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Introduction

Today we encounter supermajority rules in most elements of our social lives. If we choose to purchase a home in a residential community, we are likely to be bound by covenants, rules, and regulations enforced by community associations and secured by strenuous supermajority rules. The school boards that oversee our children's education may be obliged to use a supermajority rule for issues including the discontinuation of a recently adopted textbook, or standardization of equipment or supplies,[1] and our children's athletic clubs may have their bylaws subject to a supermajority amendment clause.[2] University professors encounter supermajority rules at many levels, from the initial hiring of faculty to tenure decisions and other decisions made by the board of trustees. Employees of other corporations, both nonprofit and for-profit, abide by decisions implemented by corporate boards that use supermajority rules for governance.

If these norms are common in our private and associative lives, they are nearly ubiquitous in the political realm. In the United States, on both the state and federal levels, laws are regularly subject to supermajority rules for enactment and abrogation. In sixteen

[1] See, for instance, New York General Municipal Law §103.
[2] See, for instance, the bylaws of the Palm Beach Garden's Youth Athletic Association:http://www.pbgyaa.com/

states, supermajorities are required to raise taxes.[3] In the Senate, the use – or threat – of filibuster, requiring a three-fifths vote for cloture, rose dramatically in recent years. Constitutions around the globe almost inevitably have recourse to supermajority rules for adoption and amendment.

These norms have profound consequences for the justice of the political universe in which we live. Consider three stylized examples:

- It is June 30, 1982, and an advocate for the Equal Rights Amendment (ERA) just learned that her efforts have been in vain. Ten years prior, Congress approved the ERA by an overwhelming margin, considerably more than the two-thirds majority required. The ratification process went smoothly in its early stages: thirty states ratified the proposed amendment by the end of 1973, followed by three more in 1974, and an additional two states in 1975 and 1977. However, even after the time limit was extended from March 22, 1979 to June 30, 1982, the amendment remained three states short of the thirty-eight necessary for approval. In total, merely seven votes stood in the way of the passage of the ERA: three in the Nevada senate, two in the North Carolina senate, and two in the Florida senate (Steiner 1985).[4]
- It is May 17, 2005, and a participant in the British Columbia Citizens' Assembly just learned that the ballot measure he helped craft, failed. The Citizens' Assembly was convened in response to widespread dissatisfaction with the disproportionality of a single-member plurality electoral system. Its members were assigned the responsibility of recommending electoral reforms and of creating a proposal to be subject to

[3] http://www.fiscalaccountability.org/supermajority

[4] For a systematic and rigorous account of the political factors contributing to the defeat of the ERA, see Mansbridge (1986). Whereas the time limit on the ERA led to its formal defeat, because of the absence of a time limit governing the proposal of the Madison Amendment, a.k.a. the Congressional Pay Amendment, 203 years passed before the thirty-eighth state ratified it on May 7, 1992 (Held, Herndon, and Stager 1997).

referendum. The participant, chosen through a process of near-random selection, spent six weekends learning about the electoral system. He attended public hearings and then spent six more weekends from September to November 2004 deliberating with 159 others about the question of electoral reform. On the basis of these hearings and deliberations, the Citizens' Assembly ultimately proposed a single-transferable vote system, and the measure was placed on the ballot during the provincial elections. The government had set a double supermajoritarian threshold: 60 percent of the province-wide vote and a majority in 60 percent of the electoral districts. The measure satisfied the latter criterion (seventy-seven of seventy-nine districts) but received only 57.7 percent of the province-wide vote.

- It is November 4, 2008, and a gay couple in California has just been forced to cancel their wedding, scheduled for Thanksgiving. On May 15, the California Supreme Court had ruled that the state constitution permitted same-sex marriage, striking down a state law restricting marriage to opposite-sex couples. In response, opponents of same-sex marriage launched an expensive campaign to amend the constitution, and Proposition 8 passed by a vote of 52.3 percent. The couple are dismayed by the cancellation, but they are also furious that what the state supreme court had recognized as their constitutional right to wed could be struck down by a mere simple-majority vote.

