, 358 (D Conn 1974) (citing Gordon in support of the proposition that a town "has an obviously legitimate governmental interest in adopting referendum procedures that will prevent the rejection of a considered decision of the Town Council by a faction of electors too few in number adequately to present the best interest of other town residents." There was no mention of such an issue in Gordon); Lukens v Brown, 368 F Supp 1340, 1343 (S D Ohio 1974) (stating that "[p]enalties to deter irregularities in the system of elections are well within the scope of power of the Ohio legislature," citing Gordon in support. There was no mention of electoral penalties in Gordon); Manes v Goldin, 400 F Supp 23, 29 (E D N Y 1975) and Pennsylvania Bank & Trust Co v Hanisek, 426 F Supp 410, 416 (W D Penn 1977) (each citing Gordon for the proposition that a "territorial distinction which has no rational basis will not support a state statute" This point was not discussed in Gordon); Wright v Carlton, 41 AD2d 290, 294 (N Y Sup Ct App D 1973) ("No individual may be denied access to the ballot solely by virtue of his tax status. See Gordon v Lance..." This issue is wholly unrelated to Gordon and was not even alluded to in the decision.). The logic of Gordon is so confusing that it even affects the objective facts of the case, see Craig D. Moreshead, Comment, Evans v. Romer and Amendment 2: Homosexuality and the Constitutional Dilemma, 24 Cap U L Rev 485, 488 (1995) (in Gordon, the "United States Supreme Court, in a unanimous [sic] decision, found that the provision did not violate the Equal Protection Clause..."). Gordon was a seven - two decision.

\(^{147}\) See Equality Foundation of Greater Cincinnati v City of Cincinnati, 860 F Supp 417, 430 (S D Ohio 1994) ("it is clear that the [Supreme Court's] analysis in Hunter goes beyond a routine
over whether **Hunter** was merely a race case or whether its use in **Gordon** implies that it should be more generally viewed as a political process equal protection case.

Even the urban/rural geographic distinction that was explicitly rejected by the Supreme Court in the reapportionment cases is not deemed an appropriate basis for overturning a supermajority rule. For example, in 1982 Arizona voters challenged a state statute that required a supermajority vote for the issuance of bonds to finance road construction in rural areas of the state. Despite the fact that Arizona voters who challenged the requirement were able to cite at least twenty-one bond authorizing statutes in the Arizona code applicable to a variety of bonds, such as hospitals, utilities, and municipalities, which mandated a simple majority decision rule, while only one, rural road construction bonds, were subject to a supermajority rule, the court upheld the statute based on **Gordon**.

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application of the principle that racial classifications must be strictly scrutinized’); **Equality Foundation of Greater Cincinnati v City of Cincinnati**, 54 F3d 261, 268 (6th Cir 1995) vacated and remanded, 518 US 1001 (1996) (declaring the lower court had “erroneously” construed **Hunter**, an opinion “anchored in the ‘suspect classification’ of race, not in any averred fundamental right to lobby the city council for favorable legislation”); **Evans v Romer**, 854 P2d 1270, 1283-84, 1299-1300 (Colo 1993) (majority opinion characterizing **Hunter** as more than a race case, dissenting opinion finding **Hunter** was primarily about race).


149. See, for example, **Smith v Town of St Johnsbury**, 150 Vt 351, 554 A2d 233, 238-39 (Vt 1988) (Vermont statute that required a two-thirds vote to overturn certain municipal actions taken by selectmen in rural areas while only a majority vote was sufficient for the same purpose in urban areas was not inconsistent with equal protection despite the presence of an identifiable, geographically defined class (rural voters)).

150. **In re Matter of a Contest of a Certain Special Election**, 659 P2d at 1297.

151. Id.
More disturbingly, attempting to understand *Gordon* in light of the Court's prior actions, rhetoric and reasoning has left many legal scholars perplexed.\(^\text{152}\) The Court's opinion in *Gordon* is all but inexplicable when viewed in the context of stare decisis and general tenets of judicial interpretation.\(^\text{153}\) It simply does not seem possible to identify any principled, coherent theory that would reconcile the Court's decision in *Gordon* with its prior rhetoric and actions in the area of equal protection.

As a consequence, *Gordon* is probably more accurately viewed as a results-oriented political decision, one in which the Court, having accepted justiciability in voting redistricting and apportionment cases in *Baker v Carr*, concluded that the bramble in one portion of the voting rights thicket—supermajority voting rules—was simply too sharp to warrant judicial intrusion. The decision in *Gordon* was one of the Burger Court's first voting rights cases, and it represented a clear break from the Warren Court's incremental embrace of the majoritarian theory of democracy that had been evolving in the decade prior to *Gordon*.\(^\text{154}\) Indeed, without explicitly overruling any Supreme Court precedent, the Court seemed to look toward the supermajority part of the thicket and simply conclude, "we don't want to go there." When viewed from this perspective, the Court's opinion in *Gordon* can be read in a way that is at once more approachable and less apt to cause cognitive dissonance.

Other "we don't want to go there" cases bear a remarkable resemblance to the Court's opinion in *Gordon*, and not just in the area of voting rights. For example, the Court's opinion in *Bowers v Hardwick*\(^\text{156}\) contains a number of underlying fundamental similarities with *Gordon*, despite the dissimilar subject matter; *Bowers* was a due process case concerning homosexual sodomy decided fifteen years after *Gordon*.\(^\text{157}\) In both *Bowers* and *Gordon*, the Court explicitly notes that it is not pass-

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153. But see *Fontham v McKeithen*, 336 F Supp 153, 161 (E D La 1971) (Gordon concurring) (“I believe that the Supreme Court in *Oregon v. Mitchell* ... and in the very recent case of *Gordon v. Lance* has placed in proper perspective the application of its recent cases interpreting the Equal Protection Clause, and has given ample guidance to District Courts in disposing of issues such as that now before us.”); Gary J. Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 Stan L Rev 663, 686-87 (1977) (supporting the Burger Court's decision in *Gordon*).

154. For a comparative analysis of the Burger and Warren Court's equal protection case law, see Wilkinson, 61 Va L Rev at 947-950 (cited in note 118). Even before the voting rights cases, the Supreme Court on a number of occasions seemed to recognize the existence of a general principle of majority rule. See note 61.


157. *Bowers* was chosen for comparison with *Gordon* because it is a case which has itself been widely criticized as a results-oriented decision. See, for example, Kendall Thomas, *Beyond the
ing on the “wisdom” of the statute at bar, but rather deferring to the will of the state legislature and the people to decide the issue for themselves. In each case the Court justifies its opinion, in part, on long-standing historical tradition while all but ignoring the broad wording of previous (Warren) Court decisions that had often disregarded those same traditions — precedent explicitly relied on by the lower courts when making the rulings that were being overturned.\(^1\) Contrary to the rhetoric used to justify prior decisions, in both Bowers and Gordon the Court declares that the case being decided is not merely distinguishable from past Court decisions, but that the factual circumstances are so vastly different that it’s not really even a close call.\(^2\) In both cases, the Court seems to find a relatively easy out by declaring its inability to locate an identifiable class: in Bowers, homosexuals are found to be defined by conduct not status;\(^3\) in Gordon,  

Privacy Principle, 92 Colum L Rev 1431, 1434-35 (1992) (stating that the decision in Bowers does not satisfy theoretical discourse or political discourse surrounding the constitutional issues at stake in that case); Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, 78 Cal L Rev 1441 (1990) (Bowers and Bowers both depend on preexisting, extra-legal (which is to say, cultural) processes of categorization. What ultimately decides the issue is not the legal rule, but rather the concept of “intimacy” that the judges bring to the case.); Erin Daly, Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey, 45 Am L Rev 77, 146 n354 (1995) (arguing that the Court’s decision in Bowers was result-oriented); William N. Eskridge Jr., Democracy, Kulturkampf, and the Apartheid of the Closet, 50 Vand L Rev 419, 426 (1997) (describing Bowers as “the most uniformly criticized Supreme Court decision in my lifetime”). See also Earl M. Maltz, The Prospects for a Revival of Conservative Activism in Constitutional Jurisprudence, 24 Ga L Rev 629, 645 n95 (1990) (noting that “commentators have almost unanimously condemned” the Court’s decision in Bowers and providing extensive list of articles offering criticism of the case). The use of history as a justification may support the view of a results oriented method. See William N. Eskridge Jr., Dynamic Statutory Interpretation, 135 U Pa L Rev 1479, 1484-86 (1987) (criticizing the Court’s contrived use of historical intent as camouflage for a “results oriented” method of statutory interpretation).

158. See Bowers, 478 US at 190 (“This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable.”); Gordon, 403 US at 7 (“Wisely or not, the people of the State of West Virginia have long since resolved to remove from a simple majority vote the choice on certain decisions....”).

159. Bowers, 478 US at 192-94 (discussing the history of sodomy laws in the United States from Colonial times); Id at 196-98 (Burger concurring) (discussing the history of sodomy laws in Western civilization); Gordon, 403 US at 6 (“[T]here is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue.”).

160. See Bowers, 478 US at 199-214 (Blackmun dissenting). For Gordon, see notes 57-61.


162. Id at 190-91 (“[W]e think it evident that none of the rights announced in those cases [due process cases dealing with privacy] bears any resemblance to the claimed constitutional right” of the plaintiff.); Gordon, 403 US at 5 (“Unlike the restrictions in our previous cases, the West Virginia Constitution singles out no ‘discrete and insular minority’ for special treatment ... we can discern no independently identifiable group or category that favors bonded indebtedness over other forms of financing.”).

163. See Mark Chekola, Equality Foundation v. City of Cincinnati: Invisibility and Identifiability of Oppressed Groups, 6 Law & Sex 141, 143 (1996) (“[T]he [Bowers] court held that homosexuals are not an “identifiable class” of citizens, but are instead defined by their conduct, which is not constitutionally protected.”). But see Romer v Evans, 517 US 620, 633-35 (1996) (recent Court decision seems to imply homosexuals do constitute an identifiable class).
there can be discerned no group that favors bonded indebtedness over other forms of financing. In both cases the Court offers relatively brief, almost dismissive majority opinions that it attempts to refine and narrow by the insertion of footnotes, presumably in an effort to reserve for itself the right to decide analogous cases differently. Finally, each case is defined by a typical ideological split, with Justices Burger and White in the majority and Justices Brennan and Marshall dissenting.

This comparison is not offered in support of a conclusion that either *Bowers* or *Gordon* was either rightly or wrongly decided, or that there existed insufficient justification for deciding either case one way or the other. Rather, I would argue that the comparison supports a conclusion that both cases were probably decided from a results-orientated perspective. Certainly in *Gordon*, and also in other Burger Court decisions such as *Roe v Wade*, it seems at times that the Justices first decided that “we don’t want to go there” and then appended the opinion as an afterthought. Admittedly, the *Bowers* analogy offered in support of the conclusion that *Gordon* was to a large degree a political decision is at best interesting and, depending on one’s disposition, may be dismissed as mere conjecture, coincidence or contrivance. However, there is considerably stronger evidence to support this contention.

That *Gordon* should be most accurately viewed as a political decision was practically declared by Justice Harlan, who delivered an invective against the rationale, but not the results, of *Gordon* and two other voting rights cases handed down on the same day. In his concurring opinion to all three cases, Justice Harlan all but accuses the majority of theoretical hypocrisy and claims that had the Court been faithful to prior precedent, *Gordon* would have been decided in the opposite. While somewhat rambling, the screed offered by Justice Harlan is perhaps the best evidence available that *Gordon* was for the most part a results-oriented decision.

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164. *Bowers*, 478 US at 188 n2 (despite the fact that the statute at issue covered all forms of sodomy, the Court stated that the “only claim properly before the Court...is Hardwick’s challenge to the Georgia statute as applied to consensual homosexual sodomy” and therefore “[w]e express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.”); *Gordon*, 403 US at n6.

165. Justice Blackmun switched sides. See Leonard W. Levy, *Against the Law: The Nixon Court and Criminal Justice*, 1-60 (Harper, 1974) (criticizing the Burger Court, particularly President Nixon’s Supreme Court appointees - Justices Burger, Blackmun, Powell and Rehnquist - as biased and result-oriented). In *Gordon*, the two Nixon appointees on the Court at the time the case was decided - Burger and Blackmun - voted with the majority. In *Bowers*, three of the four Nixon appointees voted in the majority, with Blackmun writing the dissent.

166. 410 US 113 (1973).

167. For a general critique of the Burger Court, see Albert W. Alschuler, *Failed Pragmatism: Reflections on The Burger Court*, 100 Harv L Rev 1436, 1449 (1987) (“Illustrating again its cleverness and result orientation, the Court reported that constitutional doctrine broke down neatly into trimesters. Judged solely on a scale of intellectual honesty (which, to be sure, is not the only measure that matters, the Burger Court may have marked the low point in the Supreme Court’s not always illustrious history.”).
Past [Supreme Court] decisions have held that districting in local governmental units must approach equality of voter population “as far as is practicable,” and that the “as nearly as is practicable” standard of Wesberry v. Sanders for congressional districting forbade a maximum variation of 6 percent. Today the Court [in Abate v. Mund] sustains a local governmental apportionment scheme with a 12 percent variation.... Prior opinions stated that “once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.” Today the Court sustains [in Gordon] a provision that gives opponents of school bond issues half again the voting power of proponents. The Court justifies the wondrous results in these cases by relying on different combinations of factors.... Gordon v. Lance relies heavily on the “federal analogy” and the prevalence of similar anti-majoritarian elements in the constitutions of the several States. To my mind the relevance of such considerations as the foregoing is undeniable and their cumulative effect is unanswerable. I can only marvel, therefore, that they were dismissed...[this Court has previously decided a] line of cases [that] can best be understood, I think, as reflections of deep personal commitments by some members of the Court to the principles of pure majoritarian democracy. This majoritarian strain and its non-constitutional sources are most clearly revealed in Gray v. Sanders, where my Brother Douglas, speaking for the Court, said: “The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.” If this philosophy of majoritarianism had been given its head, it would have led to different results in each of the cases decided today, for it is in the very nature of the principle that it regards majority rule as an imperative of social organization, not subject to compromise in furtherance of merely political ends. It is a philosophy which ignores or overcomes the fact that the scheme of the Constitution is one not of majoritarian democracy, but of federal republics, with equality of representation a value subordinate to many others, as both the body of the Constitution and the Fourteenth Amendment itself show on their face.... If majoritarianism is to be rejected as a rule of decision, as the Court implicitly rejects it today, then an alternative principle must be supplied if this earlier line of cases just referred to is still to be regarded as good [law].

Another indication of the political nature of the reasoning in Gordon is the final sentence of the majority opinion, which contains a summary of the Court’s main holding in the case:"

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168. Gordon, 403 US at 8 (Harlan concurring, as published in Whitcomb, 403 US at 165) (citations omitted). See also Fontham, 336 F Supp at 171 (Wisdom dissenting) (“The identifiable insular minority principle of Gordon v. Lance... seems to me a great departure from the purity of the Court’s concern with the right to vote which plainly characterized the Court’s opinions in Kramer and Cipriano and led the Court to invoke the compelling interest test in those cases. I think, then, that Gordon v. Lance must be taken as a special restriction upon, and not a repudiation of, the earlier landmark cases involving application of the compelling interest test to voter eligibility standards.”).

169. See Calvert, 6 Cornell J L & Pub Pol at 404 (stating that the Court’s inclusion of this footnote might have been out of a recognition that it had “gone out on a limb in relation to the one person-one vote principle...”) (cited in note 101).
That West Virginia has adopted a rule of decision, applicable to all bond referenda, by which the strong consensus of three-fifths is required before indebtedness is authorized, does not violate the Equal Protection Clause or any other provision of the Constitution. n6

(n6 We intimate no view on the constitutionality of a provision requiring unani-
mity or giving a veto power to a very small group. Nor do we decide whether
a State may, consistently with the Constitution, require extraordinary majorities
for the election of public officers.) 170

This concluding sentence is odd in that at the same time it both unnecessarily
broadens and narrows the Court’s decision. First, while the inclusion of footnote
six may be seen merely as an attempt by the Court to forestall any arguments
that it was endorsing the use of supermajority voting in all instances, its presence
is peculiar for a number of reasons. The footnote’s first sentence on small group
vetoes is understandable but problematic. 171 It is conceivable, given the Court’s
ruling in Gordon, that a state might adopt a provision that required, say, 90 per-
cent of all voters to approve a certain type of referendum, thus giving a practical
veto over certain policy decisions to a mere 10 percent of voters. While such a
provision may seem unwise or patently unfair in light of democratic norms, it is
difficult to see how it is constitutionally distinguishable from the situation in
Gordon. The Court is intimating that it might be able to find somewhere in the
Constitution the notion that, for example, an 89.9 percent supermajority voting
rule is permissible, while a 90 percent supermajority rule would be unconstitu-
tional. Even in the grayest penumbras and deepest emanations of equal protec-
tion theory such a line could never be viewed as anything but the arbitrary adop-
tion of a naked preference wrapped in the garb of legal rulemaking. As noted by
one constitutional scholar, “[o]nce majority rule is abandoned, there is no logical
stopping point between, say, a 50 percent plus two rule, and a 99.9 percent rule.” 172

171. The Court did not explicitly define what it would consider a “small group.” See Santa
       Clara, 11 Cal 4th at 259 (“Although the high court did not define the very small group it referred
to in Gordon, it is clear that a group composed of one-third plus one of those voting in a tax
election—the proportion needed to defeat a tax measure subject to a two-thirds voter approval
requirement—is not the ‘very small group’ that the Gordon court had in mind. It is manifest ...
that a repository of veto power in a minority constituted by more than 1/3 of those voting (as
in the case at bar) lies outside the concept imported by a ‘very small group’. . . This conclusion
is first supported on the face of the Gordon opinion itself. After stating that its reasoning applied
no less to a vote of the people than a vote of the legislature, the high court observed: Indeed,
we see no constitutional distinction between the 60 percent requirement in the present case and
a state requirement that a given issue be approved by a majority of all registered voters.... In a
footnote at that point...the court conceded that in practice, the latter requirement would be far
more burdensome than a 60 percent requirement. The court then pointed out that in the case
before it approval by a majority of all registered voters would have required the affirmative
votes of over 79 percent of those voting. This is far more, of course, than the two-thirds re-
quirement at issue here.”) (citations omitted).
172. Akhil Reed Amar, 94 Colum L Rev at 503 (cited in note 2).
Additionally, the presence of the second sentence of footnote six on the use of supermajority voting rules in the election of public officials is wholly unnecessary. Because supermajority voting rules preference inertia, their use in the election of public officials is all but unknown given the ever present potential of extended periods of office vacancy while a supermajority coalesces around one candidate.173 And since supermajority rules are usually adopted by the political party in power, it is equally rare that such party would be willing to give its opposition a veto over the reelection of its sitting representatives, as opposed to the more typical use of supermajority rules, which sees the party in power establishing a future minority veto over certain preferred issues. In a two-party system the use of supermajority electoral rules is even more unlikely given their additional tendency, if utilized in candidate elections, to produce “third choice” results.174 For all these reasons, the use of supermajority voting rules in the election of public officials is almost unknown in the American political system and would be a readily distinguishable case without the need for a qualifying footnote.175

Despite the Court’s need to somehow narrow its opinion in Gordon with the inclusion of footnote six, in the very sentence to which footnote six is appended the Court improperly176 broadens its ruling well beyond the issues presented to it.

173. See Brenner, 315 F Supp at 631-32 (“In a candidate election there are a limited number of available rules for determining the winner. In a two man race, the candidate receiving the highest number of votes is obviously the choice of a majority of those voting. But in a three man race, a policy choice must be made between (1) declaring the candidate who received the highest number, although not a majority, of votes to be the winner; or (2) by requiring a run-off; or (3) by providing some other method, such as the method selected by Georgia, involved in Fortson v. Morris [choice by state legislature]. Where the applicable State law provides that a candidate receiving a plurality is the winner, it is obvious that the selected decisional rule permits the selection of a winner who has in fact received less than a majority vote.”).

174. In light of this quirk of supermajority rules, the Pope has recently decreed that it will be possible for future Papal elections to be subject to majority rule. See Michael Walsh, Book Review, Inside the Vatican: The Politics and Organization of the Catholic Church, National Catholic Reporter, Vol 33 No 9 at 14 (Dec 27, 1996) (In the new 1996 Papal constitution “John Paul II has introduced simple majority voting into the conclave [which will elect the next Pope]. For the first dozen or so ballots the old rules apply—a candidate has to obtain a two thirds majority before he can be elected. After that period, however, and if a majority of the cardinal electors so wish it, the decision can be made by a simple majority vote.”).