These examples illustrate modern uses of supermajority rule, with its attendant liabilities and possible benefits. Those who lose under supermajority rule often lament the excessively stringent bias toward the status quo it protects; similarly, those who believe their rights have been violated under majority rule often turn to the promise of supermajority rule as a means of guaranteeing their protection. It might seem, then, that nothing inherent in supermajority rules ought to generate any serious normative concerns: The complaints of the ERA advocate and the member of the Citizens' Assembly, purely contextual, are no

more valid – indeed, perhaps less so – than the frustrations of the same-sex couple. In this work, I hope to demonstrate that in all three cases, the losing parties have a reason to object to the procedures under which their preferred alternatives were defeated.

Legislators, citizens, and political theorists alike identify three core problems generated by majoritarian decision making. The first is institutional instability: A majoritarian system would encourage political actors to revise their laws, including constitutional provisions, each time the composition or preferences of the majority change. This would introduce uncertainty into law and leave the consequences of actions and investments insecure. Second, because a bare majority would be sufficient to enact such changes, the majority would have no incentive to consult with the minority or to take their interests into account; fundamental laws would not necessarily reflect social consensus. Third, because the majority could act without the support of a minority, a simple-majority rule would not protect vulnerable minorities from abuse or neglect.

For at least two centuries, the view that supermajority rules effectively solve these defects of majority rule has proven compelling to legislatures, constitutional framers, and corporate bodies around the world. Even as critics of the filibuster, of the political conditions of the State of California, and of the barriers to amendment under Article V of the U.S. Constitution grew increasingly vocal over the past several years, their objections to supermajority rule in these contexts have not typically been theorized more broadly. The problems of supermajority rule are usually thought to be local rather than general. Objections are raised against excessively partisan politicians who abuse their power to block changes, or the "dead hand of the law" under constitutionalism, not against supermajority rule as such.

In contrast, I argue that supermajority rule has distinctive liabilities of its own that make it incapable of remedying the defects of majority rule. My central aim in this book is to challenge the view that supermajority rules are necessary for normatively

attractive and stable democratic decision making, and to demonstrate the inadequacy of supermajority rule to many of the tasks with which it has been charged in modern history. This deficiency is in part because supermajority rules were originally designed not to remedy the problems of majority rule, but to address the issue of persistent disagreement under unanimous-decision rules. This book is written, in a sense, to try to justify the procedural objections to supermajority rules raised by the ERA advocate and the Citizens' Assembly member, and to caution vulnerable minorities, such as the gay couple in California, against relying on supermajority rules to protect their interests. But to justify these objections I must tell a story about the origins of supermajority rules in the premodern era, and the way in which modern constitutionalism appropriated these rules for different purposes. As I hope to show, this story begins with the origins of the counted vote.

Originally designed to accommodate human error and persistent disagreement under unanimity rules, supermajority rules are a weak solution to the challenges of majoritarian decision making. The deceptive ease of raising a vote threshold have helped supermajority rules become the default response to the problems of instability, partisanship, and vulnerable minorities in contemporary democracies. After all, supermajority rules seem to require no derogation from the normal mechanisms of vote aggregation; a higher threshold appears to be an obvious solution when the number of votes in favor of an outcome is the dispositive factor in resolving disputes. Yet this very simplicity – their crudity, I shall suggest – is their major liability. A blunt instrument, a supermajority threshold cannot ensure that only the right institutions are secured or that only vulnerable minorities are protected. Addressing the problems of majority rule in modern democratic societies requires far finer tools.

Voting and Judgment

In this book, I seek to explain and assess the significance of supermajority rules within the context of democratic decision

making. I argue that the counted vote is aristocratic in origin, restricted initially to an elite possessing special and superior faculties of judgment. The mass did not have judgments worth counting separately, and so it merely acclaimed rather than voted. Only in the context of democratic Athens did the belief emerge that the many made judgments worth counting individually and independently – at least in certain contexts. Even there, in domains where there was a desire to demonstrate communal commitment, the Greeks used acclamatory mechanisms to avoid what I term an enumerated minority.