175. In the only instance of post-Gordon electoral supermajority voting being challenged, the court found that a judicial retention election in Illinois was actually a referendum and thus not subject to footnote 6 of Gordon. Lefkovitz, 400 F Supp at 1015 (60 percent voting rule used to decide whether or not an elected judge would be retained or would need to stand for reelection was a “referendum” for purposes of Gordon analysis and was therefore allowable). For an example of supermajority voting rules used by cities to elect a county representative, see Liz Mullen, AQMD Move Brings Cheer To Southland Business, The Los Angeles Business Journal 3 (Dec 27, 1993) (California county’s representative on area air quality management board requires approval of two-thirds of cities within county).

176. Use of the term “improperly” is a deliberate reference to footnote 2 of the Court’s decision in Bowers, see note 164. In Bowers, the Court included a footnote in its opinion stating that it must “properly” limit the application of the Bowers decision to the specific issue (homosexual sodomy) raised by the litigants before the Court, despite the broad scope of the Georgia statute in question, which covered both homosexual and heterosexual sodomy. In Gordon, despite the fact that the litigants only raised issues of equal protection, the Burger Court implicitly
by the litigants. When the Court accepted certiorari in *Gordon v Lance*, it was asked "to review a challenge to a 60 percent vote requirement to incur public debt as violative of the Fourteenth Amendment." The West Virginia Supreme Court had also decided the case on, and limited its discussion of the facts to, issues of equal protection. However, in the final sentence of its opinion the Court declares that the West Virginia supermajority rule "does not violate the Equal Protection Clause or any other provisions of the Constitution." Thus, without the benefit of additional legal arguments, briefs or fact finding, the Court not only decides that supermajority rules are permissible on equal protection grounds, but also summarily rejects all other challenges to such provisions based on other constitutional provisions, such as the Due Process Clause or the Guaranty Clause. Of course, we do not know why supermajority rules do not violate any other constitutional provision because there was no discussion on this point; no legal reasoning offered, no citations to previous cases or precedent, and no references to historical traditions or constitutional norms. Apparently, none of this was necessary. Rather, the Court stated firmly and conclusively that "we are not going there"—whether by equal protection or any other constitutional route.

The *Gordon* opinion is perhaps even more surprising given the Court's self-appointed task as keeper of the majoritarian process flame. Since World War II, legal theorists have generally viewed majoritarian politics as the mechanism that "produces the basic policy decisions that regulate our society [with] nonconstitutional law operat[ing] within the limits established by those decisions", and constitutional law acting as a corrective device when defects in the process are identified. The institution for identifying majoritarian defects and applying the constitutional remedy is the judiciary. With the decline of natural rights theory and the end of *Lochner* era jurisprudence came the ascendance of the notion that democracy must embody certain external values (such as popular sovereignty and majority rule) or else be degraded into a naked, unprincipled power struggle.
where “might makes right.”181 Thus came infamous footnote four of *Carolene Products*, where the Court reserves for itself the task of applying “more exacting judicial scrutiny” when evaluating legislation that “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”182 In this sense, the Constitution is distinctly concerned with procedural fairness within a representative democracy, and the role of the Court is to protect our democracy from systemic malfunctioning.183 This does not, of course, militate for the adoption of strict majoritarianism. Rather, it would be expected that consistent with this responsibility the Court would closely and thoroughly examine any rules that mandate departures from majoritarianism with a keen eye to ensure that such rules do not run afoul of the political process norms that are central to democratic governance. Even a generous evaluation of the Court’s decision in *Gordon* precludes the finding of any such keen eye. In this light, the Court’s brief, unprincipled and rather dismissive opinion in *Gordon* is surprising.

When evaluated in the context of legal theory, the Court’s *Gordon* opinion is doctrinally incoherent, internally inconsistent and cannot be reconciled with the prior legal discourse surrounding the voting rights and non-voting rights cases; it is at its core a legal/theoretical lacuna. For this reason, *Gordon* contributes little to a larger understanding of how majority rule, supermajority requirements and the Constitution should interact in a modern democratic state. Admittedly, however, as a political decision *Gordon* has been highly effective; since the Court’s ruling, not one federal, state or local supermajority voting requirement has been successfully challenged on constitutional grounds. The supermajority portion of the political thicket is entirely vacant, but so too is any principled reason for keeping it so. In some sense, what the Court might have explicitly done in *Gordon* (because in reality it is what it implicitly did) is to have simply carved out an exception to the doctrine of justiciability first enunciated in *Baker v Carr* by ruling that the use of supermajority voting rules are non-justiciable political questions. The results over the last thirty years likely would have been about the same, but

181. See Chemerinsky, 103 Harv L. Rev at 65-68 (discussing the consequences of the decline of *Lochner* and the rise of majoritarian theory) (cited in note 4).
II. ARE LEGISLATIVE SUPERMAJORITY RULES CONSTITUTIONALLY IMPELLASSIBLE?

Under the proposed Constitution, the federal acts will take effect without the necessary intervention of the individual States. They will depend merely on the majority of votes in the federal legislature, and consequently each vote...will have an equal weight and efficacy...[and] a precise equality of value and effect.185

On the first day of the 104th Congress, Representative Jim Saxton stood on the floor of the House of Representatives and argued that the enactment of the House Rule was constitutionally permissible because the “Supreme Court blessed the constitutionality of supermajority restraints on the taxing and spending propensities of government in Gordon v. Lance.”186 By the end of that day, the House had used its rulemaking authority to pass the first supermajority rule in Congressional history concerning the final passage of bills. The debate that followed the adoption of the House Rule focused considerable attention on the extent to which the Constitution may or may not be interpreted to require simply

184. At the margins, Gordon is a dream case for Critical Legal Studies scholars. The Court’s reasoning is plastic at a first order level, the presence of post hoc rationalization is strikingly obvious, the semantic incoherence of the opinion should be discernible to even the novice constitutional observer, and the case represents a clear rejection of the majoritarian meta-narrative employed in earlier decisions. This makes Gordon, as I have argued, a paradigm example of a court attempting to hide its ideological preferences by dressing them in the garb of purportedly neutral legal reasoning. In recognition, I term my discussion of Gordon a deconstruction, while remaining highly skeptical of much of CLS scholarship in general. See generally, Richard A. Posner, Book Review, Beyond All Reason: The Radical Assault on Truth in American Law, The New Republic Vol 217 No 15 at 40 (Oct 13, 1997) (criticizing CLS and related “postmodern left” theories).

185. Federalist 54 (Madison) in Federalist Papers at 340 (cited in note 1). This passage in the Federalist Papers would seem to lend support to arguments that the Framers assumed that majority rule would be used in the Congress. But see notes 238 - 242.

majority rule in certain areas. Ignoring the "wisdom or folly" of the House Rule as public policy, the issue is whether a branch of Congress, through its internal rulemaking procedures, may require that more than a simple majority of legislators vote in the affirmative in order to conclude a decision. While numerous articles have been written both in support of and in opposition to the House Rule, the debate has generally been framed around three broad interpretive and historical questions. First, does a plain reading of the Constitution's text provide a basis for Congressional authority in adopting the House Rule? Second, did the Framers expect or intend for the Congress to pass bills by simple majority vote, or was this issue implicitly left to the Congress to decide? Third, do the traditional norms of historical legislative bodies that must be incorporated into any interpretation of the Constitution's law-making provisions dictate a simple majority rule for passing legislation?

I believe that each of these questions is ultimately indeterminate in that the historical record and Constitutional text can be read in each instance both to support and refute a mandate of simple majority rule in Congress. However, the issue itself, I believe, is subject to resolution given the general consensus that surrounds traditional notions of legislative authority; a point that is often discussed in debates over the House Rule but whose ability to bring a principled resolution to the issue has, I believe, been undervalued. This may be because many of the arguments offered on either side of the House Rule debate have been much like the Court's opinion in Gordon; an attempt to wrap a contingent theory of constitutional majoritarianism around idiosyncratic policy preferences. This is accomplished by arguing from one side of history or text, while avoid-

187. United States v Ballin, 144 US 1, 5 (1892) ("The advantages or disadvantages, the wisdom or folly, of an internal Congressional] rule does not present any matters for judicial consideration. With the courts the question is only one of power.").
188. See note 14.
189. As used in this Article, the term "legislative authority" refers to its Constitutionally constructed American version, whereby powers are derived from the People, codified in a constitution and thereby granted to the legislature; it might more completely be described as "constitutionally granted and limited legislative authority." In the British sense, legislative sovereignty refers to the absolute power of the Parliament to prevail notwithstanding competing power centers in society. See J.W. Gough, Fundamental Law in English Constitutional History, 174-91 (Oxford, 1985) (discussing legislative sovereignty in England); Eastlake v Forest City Enterprises, 426 US 668, 672 (1976) (Burger) ("Under [American] constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create."); J. Alder, Constitutional and Administrative Law, 63-67 (1989) (the British governmental system rests on the concept of the sovereignty of parliament). Traditionally, the British Parliament is not bound by any substantive rules, and every act of parliament is valid if enacted according to the proper procedures. E.C.S. Wade and A.W. Bradley, Constitutional and Administrative Law, 68-85 (Longman Group, 11th ed 1993). See generally A. London Fell, 1 and 2, Origins of Legislative Sovereignty and the Legislative State, 1-12 (Oelgeschlager, Gunn & Hain 1983); Bradford P. Wilson, Separation of Powers and Judicial Review, in Separation of Powers and Good Government 73-74 (Bradford P. Wilson and Peter W. Schramm, eds) (Rowan and Lithfield 1994). Some commentators, such as McGinnis and Rappaport, use the term "legislative equality" to make the distinction between the British and American versions. See McGinnis and Rappaport 1 at 505 ("While American law abandoned the [British] principle of legislative sovereignty, it retained that of legislative equality.") (cited in note 14).
ing—whether intentionally or not—placing the issue in the context of a principled and coherent theory of legislative authority.

A. THE INDETERMINATE ARGUMENTS FROM HISTORY, TEXT AND INTENT

At its most basic level, the disagreement over the House Rule is actually quite simple. The Constitution requires that each bill that is passed by the House and Senate be presented to the President, who may sign, ignore or veto it.190 The Constitution does not define what constitutes “passed,” although it does specifically allow each house of Congress to “determine the Rules of its Proceedings…”191 Thus, the issue raised in the debate over the House Rule can be framed as follows:

[When interpreting Art. 1 of the Constitution] If “passed” means “passed by whatever number of votes each house shall deem appropriate,” then the three-fifths rule is constitutional. If “passed” is properly understood to mean “passed by majority vote,” then the three-fifths rule is unconstitutional. The issue is that simple.192

Proponents of the House Rule, in particular Professors John McGinnis and Michael Rappaport,193 offer a number of arguments in support of the rule. In particular, they assert that since the Constitution does not specifically require legislative majority rule, since the Constitution explicitly permits each house to adopt its own internal rules of procedure, and since the House Rule does not run afoul of any explicit constitutional provision to the contrary,194 it must therefore be considered an appropriate act of Congress.195 While initially compelling from a plain reading of the Constitution’s Article I lawmaking provisions,196 the pract-

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192. Rubenfeld, 46 Duke L J at 74 (cited in note 14). At a more abstract level, the debate encompasses issues of popular sovereignty and the extent to which the power to act by majority rule is viewed as either an inalienable right retained by all times by the People, or a right that was implicitly delegated to the Congress by the Constitution’s law making provisions. This debate is beyond the scope of this Article. See generally Benjamin F. Wright, Jr., American Interpretations of Natural Law: A Study in the History of Political Thought, 124-39 (Harvard 1931); Charles G. Haines, The Revival of Natural Law Concepts, 52-59 (Harvard 1930); Philip A. Hamburger, Natural Rights, Natural Law, and American Constitutions, 102 Yale L J 907, 955-60 (1993).
194. In United States v Ballin, the court held that a house of Congress “may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.” 144 US at 5. See also Powell v McCormack, 395 US 486, 518-22 (1969) (while the House has broad authority to determine its rules of procedure, it may not adopt a rule that upsets the existing Constitutional scheme).
195. See Leach, 44 UCLA L Rev at 1256 (cited in note 14).
tical and potential consequences of such a position are problematic. First, if it is assumed that Congress has the power to abandon majority rule and adopt a three-fifths rule, Congress might also adopt a one percent rule or a 99 percent rule or any rule in between. Once on the supermajority slippery slope, a whole host of rules implementing naked power preferences becomes imaginable, exposing the entire legislative process to blatant political manipulation. For example, Congress could give a veto to a small number of members, or to particular states or representatives from particular states. Additionally, since there is no explicit provision in the Constitution that requires that each member of the House have only one vote, or that each House member's vote be counted equally, manipulation by weighted voting would presumably be constitutional. Another scenario imagines a congressional rule providing that a bill shall be considered "passed" if such bill is either approved by a simple majority vote of the members or signed by the Speaker of the House. Such a rule, if adopted in both houses of Congress, might allow a bill to become a law on the actions of just three persons, the Speaker of the House, the President of the Senate and the President. Obviously, such shenanigans would make a mockery not only of any notion of democracy, but also of the Constitution, for they would allow the Congress, through the use of internal Congressional rules, to unilaterally alter the constitutionally prescribed balance of power between the states and the federal

197. McGinnis and Rappaport admit that their defense of Congress' power to enact the House Rule logically means that Congress has the power to adopt submajority requirements (for example, rules which would allow a bill to be passed by less than a majority of votes). McGinnis and Rappaport I, at n38 ("It follows from the logic of our position that the Rules of Proceedings Clause also authorizes a house to pass a rule allowing for the passage of bills by less than a majority vote") (cited in note 14). Thus, a fair reading of the McGinnis and Rappaport position would seem permit a House rule that would allow a bill to be considered "passed" on the vote of say, 25 members voting in the affirmative, and 400 members voting in the negative. McGinnis and Rappaport also concede that if the House can require a three-fifths rule, "there is no principled reason why it could not also require a 99 percent vote." Id at 504 (cited in note 14).

198. Some have argued that the slippery slope of supermajority legislative rules simply means that some such rules are merely unwise, not unconstitutional. See Kett, cited in note 185. However, I believe that they serve as a valid tool to test any argument regarding constitutionality and should not be dismissed as speculative folly.

199. This would not only be at odds with legislative tradition, but also with the expectations of the Framers. As Madison stated, "Nor will the representatives of the larger and richer States possess any other advantage in the federal legislature over the representatives of other States than what may result from their superior number alone." Federalist 54 (Madison), in Federalist Papers at 339-340 (cited in note 1).

200. See Rubenfeld, 46 Duke L J at 80-81 (cited in note 14). The Constitution does require each Senator to have one vote, which may or may not imply that House members need not only have one vote. See notes 208 - 210. Additionally, there is no Constitutional requirement that each vote cast in Congress be counted, or that each member be allowed to vote on each bill. Attempts to dilute or nullify members' votes have resulted in court challenges in the past. See Fisk and Chemerinsky, 49 Stan L Rev at 235-37, 251 (cited in note 19).

201. As the Vice-President is the President of the Senate, the choice could also be the President Pro Tem. of the Senate, or indeed, any other Senator.
government and between each of the coordinate branches of the federal government itself.\(^{202}\)

On this point almost everyone seems to agree that the imagined hypotheticals outlined above would be both politically objectionable and constitutionally problematic. But is support of the House Rule an admission that Congress has broad latitude to regulate its internal affairs and thus, where the Constitution is silent, such a Pandora’s Box is arguably opened? McGinnis and Rappaport have responded that this “parade of horribles” does not necessarily result from a position that the House Rule is constitutional. After a close review of their counter-arguments, I believe a number of them are unpersuasive.\(^{203}\) For example, McGinnis and Rappaport assert that the Constitution implicitly adopts certain parliamentary norms thereby “forbid[ding] the House from conferring one vote on some Members while providing more than one vote to other Members” because historically “equal voting rights accords with the traditional legislative principle of ‘the perfect equality of all members of the House.’”\(^{204}\) However, as McGinnis and Rappaport seem to have implicitly recognized,\(^{205}\) supermajority rules are a form of weighted voting; legislators who vote “no” have more influence on the outcome of the voting than those who vote “yes,”\(^{206}\) and in such situations legislators cannot be said to be in “perfect equality” nor be casting votes that “have an equal weight and efficacy...[and] a precise equality of value and effect” as Madison expected them to have.\(^{207}\) The only mechanism that ensures the perfect equality of votes is simple majority rule.\(^{208}\)

A more significant weakness in the McGinnis and Rappaport position is the opportunistic use of historical precedent. In refuting the imagined parade of horribles that opponents of the House Rule contend may result if the Congress is allowed broad latitude to set its internal rules and procedures, McGinnis and Rappaport continually resort to appeals to a variety of historic parliamentary traditions to read into the Constitution requirements that eliminate the worst

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203. I agree, however, that a number of the McGinnis and Rappaport arguments against certain hypotheticals offered by others are persuasive, particularly the argument that historical tradition and the structure of the Constitution require that only members of Congress may vote. See McGinnis and Rappaport II at 331-35 (cited in note 14).

204. Id at 333 n28 (cited in note 14) (citations omitted).

205. See John O. McGinnis and Michael B. Rappaport, Supermajority Rules as a Constitutional Solution, 40 Wm and Mary L Rev 365, 457 (1999) (“A supermajority rule would offend democracy only if one added that each legislator must possess formal equal voting influence on each piece of legislation.”).

206. See Los Angeles City Transportation Comm v Richmond, 31 Cal 3d 197, 204 (Cal 1982) (“In Westbrook, we noted that ‘the inevitable result of any extraordinary majority requirement is to give to one group of voters a greater influence on the outcome of an election than to another group of comparable size but opposite conviction.’ It is the functional equivalent of allowing ‘those citizens who opposed a measure . . . to vote twice while those who favored it were limited to only one ballot’”) (citation omitted). See also note 98.

207. See note 185.

208. Weighted voting rules are not, however, unknown. See, for example, Derrick Wyatt and Alan Dashwood, European Community Law 44-46 (Sweet & Maxwell, 3d ed 1993) (Discussing weighted voting rules in the European Union).
possible scenarios, such as that each House Member must have only one vote, that each vote must be equally counted, and that each Member must be allowed to vote on each bill. In and of themselves, these arguments are quite strong, for traditionally, parliamentary bodies were not allowed to engage in the sort of procedural manipulations that are imagined by the proffered parade of horribles. The problem arises, however, when the House Rule itself is considered in light of legislative history and precedent. Significantly, McGinnis and Rappaport fail to offer even one example of a rule similar to the House Rule having been enacted previously by Congress. One of the most simple and compelling facts in the debate over the propriety of the House Rule is that there has yet to be offered an example of where a rule analogous to the House Rule—a rule in which a legislative body adopts for itself a supermajority requirement on certain substantive legislation—has ever been used by the House, the Senate, any of the original thirteen Colonial legislatures or in any established parliamentary body preceding the adoption of the Constitution. Despite assertions by McGinnis and Rappaport somewhat to the contrary, a concept such as the House Rule was all but unknown at the time the Constitution was drafted, and the concept has never been part of either the House or the Senate until the first day of the

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209. McGinnis and Rappaport assert that the House Composition Clause of the Constitution, which states that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several states," implicitly can be read to require each of the following: (1) the House is to be composed of Representatives; (2) Representatives are deemed to be Members of the House; (3) Members have the right to vote on each Bill that comes before the House; (4) only Members may vote on Bills; and (5) each Member shall have an equal vote. McGinnis and Rappaport I at 330-33 (cited in note 14).

210. McGinnis and Rappaport do offer examples of certain supermajority requirements which were present in the various early State constitutions. Id at n66. Admittedly, an exhaustive review of colonial legislative history was not conducted in connection with this Article, and, in the future, examples of rulemaking similar to the House Rule may be identified. Notwithstanding this fact, it appears that at the time of the adoption of the Constitution, manipulation of internal legislative decision rules in Colonial legislatures was anything but rare and infrequent.