Supermajority rules, virtually from inception, reflected ambivalence about the use of aggregation instead of acclamatory or consensual mechanisms. Among their earliest uses, supermajority rules constituted an alternative to medieval *unanimitas* ("oneness of spirit"), in which the divine spirit suffused the electors of the pope. Only after losing the hope of transcendent resolution through acclamation were votes counted. Even then, the relative quality of the judgments of the cardinals played an important role in shaping the voting rules that emerged to replace acclamation. Ultimately, supermajority rule emerged as a mechanism designed to reflect the distinctive wisdom of the individual voters while accommodating their fallibility, both moral and epistemic. In turn, through acknowledging the inevitability of human fallibility, supermajority rules reduced the coercive potential of unanimity rules and helped quell discord. As we shall see in the first half of this book, arguments for supermajority rule traveled far from the context of papal elections, playing a pivotal role in the development of modern political thought about the institutional design of assemblies and juries. Even today, supermajority rules (also termed qualified-majority rules) replace unanimity rule to avoid potentially ruinous disagreement, particularly in confederations, transnational bodies, and multinational organizations. In general, however, supermajority rules are no longer regarded primarily as a solution to the problems of unanimity rule, but instead as a remedy for the deficiencies of majority rule – a task to which they are ill-suited.

Majority and Supermajority Rule

Though originally devised as an alternative to the unyielding demands of unanimity rules, supermajority rule has in the past two centuries acquired a different set of justifications. The aim of the modern use of supermajority rules is ostensibly to curb the abuses of unfettered majoritarianism. Yet in the second half of the book, I suggest that to weigh judgments unequally in a given domain, as supermajority rule does, is an affront to the members' dignity; it fails to treat members with equal respect. In a democracy, I shall suggest, citizens' judgments – which include, but are not restricted to, judgments of their interests[5] – should be presumed to be of equal merit.

From antiquity, democrats have been committed to the view that ordinary citizens possess sufficient capacity for judgment for political decision making; this distinguishes them from aristocrats. To presuppose that some citizens possess less valuable judgments – to establish institutions that systematically weigh judgments unequally – is to treat such citizens disrespectfully. If respect for individual and independent judgment are central commitments of democracy, and if equal respect for citizens entails the presumption that citizens' judgments – again, including their judgments of their own interests – are of equal merit, then the default voting rule within democracies should be majority rule. As I shall argue, this does not mean that expertise cannot play a role in political decision making. Representative institutions

[5] Throughout this work, I intentionally elide the common distinction between judgments and preferences; my view is that the arguments on behalf of aggregation in general and majority rule in particular hold regardless of whether voters assess what is in their own interest or that which is in the common good. For my purposes, the relevant issue is whether we take *individual* judgments – of their interests or the common good – as the basic component of democratic politics, or some judgment that seems to emerge from the whole via acclamatory or consensual mechanisms. For discussions of the judgment-versus-preference ideal, see Coleman and Ferejohn (1986), Cohen (1986), and Brennan and Pettit (1990). More recently, see Goodin's (2003) account of a way in which a model of democracy for which the aggregation of preferences is fundamental can nonetheless attend to the construction of these preferences through what Goodin terms "democratic deliberation within."

reflect in part the importance of eliciting expert judgments in certain domains, although respect for representatives' judgments (which include judgments of their constituents' interests) within legislatures also means that they ought to be given equal weight through majority rule. My view also does not entail the claim that fundamental decisions about our lives in common ought to be made by immediate recourse to referendums or by a swift vote of the legislature; constitutionalism is surely beneficial to political communities. But this is because judgments worth counting individually and independently require careful development through deliberation and over time. Counter to conventional wisdom, constitutionalism does not depend on supermajority rule. At the end of this work I sketch and advocate a set of "complex-majoritarian institutions." These could take different forms, but they must help citizens develop the sort of reflective judgments worth counting.

No doubt the defense of majority rule from equal respect for judgment will elicit skeptical responses of the sort that have met Jeremy Waldron's *Law and Disagreement*,[6] an important work offering a similar justification of majority decision making from a different set of vantage points. Two significant objections arise in response to any assertion that majority rule can or should be justified by reference to the equal treatment of citizens. The first is that formal equality in the vote may generate, or fail to remedy, substantive inequalities among citizens. The second, related objection targets more sharply the claim that majority rule is respectful of citizens' judgments. This view holds that the substantive outcomes of majority decision making may disrespect the fundamental interests of minorities; as such, liberal rights, rather than any voting procedure, constitute the proper institutional manifestation of equal respect for citizens.