211. Despite their inability to cite precedent for a supermajority requirement analogous to the House Rule in some 300 years of legislative history, McGinnis and Rappaport assert that "there is no significant historical or structural support for the principle that legislation must be passed by ordinary majority vote." McGinnis and Rappaport II at 345 (cited in note 14). I believe this overstates the historical record. McGinnis and Rappaport offer a number of examples where Colonial and early State constitutions provided for supermajority voting requirements, and of course the Articles of Confederation employed a well known supermajority voting scheme. But these are constitutional examples and therefore completely different from internal legislative supermajority requirements. As McGinnis and Rappaport themselves note "[b]ecause it is easy to confuse constitutional and legislative supermajority requirements, care must be taken when interpreting statements about this subject." McGinnis and Rappaport I at 491 n43 (cited in note 14).

212. One of the few precedents offered by McGinnis and Rappaport for legislative supermajority rules is a statement by Luther Cushing, "a leading parliamentarian of the early nineteenth century, [who] noted that legislatures sometimes passed legislative supermajority rules." McGinnis and Rappaport II at 345 (cited in note 14). This example is, to say the least, less than compelling.
104th Congress in January of 1994. This fact cannot be dismissed in considering the House Rule in light of tradition and historical legislative practices if such traditions and practices are to be relied upon in refuting examples of Congress’ ability to manipulate its internal rules if it is given broad latitude to adopt the House Rule.

Additionally, McGinnis and Rappaport seem to employ conflicting interpretative mechanisms to construct a theory that ensures that the House Rule, but few others, are unconstrained by traditional notions of parliamentary democracy. For example, they note that the Framers specifically inserted a majority quorum requirement but not a majority voting requirement into the Constitutional text, a point on which they base the following argument:

The Constitution’s silence on the number necessary to pass a bill stands in stark contrast to other provisions that specify the requisite number to undertake particular actions. Most significantly, the Quorum Clause states that “a Majority of each [house] shall constitute a Quorum to do Business.” The Quorum Clause shows that, when the Framers thought it important, they could expressly establish a majoritarian requirement in the Constitution. The Clause rebuts the argument that the Constitution silently incorporates majoritarian rules of parliamentary procedure.

Initially, this textual “argument from silence” seems persuasive, particularly in light of the fact that when assembled in Philadelphia to draft the new constitution, the very first two rules adopted by the Constitutional Convention were a majority quorum requirement and a majority voting requirement. If the Framers did not assume a majority voting requirement for the Constitutional Convention, why should they be deemed to have done so in the Congress that was established as the result of their efforts?

The logic of this argument is that by explicit inclusion of one provision, but silence on a closely related provision, we should infer that the Framers intended to defer to the wishes of Congress on the provision that was excluded from the text of the Constitution. In this case, we should infer that the Framers did not intend

213. As the clerk of the House of Representatives stated in arguments before a federal court over the constitutionality of the House Rule, “[t]he House has never failed to deem passed a bill that has received the support of a simple majority...” Skaggs, 110 F 3d at 834. See also Open Letter at 1539-41 (noting that the House Rule “is unprecedented” and that “[n]othing in the past two centuries of our history authorizes a simple majority of the House to take unilateral action and restrick the constitutional balance.”) (cited in note 14).

214. This is a charge being leveled at many participants in the House Rule debate. McGinnis and Rappaport accuse Professor Rubenfeld of “eschewing inferences, from history, structure and purpose” and employing traditional cannons of constitutional interpretations “selectively.” McGinnis and Rappaport I at 330 (cited in note 14).


216. See 1, The Records of the Federalist Convention of 1787, 7-8 (Max Farrand, ed) (Yale, rev. ed. 1937) (herein “Records”). The rules were adopted as follows: “A House, to do business, shall consist of the Deputies of not less than seven States; and all questions shall be decided by the greater number of these which shall be fully represented; but a less number than seven may adjourn from day to day.” Id. This observation was not included in McGinnis and Rappaport’s analysis but is included here for analogical purposes.
for a majority voting requirement to be constitutionally mandated by silent incorporation. However, when opponents of the House Rule note that the Framers specifically provided that each Senator “shall have one Vote” but did not require that each House member shall have one vote (perhaps providing a legal foundation for weighted voting in the House), McGinnis and Rappaport argue that despite such an omission, we should ignore this textual asymmetry and read into the Constitution a requirement that each House member may have only one vote. Here, McGinnis and Rappaport argue that since representatives in popularly elected legislative bodies (such as the House) were traditionally given one vote each, the Framers could have reasonably assumed that this method would be followed, whereas in the Senate, with each state having two representatives, it might not have been clear that the same tradition should be employed, thus necessitating an explicit “one-Senator, one-vote” requirement. However, this attempt at textual-historical reconciliation for Senate-House voting requirements seems to weaken the majority quorum-majority vote argument on a number of levels. Since the Framers gathered in Philadelphia were representing states, and voting by states, by similar logic the majority quorum and voting rules that were adopted at the Convention were done so because traditional rules of popularly elected representative bodies may not have been applicable to State based voting; so this analogy would be rendered moot. Second, at the time of the Convention, while almost all decisions in legislative bodies such as the British Parliament and Colonial assemblies were taken by majority vote, those bodies were often allowed to set the quorum for business at a level below fifty percent, a concept strongly criticized by Thomas Jefferson. Thus, by the same logic used to argue for an implicit one-person, one-vote rule in the House, it would seem reasonable that the Framers could have assumed the new Congress would follow the long established historical tradition of majority rule for legislative decision making, but they wanted to eliminate the power of Congress to set its own quorum by insertion of the majority quorum rule, thus explaining the omission of an explicit majority voting rule and severely eroding the foundation of the argument from

218. McGinnis and Rappaport II at 335-36 (distinguishing the inclusion of the Senate’s one-person, one-vote requirement on special circumstance grounds) (cited in note 14). This argument is not persuasive, since although weighted voting was not generally employed in legislatures at the time, it was not unknown. Additionally, weighted voting was quite common in the corporate arena. See Brett W. King, The Use of Supermajority Voting Rules in Corporate America: Majority Rule, Corporate Legitimacy, and Minority Shareholder Protection, 21 Del J Corp L. 895, 902 (1996) (discussing weighted votes in the context of corporate shareholder voting).
219. Jefferson listed as one of six major flaws in Virginia’s constitution that the assembly could determine the size of its own quorum, which allowed a smaller number to control in decision making. Thomas Jefferson, Notes on the State of Virginia, in Writings, 251 (Merrill D. Peterson, ed) (Viking 1984). In criticizing this power, he noted that its justification was its origins in England, where “the British parliament fixes its own quorum: our former assemblies fixed their own quorum: and one precedent in favour of power is stronger than an hundred against it.” Id.
When offering the majority quorum-majority vote argument, McGin-
nis and Rappaport imply that plain text should trump historical precedent; whereas, when refuting the implications of the absence of a one-member, one-
vote requirement in the House, they appear to argue that historical precedent should trump text. Whatever the merits of the latter or former approach to con-
stitutional interpretation, it seems least persuasive when employed both ways.221

Either the argument must proceed from a textualist understanding of the
Constitution, in which case the House Rule is allowable by explicit omission,
necessarily also omitting many other parliamentary shenanigans, or there must be
an assumption that traditional norms of parliamentary democracy, history, and
tradition are implicitly incorporated into the Constitution’s law making provi-
sions, in which case, given the dearth of historical precedent for internal legisla-
tive supermajority rules, the House Rule is highly suspect.222

Many opponents of the House Rule, however, have at times been equally in-
consistent in their application of interpretive arguments in order to achieve a
desired end. The argument against supermajority legislative requirements is actu-
ally quite strong, but only if consistently applied. The Constitution’s Article I
lawmaking provisions, it is asserted, implicitly requires that certain fundamental
unwritten rules be followed; none of which are stated in the text, all of which are
crucial for a truly fair and democratic process. These unwritten rules run the
gamut of a practical continuum, from the blatantly obvious (that each member
of Congress be a human being) to other norms of traditional democratic legisla-
tive bodies, such as that only a member of Congress may vote, that each member
has only one vote, each member may vote on each bill to come before the body,
and that each vote cast counts equally with all other votes. Among these genera-
ally accepted norms is an implicit prescription of simply majority rule, the only
alternative being a possible slide down the slippery slope of supermajority re-
quirements with all its attendant anti-democratic consequences.223 Simple major-

220. I would therefore agree with Professor Rebenfeld that “the argument from silence is not

221. McGinnis and Rappaport also argue that the “only inference that can be drawn from the
supermajority requirements in the Constitution is that the Constitution itself does not require a
supermajority to pass a bill.” McGinnis and Rappaport II at 328 n9 (cited in note 14). By this plain-
text reading of the Constitution, it would seem to follow that the only inference that can be
drawn from the one-Senator, one-vote requirement in the Constitution is that the Constitution
itself does not require a one-member, one-vote rule in the House; a reading that McGinnis and
Rappaport explicitly reject.

222. For other non-textual limits on the power of Congress’s law making ability, see INS v
Chadha, 462 US 919 (1983). But see McGinnis and Rappaport I at 495 (contending that the Chadha
decision supports the position that a supermajority rule is permissible) (cited in note 14).

223. Of course, the extremes of the slippery slope argument could go both ways. See, for
example, Fontham, 336 F Supp at 171 n6 (Wisdom dissenting) (“Were majoritarianism constitution-
alistically prescribed, its ramifications would be profound. If the people acting in referendum may
not be subjected to extraordinary majority requirements, presumably legislators acting for the
people may not either. Thus extraordinary majority requirements within state legislatures would
be unlawful. State constitutions would be reduced to little more than codified statues, since a
simple majority of either the people or their representatives would have to be permitted to
change the provisions of the state’s fundamental law. The gubernatorial veto would be unconsti-
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ity rule is the historical rule followed in almost all cases for hundreds of years, is the default rule in all legislative bodies, and is part of the intellectual foundation of American democracy. It ensures the constitutionally provided role of the Vice President in the Senate, which would eliminate the potential for many polit-

tutional if the logic of majoritarianism prevailed in full. These are but a few of the unsettling implications of constitutionally-mandated majority rule. In my opinion they explain why the Court would seek to restrict the application of such a principle, as it did in *Lanza.*') (citation omitted). I believe this argument overstates the case since it fails to recognize that, in some instances, supermajority rules could be allowed (for example, impeachment of the President or a state governor), while in others (for example, these implicating municipal weed control ordinances) might be impermissible.

224. Under well established Common Law rules, majority rule (as to both quorum and voting) is the default rule of decision and procedure in all legislative bodies. See 1 William Blackstone, *Commentaries,* 181-182 (Cadell and Davies, 15th ed 1809); 3 Josef Redlich, *The Procedure of the House of Commons,* 37-41 (Constable, 1908); John Hatsell, *Precedents of Proceedings in the House of Commons* (H Hughes, 2d ed 1785) (discussing Common Law Rules regarding parliamentary privilege); John Locke, *The Second Treatise on Government,* 52-53 (C. B. MacPherson, ed) (1980); William Hakewill, *The Old Manner of Holding Parliaments in England,* 93 (Abel Roper, ed) (1671); George Petyt, *A Treatise of the Law and Custome of the Parliaments of England,* 165 (Goodwin, 1689). See also Thomas Jefferson, *Notes on the State of Virginia,* at 171 (stating that majority rule "is the natural law of every assembly of men") (cited in note 1); 17 *The Papers of Thomas Jefferson,* 195 (Julian P. Boyd, ed) (1965) ("Every man, and every body of men on earth, possesses the right of self-government...for the law of the majority is the natural law of every society of men. When a certain description of men are to transact together a particular business, the times and places of their meeting and separating depend on their own will they make a part... This, like all other natural rights, may be abridged or modified in it's [sic] exercise, by their own consent, or by the law of those who dupute them..."). This concept was reaffirmed by the Supreme Court in *United States v Ballin,* 144 US at 2 ("The general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations.").

225. See, for example, John Locke, *Second Treatise* § 96, in *Two Treatises on Government,* 332 (Peter Laslett, ed) (Cambridge, 1988) (in all assemblies empowered to act by positive law "where no number is set by that positive Law which impower them, the act of the Majority passes for the act of the whole, and of course determines, as having by the Law of Nature and Reason, the power of the whole.").

226. One difficulty with allowing the House Rule is that a similar rule in the Senate could eliminate the role of the Vice-President, who is constitutionally allowed the casting vote in that chamber. Proponents of the House Rule assert that this merely means the Framers contemplated majority rule as a default mechanism—in which case the Vice President might play a role—but does not mandate majority rule on all votes. See Leach, 44 UCLA L Rev at 1261 (cited in note 14). However, this argument is problematic on two counts. First, if the Senate adopted a 51 percent rule on all votes, something proponents of the House Rule assert is constitutionally permissible, the constitutionally mandated role of the Vice-President would be completely eliminated. Rules of statutory construction generally exclude interpretations of one statute that would render another statute infirm. See also *Cashmore v Anderson,* 160 Mont 175,185; 500 P2d 921, 927 (Mont, 1972) ("We are mindful of the principle that when a statute is equally susceptible of two interpretations, one in favor of natural right and the other against it, the former is to be adopted...Majority rule is a natural right and fundamental tenet of government in a democracy, and only the strongest evidence that something more than a majority, i.e., an extraordinary majority, is required in a given situation will suffice."). Additionally, if the Framers felt that Congress could determine the decision rules to be used in each house through its rules
cal shenanigans, and would bolster the perceived legitimacy of a system whose voting rules are not seen as flowing merely from naked political power preferences but from historical democratic norms and popular sovereignty. There is a certain neutrality to majority rule, in that "no legislator is preferred over any other and no outcome is preferred over any other," and only by majority rule is the historic "equality of legislators" completely preserved. It also is preferred in that it does not allow one party to "stack the deck" with rules that work to entrench political power against the preferences of cycling majorities, and majority rule has certain externally justifiable benefits not applicable to supermajority rule. The foregoing are not offered as support for an argument that supermajority rules are always good or bad policy, but as an observation that it seems much easier to fit general notions of majority rule into the American tradition of democracy than to allow the rules of the game to be set at the whim of each succeeding Congress.

A continual stumbling block, however, arises when House Rule supporters note that despite the rhetoric of majoritarianism, Congress historically has had procedural supermajority rules. The most notable of such requirements is the Senate's filibuster rule, which requires the vote of 60 Senators to close debate and bring the matter at hand to a floor vote. While the exact origins of the filibuster are obscure, it is generally conceded that the concept has been part of the Senate for as long as can be determined, perhaps even from the first session of proceedings, presumably Congress would be competent to assign the casting vote or provide alternative procedures when a tie vote might occur. In the Federalist Papers, Hamilton justified the role of the Vice-President in the Senate arguing that "to secure at all times the possibility of a definite resolution of the body, it is necessary that [the Vice-President acting as] the President [of the Senate] should have only a casting vote" (Hamilton) in Federalist Papers at 415 (cited in note 1) (emphasis added). If the Senate had the power to solve this problem itself through procedural rules, Hamilton's argument should have proceeded from expediency, not from necessity.

Rubenfeld, 46 Duke L J at 86 (cited in note 14). See, for example, Kenneth O. May, A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision, 20 Econometrica 680, 682 (1952) (demonstrating that simple majority rule is the group decision rule that does not preference any one particular outcome).


Congressional Quarterly's Guide to Congress, Standing Rules of the United States Senate, Rule XXII 68-A (4th ed. 1991). For a discussion of the anti-majoritarian nature of the Senate filibuster rule, see Fisk and Chemerinsky, 49 Stan L Rev at 181 (cited in note 19); Julian N. Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 1987 Am Bar Pound Res J 379, 407-12 (arguing that because a motion to repeal the Senate's filibuster rule might itself be filibustered, the filibuster rule seems unconstitutional). See also Thomas Geoghegan, In the Senate, the Dole Fibuster Busts the Designs of the Founding Fathers, The Washington Post C1 (Sept 4, 1994); Darryl K Brown, Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines, 47 Hastings L J 1255, 1280 n101 (1996) ("The U.S. Senate's rule requiring 60 votes to end a filibuster (often instigated by one or a few members) is one example of an internal rule that frustrates realization of coherent majority preferences.")
of Congress. Proponents of the House Rule correctly point to the filibuster rule as an explicit example of a departure from majority rule that has played an integral part in the Senate’s history, thus demonstrating that in some respects history is also on their side. Some House Rule opponents have tried to distinguish the filibuster rule, but these arguments are generally unpersuasive; having established the slippery slope argument of majority rule, the filibuster rule would seem to leave majority rule supporters hoist on their own petard. For example, after constructing a number of scenarios where Congressional supermajority voting rules should be considered impermissible because of their consequent alteration of the basic constitutional balance of power, Professor Jeb Rubenfeld offers this argument:

Supporters of [the House Rule] point to the Senate’s filibuster rule as a well-established rule of proceeding that also frustrates majority rule. But the filibuster rule does not purport to alter the Constitution’s rules of recognition….Wise or unwise, such rules do not alter the criteria by which the legal system determines whether an act is law. The argument here is not that any rule impeding majority rule in the House or Senate is unconstitutional. But a rule purportedly changing the rule of majority rule (for the passage of laws) is unconstitutional, because majority rule is the rule constitutionally laid down.

But attempting to draw a principled distinction between substantive rules of recognition (what I deem “Category I rules”) and procedural rules that do not alter legal criteria (“Category II rules”) seems wholly untenable on at least two counts. First, under Rubenfeld’s theory, if 55 Senators were to vote in favor of a bill, but that bill was deemed to have failed because a Senate rule purported to require the affirmative vote of 60 Senators before such bill could be considered “passed,” the bill should nonetheless be considered passed by the Senate, because the rule would be constitutionally impermissible. However, if those same 55 Senators are not allowed to vote on that bill because a Senate rule requires 60 Senators to end debate and bring the bill to the floor, and only their 55 affirmative votes can be mustered in a cloture call, this scenario is deemed constitu-

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230. For a detailed history of the filibuster, see Fisk and Chemerinsky, 49 Stan L Rev at 187-209 (cited in note 19).
231. See McGinnis and Rappaport I at 497 (“No plausible constitutional distinction exists between the rules that have permitted filibusters and the three-fifths [House] rule; if the former is within the historical meaning of the Rules of Proceedings Clause, so is the latter.”) (cited in note 14). “The filibuster and the three-fifths rule both have the ... substantive effect of giving more power to a minority of legislators.” Id at 497. See also Leach, 44 UCLA L Rev at 1267 (“Some commentators have attempted to distinguish the filibuster from the House Rule .... These arguments, however, are hardly compelling.”).
tional. The distinction is not only somewhat incoherent from a theoretical standpoint, but from a practical one as well. If the judiciary were to infer a majority rule requirement such as the one offered by Rubenfeld, we would have a constitutional standard, but it would be one that Congress could be easily side-step to achieve the same result. Additionally, the distinction slights the reality of the modern legislative process, where a vast bureaucracy of staff, standing committees, subcommittees, leadership groups, political parties, lobbyists... etc. all converge in an arena constrained by time and resources; in short, the reality in Congress is that policy and process are inextricably linked. It is all but impossible to draw a tenable distinction between substantive voting rules and those that merely implicate procedure. If a Congressional chairperson kills your long sought after bill by holding it in committee, process is substance. In the end, opponents of the House Rule must incorporate into their arguments the recognition that the filibuster rule creates an effective supermajority requirement for the enactment of most Senate legislation.

Another example offered by Rubenfeld is that a House rule mandating that any bill concerning the District of Columbia receive the prior approval of the DC Mayor before such bill could be considered “passed” would be an unconstitutional “Category I” rule because of an implicit Constitutional requirement that only the votes of members of Congress may count in the passage of bills. Assume however that the House were to adopt the following rules: Rule 1: All bills concerning the District of Columbia shall be referred to the Subcommittee on the District of Columbia. Rule 2: No bill shall be reported out of the Subcommittee on the District of Columbia unless and until the Chairman of that subcommittee shall have received from the Office of the Mayor of the District of Columbia a report assessing the impact of such bill on the District. If we also assume that there was no mechanism by which a Member could compel the submission of a Mayoral report or force a discharge from committee, such a rule would give the Mayor an effective veto over District legislation yet would also

234. See Leach, 44 UCLA L Rev at 1257 n9 (cited in note 14). It would probably take Hill staff members less than a week to reconfigure any House or Senate rule that might fall into the “impermissible” Category I into a more procedurally oriented rule that would accomplish the same ends but be considered constitutionally allowable in Category II.

235. Id at 1272 (“The legislative process is complicated, cumbersome, and quintessentially political. Any attempt to classify one procedure as promoting or defeating the principle of majority rule would be daunting indeed.”). 

236. Id at 1269 (“As John D. Dingell, the former chairman of the House Energy and Commerce Committee, notes, ‘If you let me write procedure, and I let you write substance, I’ll screw you every time!’”) (citing Claude R. Marx, National Issue of Filibusters and House Rules: Controlling Procedures Means Control of Politics, Investors Business Daily 1 (Aug 16, 1994)).