It is impossible to dispute these objections; majority rule may usher in injustice or exacerbate distributive inequalities. Yet my primary aim here is to suggest scholars and citizens alike have misplaced their faith in supermajority rule as a remedy for

[6] See, for instance, Christiano (2000); Eisgruber (2002).

the deficiencies of majority rule. The minority veto created by supermajority rule increases the capacity of powerful actors to thwart efforts at redistribution, and may as readily hamper the expansion of fundamental rights as prevent their eradication. A case in point is the shameful historical use of the filibuster against civil rights legislation in this country. Supermajority rule introduces a generally unwarranted bias in favor of the judgments (including, again, the judgments of the interests) of some citizens against others, rendering decisions that may generate and secure adverse distributive consequences without providing an effective remedy to the primary liabilities of majority rule. I hope that even if readers reject equal respect for judgment[7] as a justification for majority rule – or even if they reject majority rule on other normative grounds entirely – they may find my critiques of supermajority rule compelling.

The best argument for supermajority rule as an alternative to majority rule is that in some restrictive circumstances, the bias it introduces may in fact have moral or epistemic warrant, as in jury decision making, or as with a restrictive set of civil and political rights designed to protect the capacity for critical engagement judgment. As we shall see, however, in most cases this bias is not merited. Further, supermajority rules are today defended on different grounds. Conventional wisdom assumes that requiring a supermajority (1) helps ensure institutional stability; (2) promotes consensus-building; and (3) grants protection to vulnerable minorities.

First, institutional stability is ostensibly attractive because of the "security of expectations" such conservatism affords. The cost of major policy changes is so high, it is thought, that

[7] The argument from equal respect is, of course, not the only possible justification for majority rule (Risse 2004; Beitz 1989). Among the most famous are claims from utility maximization, the Condorcet Jury Theorem, and May's Theorem (proving that majority rule is the only threshold satisfying the key conditions of anonymity, decisiveness, neutrality, and positive responsiveness). The argument for majority rule I develop here, I shall suggest, is broadly compatible with these justifications in many respects; it does not claim to override or supersede them, although I shall argue that it is both historically significant and has substantial normative appeal.

the supermajority thresholds are necessary to ensure that the investment will not be squandered once a new party takes majority control of the legislature. Further, it is often thought that only if strenuous supermajority rules secure the "rules of the game" (i.e., fundamental legislative and constitutional matters) against easy amendment can constitutionalism enable ordinary politics to occur (Holmes 1995). We can get the hard, messy work of politics done only if we ensure that we are not always tinkering with the rules governing political life. Such arguments support the use of supermajority rules themselves, as well as serving as a basis to defend the ongoing existence of supermajority rules against efforts at change. That is, supporters of Article V of the U.S. Constitution argue that its strenuousness and durability constitute the means by which the constitutional system operates. To alter it would be to risk eviscerating American constitutionalism as a whole, and in any case to harm the clause's intrinsic value as a legacy of the American founding and its constitutional history.

The second purported justification is that critical political changes, such as sweeping health care reform or constitutional amendments, ought to receive widespread and bipartisan support before adoption. When confined – as it is often, if erroneously, thought to have originally been (Binder and Smith 1997) – to fundamental matters of national importance, the filibuster ensures that narrow partisan majorities cannot enact their will at odds with the general interest. More generally, the requirement that more than a narrow majority of voters or representatives support a proposed law ostensibly lends an extra degree of legitimacy to the decision, which may be important if the proposed change is relatively dramatic.

Third, without supermajority rules such as the filibuster, the interests of the minority in particular would be overlooked. Granting the minority the power to veto ensures that the majority takes their concerns into account, and promotes compromise and consensus-building across the aisle. In the constitutional context, a supermajority rule helps ensure that key protections for minorities are not eviscerated by majority decision making.