238. Rubenfeld, 46 Duke L J at 82-83 (cited in note 14). There is debate over whether the voting rights of “members” is implicit or explicit. See McGinnis and Rappaport I at 485 n9 (arguing that the Constitution’s use of the phrase “the House...shall be composed of Members...” explicitly means only elected Representatives may vote) (cited in note 14). But see Rubenfeld, 46 Duke L J at 83 n33 (asserting the phrase actually implicates length of service and not member voting in Congress because it reads “the House...shall be composed of Members elected every second Year...”) (cited in note 14).
seem to be a permissible Category II rule under Rubenfeld’s theory; but what would be the practical difference?

Although generally a fertile source of information on the Framers’ designs at the time the Constitution was drafted, in the case of supermajority rules the Federalist Papers provide little help in resolving the intent of the Framers in general with respect to legislative majority procedure. Both Madison and Hamilton argued against legislative supermajority voting rules in the Federalist Papers, and the quotation offered above seems to imply that Madison assumed Congressional bills would be subject to a majority rule. In Convention, however, Madison unsuccessfully proposed that the Senate have a two-thirds quorum requirement and also unsuccessfully proposed a two-thirds voting rule for taxation of interstate commerce as an alternative to the absolute prohibition on such taxation that was ultimately adopted. Hamilton, in an alternative plan of government drafted near the end of the Convention, called for both the House and the Senate to have an adjustable quorum rule (between 40 percent and 50 percent as determined by each Congress). Why both Hamilton and Madison made proposals at the time of the Convention that were inconsistent with their later views as set forth in the Federalist Papers is unclear, but this contradiction offers both opponents and supporters of

239. Federalist 58 (Madison) in Federalist Papers at 361 (“It has been said that more than a majority ought to have been required for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority.”) (cited in note 1); Federalist 22 (Hamilton), id at 147–8 (“[w]hat at first sight may seem a remedy [supermajority requirements], is in reality a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is, in its tendency, to subject the sense of the greater number to that of the lesser number…. But its real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority... If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority in order that something may be done must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good.”).

240. See note 185.

241. Records, vol II, at 363 (cited in note 216). This makes Madison one of the few delegates on record as having proposed and supported a supermajority taxation provision, which is ironic because Madison is the delegate who is most frequently cited in debates over the House Rule as embodying the Framers’ intent to require majority voting for all legislative acts, including tax bills.

242. Records, vol III at 621 (cited in note 216). The proposal allowed each body’s quorum requirement to be raised, up to a maximum of 50 percent, on action of that body.
the House Rule a way to assert that the Framers were sympathetic to their point of view.243

To a large extent, the arguments from text and tradition seem to be indeterminate. The text of the Constitution does not explicitly require majority rule, but it also fails to mandate many other procedural rules that are critical for a fair and democratic process — rules that traditionally have been incorporated into our understanding of representative decision making. While there do not seem to be any historical precedents for the House Rule, the fact that the Congress has used supermajority rules in the past, including a Senate filibuster rule that may be as old as the body itself, means that semi-persuasive arguments from history and tradition can be constructed on both sides of the debate. The fact that the Federalist Papers contain statements by both Madison and Hamilton that are somewhat inconsistent with their actions at the time of the Constitutional Convention is almost symbolic of the indeterminacy that surrounds any attempt to resolve the House Rule debate by peering into the dark recesses of constitutional history and tradition.

B. THE ARGUMENT FROM LEGISLATIVE AUTHORITY

Despite the difficulties surrounding any historical analysis of constitutional majority rule, I believe a resolution of the debate over the House Rule is in fact relatively straightforward given that almost everyone seems to agree that the authority of Congress as a Constitutional legislature is fundamentally inalienable except by constitutional change. To some extent, the debate over the House Rule seems to have continued because there has been relatively little focus on this point. The arguments that have been put forward seem to exist more as pre-theory rather than a rigorous analysis of the implications of the House Rule in light of generally accepted norms of Congressional legislative authority.

Most commentators who have analyzed the House Rule agree that it may be repealed by a simple majority of the House. In fact, there is general agreement that a majority of each house of Congress may at any time repeal any of its internal rules, irrespective of any entrenchment effort purporting to disallow such repeal, because traditional theories of legislative authority do not allow the authority granted to Congress to be diluted by non-Constitutional prior enact-

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243. But see McGinnis and Rappaport I at 490 n34 (cited in note 14). Although this Article does not discuss general theories of majority rule at the time of the Constitutional Convention, many enlightenment thinkers asserted that the will of the majority must prevail in civil society unless prior agreement had been reached to the contrary. See, for example, John Locke, Second Treatise § 99, at 333 (emphasis added) ("Whosoever therefore out of a state of Nature unite into a Community, must be understood to give up all the power, necessary to the ends for which they unite into Society, to the majority of the Community, unless they expressly agreed in any number greater than the majority.") (cited in note 225). Taken at face value, Locke's inclusion of the word "expressly" would seem to vitiate arguments that strict majority rule is not implied by natural law theories of popular sovereignty. At least according to Locke, it would seem that in the absence of a provision "expressly" granting the authority to act otherwise, Congress must vote by majority rule.
The theory of legislative authority is premised on the historical tenant that popular sovereignty is itself inalienable, that the Constitution derives its authority from the People, and that the legislative powers granted to the Congress by the Constitution therefore cannot be modified, diminished or enhanced by mere acts of Congress, but only through constitutional change. To be a Constitutional legislature implicitly means Congress must have all of the authority granted to it by its higher charter, and so any attempt to “tie the hands” of a legislative body are inconsistent with its constitutional status and therefore impermissible. Significantly, both sides of the House Rule debate seem to agree

244. See McGinnis and Rappaport I at 500-04 (cited in note 14). See also Skagg, 110 F3d at 844 (Edwards dissenting) (“The Clerk suggests that a legislative supermajority requirement is somehow different from a constitutional super-majority requirement, claiming it is more consistent with majority rule since the majority itself can pass and repeal a legislative supermajority requirement.”).

245. See The Declaration of Independence, para [1] (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness...”) USCA Declaration of Independence.

246. See id (“Governments are instituted among Men, deriving their just powers from the consent of the governed”); Tribe, American Constitutional Law, § 1-2 (“That all lawful power derives from the people and must be held in check to preserve their freedom is the oldest and most central tenet of American constitutionalism.”) (cited in note 153); Akhil Reed Amar, Of Sovereignty and Federalism, 96 Yale L J 1425, 1431-35 (1987) (the United States rejected the English concept of Parliamentary sovereignty; American legislative authority was more closely analogous to corporate charters and was subject to the understanding that government was “bounded by the terms of the delegation” of power derived from the consent of the governed; such consent was provided through “meta-legal” conventions of a unitary national public that reorganized the agencies of government).


248. See Reichelderfer v Quinn, 287 US 315, 318 (1932) (“[T]he will of a particular Congress... does not impose itself upon those to follow in succeeding years.”) (citations omitted); Manigault v Springs, 199 US 473, 487 (1905) (holding that a general state statute duly enacted by a legislature can be repealed or amended by enacting succeeding ordinary legislature); Newton v Commissioners, 100 US 548, 559 (1879) (a “succeeding legislature possesses the same jurisdiction and power with respect to [legislative enactments] as its predecessors”); 1 William Blackstone, Commentaries, at 90 (“Acts of parliament derogatory from the power of subsequent parliaments bind not...Because the legislature, being in truth the sovereign power, is always of different, equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's [sic] ordinances could bind the present parliament.”) (cited in note 224). See also Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality, 6 (Cambridge 1984) (“Nor would they [principles that constrain majority decision making] be seen as binding were it possible to adopt them by simple majority decision. The general problem which haunts constitutionalism - why should any generation be bound by the decisions of its predecessors? - would be exacerbated if 51 percent of one generation could bind the next generation to principles which could be undone only by a two-thirds majority or even by unanimity.”). See generally Thomas M. Cooley, Constitutional Limitations, 125-26 (Little, Brown 1868); Earl T. Crawford, The Construction of Statutes, 171, 193 (1940). This theory is entirely based on English precedent. S. E. Finer, The Five Constitutions and the British Constititional Framework in Five Constitutions, 12, 35 (S. E. Finer, ed) (Harvester 1979) (One Parliament cannot bind another); Geoffery Wilson, Cases and Materials on Constitutional and Administrative Law, 225 (Cambridge 2d ed 1976) (sovereignty of British Parlia-
on this point, a notion that has also been recognized by both the executive branch and the judiciary. However, each side argues that such an acknowledgment of Congress' legislative authority militates for its position on the constitutionality of the House Rule.

McGinnis and Rappaport contend that because the House Rule, like all other internal rules of procedure, can be waived on the vote of a simple majority, a simple majority of the House retains control to enact all legislation and do all other things consistent with its constitutional status, and thus there has been no infringement of legislative authority. For example, if more than 50 percent of the members of the House wanted to enact a tax measure, they could, by majority vote, first waive or repeal the House Rule and then pass the tax bill by a simple majority. Because a majority of the House retains at all times the ability to legislate, the House Rule should more correctly be seen as a procedural mechanism along the lines of the Senate’s filibuster rule. Only if Congress attempted to cross the line and actually restrict the ability of a majority of the House to act would there be a constitutionally impermissible encroachment of legislative authority.

House Rule opponents, however, take issue with the classification of an actual voting rule as a procedural mechanism. They note that while procedural supermajority rules do exist, they are fundamentally different than the final voting rule, which is used when a bill is brought to the floor and the question presented is not merely a point of order or other parliamentary maneuver, but the enactment of the bill itself (that is, a Category I vs. Category II rule distinction). Here, if a majority is not allowed to pass a bill, Congressional authority has been

249. There is disagreement over whether a Congress may bind itself, or whether the restriction only runs to future Congresses. Both this Article and McGinnis and Rappaport adopt the former position. McGinnis and Rappaport I at 505 (cited in note 14).

250. See Constitutionality of Proposed Budget Process Reform Legislation, 11 Op Off Legal Counsel 44, 45 (1987) (opining that "Congress cannot by legislation prevent itself from enacting future legislation pursuant to whatever procedures it chooses to follow at that future time").

251. Hume v Levee Commissioners, 86 US (19 Wall) 655, 660-61 (1873) ("The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or National.").

252. McGinnis and Rappaport I at 500-04 (cited in note 14). The idea that a majority will be the operative number, the one on which decisions are naturally based, seems to rest on both historical grounds and early political theory. See, for example, John Locke, Second Treatise, § 97 at 332 ("And thus every Man, by consenting with others to make one Body Politick under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the majority, and be concluded by it; or else this original Compact, whereby he with others incorporates into one Society, would signify nothing, and be no Compact, if he be left free, and under no other ties, than he was in before in the State of Nature.") (cited in note 224).
impermissibly breached, and the fact that the rule that caused the breach might have been repealed does not alter this fact. Further, House Rule opponents generally note that the need for House Rule supporters such as McGinnis and Rappaport to read into the Constitution an implicit Congressional power to act by majority rule supports their argument that majority rule is the default rule for Congress unless otherwise constitutionally proscribed.253

In assessing the relative merits of each of these positions, an analysis of the assumptions implicitly embedded in them is helpful, and it is here that the McGinnis and Rappaport argument begins to show some weakness. In order for the McGinnis and Rappaport position to be tenable, a number of exceptions must be allowed. First, the ability to waive the House Rule by majority vote must be concurrently accessible to members who are voting on a bill subject to the supermajority requirement.254 To the extent such a waiver required the prior circumlocution of the House Rules Committee or other standing bodies or procedures where it could be blocked, modified or delayed, the argument that the House Rule violated the legislative authority of Congress would be strengthened. Here again, the notion that substance and process in Congress begin to converge as Congressional rules attenuate means that if there is a distinction between substance and process, it must be closely linked to the applicable bill and readily available to the affected members. Second, the McGinnis and Rappaport position on legislative authority not only conflicts with current Senate rules, but it also has a filibuster problem. Senate rules currently require that all changes to the rules be approved by a two-thirds vote; since the ability to change the rules is embedded in the rules themselves, under the McGinnis and Rappaport view, certain standing rules of the Senate are unconstitutional.255 Second, much like the difficulties that House Rule opponents encounter when trying to reconcile the traditions of majority rule with the Senate filibuster, from a legislative authority perspective the filibuster is also problematic.256 To be consistent, the McGinnis and Rappaport argument must proceed on the assumption that the Senate filibuster requirement is waivable or repealable at any time by majority vote, a con-

253. See, for example, Rubenfeld, 46 Duke L.J at 88-89 n43 (cited in note 14).
254. There is considerable debate over the ability of members to waive internal rules. See Open Letter at 1542 (contending in the House such a procedure is unduly difficult) (cited in note 14); Rubenfeld, 46 Duke L.J at 89, n44 (noting the difficulties involved in securing a waiver of the House Rule) (cited in note 14). But see McGinnis and Rappaport I at 502 (arguing repeal of House Rules is accessible to members through majority rule procedures) (cited in note 14).
255. There is, however, some disagreement on this point. McGinnis and Rappaport assert that Senate rules, including the filibuster, can be repealed by a simple majority vote. McGinnis and Rappaport I at 507 (cited in note 14). To the extent they are correct on this point, there would be no inconsistency.
256. Id. At the least, McGinnis and Rappaport would need to assert that an effort to repeal a filibuster is not subject to a filibuster. Since they have not yet asserted that point, it appears that any effort to repeal would require a three-fifths vote on cloture. McGinnis and Rappaport recognize, but summarily dismiss, this issue. McGinnis and Rappaport I at 507 (“It is true that an attempt to change the cloture rule might itself be filibustered, but that is another matter.”) (cited in note 14).
cept that is neither part of the filibuster's history nor probable under current practice.257

Finally, to save the House Rule from Constitutional infirmity, the McGinnis and Rappaport argument must sanction an implicit distinction between actual legislative authority and contingent legislative authority, and must only preference the latter. It is here where the critical theoretical difference comes to play, because House Rule opponents generally preference the former. The difference, while subtle, is therefore critical. McGinnis and Rappaport assert that a House rule that explicitly conditions its repeal or waiver on a supermajority vote of the House would be invalid on the basis of historical principles of legislative authority. Thus, a majority of the House could, at any time, could vote to abolish such a rule by simple majority vote irrespective of a purported requirement that such abolition must be accomplished by a supermajority vote. This is because legislative authority requires that a majority of each House of Congress must, at any time, be able to act unimpeded—other rules to the contrary notwithstanding—and wield the full panoply of its constitutional powers. But the House Rule is constitutional because of the ability of the House to repeal it by majority vote. Thus, under this theory, the legislative authority enjoyed by Congress is that the majority must always have the potential to act, and that being the case, the actual actions of branch taken by majority rule can be defeated because of this preexisting potential. The actual will of a majority at a particular time is not dispositive, only its ability to act during a prior time period.258 To the extent one accepts such a contingent theory of legislative authority, the House Rule would seem acceptable. If one views the concept of legislative authority as absolute, the House Rule would be constitutionally infirm.

At this point, an example might be helpful. Consider the following hypothetical: at time $T_1$ the House enacts two rules, Rule A is the House Rule, and Rule B purports to entrench Rule A and itself by providing that neither Rule A nor Rule B may be repealed unless on the vote of at least two-thirds of the Members voting. The next day, time $T_2$, the house votes by 55 percent yea to 45 percent nay to repeal Rule B. The following day, time $T_3$, the House votes 55 percent yea to 45 percent nay on a tax bill subject to Rule A ("Tax Bill"). What are the results of the votes taken at time $T_2$ and $T_3$?

Most legal theorists seem to agree that Rule B would be repealed notwithstanding the failure of the House to achieve a two-thirds vote in the affirmative, because notions of legislative authority do not allow a Congress at time $T_1$ to bind the hands of Congress at time $T_2$. Therefore, notwithstanding the wording of Rule B to the contrary, the majority of the House at time $T_2$ retained the right to act by simple majority rule, and Rule B is repealed. Thus, at time $T_2$ the actions of a majority of the House trump the text of the rule adopted at time $T_1$.

However, McGinnis and Rappaport would argue that we should consider the Tax Bill defeated, notwithstanding the wishes of a majority of the House at time $T_3$, because in this instance the rule adopted at time $T_1$ binds the House at time

258. Hence the notion of contingency.
T₃ because (and only because) the House could have waived or repealed such rule (but did not) by majority vote at some point prior to time T₃.²⁵⁹ In this instance, the actions of a majority of the House at time T₃ are defeated and the text of the rules should be deemed to control.

Many opponents of the House Rule seem implicitly to reject this distinction. They assert that if notions of legislative authority compel us to acknowledge the supremacy of the majority acts of Congress by recognizing the repeal of Rule B at time T₂, then by that same theory we must recognize the passage of the Tax Bill at time T₃. That is, it is simply inconsistent to assert that a majority trumps the rules at time T₂, but that the rules trump a majority at time T₃.²⁶⁰

After a considerable period of reflection, I do believe that there is a certain logical incoherence to any purely contingent theory of legislative authority because it assumes an uneasy and contradictory fit between potential and actual Congressional actions. By use of the latest example, if one asserts that Tax Bill should be considered passed because Congress retained the ability to repeal Rule A by majority vote prior to its vote at time T₃, then such an assumption would require that Rule B should not be considered repealed because Congress had at all times prior to time T₂ the ability to repeal Rule B. Just like Rule A, the textual provisions of Rule B should control at time T₂. But this would be an impermissible infringement on legislative authority. That is, the problem is not just that a contingent theory requires us to construct some sort of a distinction to justify the fact that a majority trumps the rules at time T₂, but the rules trump a majority at time T₃. Rather, the problem gets worse because, under a theory of contingent legislative authority, Rule B can never be repealed by a simple majority because it can always be repealed by a simple majority. Of course, it is possible to eliminate these abstract inconsistencies at the practical level by adopting certain corollaries to the general rule and recognizing a distinction between action taken and action intended. But such exceptions soon make any theory of legislative authority inelegant at best, and to the extent that such exceptions cannot be derived from purportedly neutral principles, contrived at worst.

If one assumes that notions of Congressional legislative authority mean that a majority of Congress has at all time the full authority to act notwithstanding any non-Constitutional limitations to the contrary, then the theory is that Congressional authority is inalienable except through Constitutional mechanisms.²⁶¹ When a majority of members of the House or Senate assembled vote in favor of a bill, that action must therefore be considered duly taken, otherwise, at some level, the legislative authority of Congress is alienable by prior acts. To say that

²⁵⁹. *McGinnis and Rappaport I* at 491 ("While constitutional supermajority requirements conflict with majority rule, legislative supermajority requirements do not.") (cited in note 14).

²⁶⁰. See, for example, Rubenfeld, 46 Duke L. J at 88 (asserting that the McGinnis and Rappaport theory is vulnerable to charges of self-contradiction).

²⁶¹. There is debate over whether under theories of popular sovereignty the People retain the ultimate right to direct Congress, whether through constitutional or non-constitutional means, or whether such right was conceded upon the ratification of the Constitution. See generally Dow, 76 Iowa L. Rev at 26-29 (cited in note 2) and Amar, 94 Colum L. Rev at 458-94 (discussing notions of popular sovereignty and constitutionalism) (cited in note 2).
such alienability is acceptable because (and only because) Congressional authority is ultimately inalienable seems to assume a theory whose base premise, without more, is incoherent. Thus, the extent to which one is willing to sanction contingency exceptions to any theory of Congressional legislative authority should determine whether or not the House Rule is viewed as constitutionally permissible.

**CONCLUSION**

As the use of supermajority requirements increase in the United States, it is crucial to principles of American democracy that a consensus is achieved regarding when and where departures from majority rule are appropriate. Failing such consensus, the perception of legitimacy surrounding popular sovereignty and democratic constitutionalism will surely begin to erode. To this end, the Supreme Court's decision in *Gordon v Lance* has little to offer efforts at constructing a theory of supermajoritarianism and should probably be more correctly viewed as a statement by the Court that supermajority rules are to be considered non-justiciable political questions. The debate over the House Rule may, however, serve to focus attention on notions of Congressional legislative authority. In this case, supermajority rules may be seen as problematic if a consensus builds around an absolute theory of legislative authority. To the extent a contingent theory is preferred, the implicit exceptions to majority rule embedded in any such theory could serve as an ideological basis for even more supermajority rules at all levels of American government.