

## WHY SUPERMAJORITARIANISM DOES NOT ILLUMINATE THE INTERPRETIVE DEBATE BETWEEN ORIGINALISTS AND NON- ORIGINALISTS

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### INTRODUCTION

John McGinnis and Michael Rappaport have done much over the last decade to draw our attention to supermajoritarian rules in our constitutional and political culture and to explain their desirability on a number of registers.<sup>1</sup> The lessons they have taught have broad application to an array of interesting debates in constitutional law and political theory.<sup>2</sup> But they now go too far. In *A Pragmatic Defense of Originalism*, they seek to explain why supermajoritarianism furnishes a new pragmatic defense of originalism.<sup>3</sup> This most recent piece of their project simply does not work: none of their major theses does anything to clarify the ongoing debate about whether the Constitution of the United States should be interpreted primarily in light of its original meaning or whether other modes of interpretation are better suited to the task. In this Essay, I dispute each of their substantive claims.

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<sup>1</sup> See, e.g., John O. McGinnis & Michael B. Rappaport, *Supermajority Rules and the Judicial Confirmation Process*, 26 CARDOZO L. REV. 543 (2005) (link); John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703 (2002) (link) [hereinafter McGinnis & Rappaport, *Our Supermajoritarian Constitution*]; John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365 (1999); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995).

<sup>2</sup> Indeed, in a recent article, I draw inspiration from their work and apply many of their insights to argue for supermajoritarian decision rules in the context of criminal jury convictions, an under-explored application of their enthusiasm for supermajoritarian rules in democratic decision-making. See generally Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141 (2006) (link) (arguing that McGinnis and Rappaport's attention to the supermajoritarian nature of our polity helps recommend supermajoritarian decision rules for conviction by the criminal jury).

<sup>3</sup> See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. (forthcoming April 2007), 101 NW. U. L. REV. COLLOQUY 68 (2007), <http://www.law.northwestern.edu/lawreview/colloquy/2007/1/> (citations *infra* refer to the COLLOQUY) (link).

First, I argue that there is nothing newly pragmatic about their defense. Although they claim to want to make originalists and pragmatists friends,<sup>4</sup> nothing about their project is likely to accomplish this matchmaking. Second, I argue that there is no reason to believe that constitutional entrenchments produced under supermajoritarian decision rules are any more desirable as a general matter than rules produced under other, more relaxed, decision rules. At the core of their argument is the claim that the procedures of supermajoritarian entrenchment will achieve desirable constitutional provisions and results; I contest this proposition. Finally, I argue that nothing about provisions subject to supermajoritarian agreement justifies, without more substantial argument, an originalist interpretative regime. In the final analysis, supermajoritarianism notwithstanding, we are left to debate the merits of originalism on the same terms as before McGinnis and Rappaport's current intervention.

It may very well be that our Constitution is a great and desirable document,<sup>5</sup> but nothing about its supermajoritarian genesis necessarily makes it so or requires us to follow only its original meaning.

#### I. WHY THERE IS NOTHING NEWLY PRAGMATIC ABOUT MCGINNIS AND RAPPAPORT'S ORIGINALISM

McGinnis and Rappaport begin their discussion by aiming to show how pragmatists can embrace originalism because, under their rationale for originalism, it is likely to produce good consequences overall.<sup>6</sup> This argument is not a new gambit for originalists—and it goes nowhere, in any case.

As McGinnis and Rappaport readily concede, there have always been originalists who have offered accounts of their interpretive methodology that emphasize the good systemic consequences originalism may produce.<sup>7</sup> Indeed, their Essay spells out a few of these well-known efforts: different originalists have proffered the benefits of the rule of law, more legitimate democracy, more stability, less judicial discretion, and less partisan interpretation as good results that may accrue from embracing originalism.<sup>8</sup>

Although McGinnis and Rappaport quickly and efficiently dismiss each of these attempts to align originalism with good results,<sup>9</sup> they fail to understand, more fundamentally, why some pragmatists have always refused to be moved by these originalist prognostications. It isn't simply that

<sup>4</sup> *Id.*

<sup>5</sup> *But see generally* SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) (providing a trenchant criticism of the entire document and many of its institutional choices); ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (2002) (same).

<sup>6</sup> McGinnis & Rappaport, *supra* note 3, at 68.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 69.

pragmatists just need a more convincing set of good results likely to follow from originalism to stimulate their conversion. Rather, there are more central reasons they can't join the originalist fray, ones McGinnis and Rappaport anticipate but fail to develop.

In short, there is a difference between what one might call "rule-pragmatism" and what McGinnis and Rappaport call in a footnote "case-by-case pragmatism."<sup>10</sup> Rule-pragmatists are looking for interpretive rules that, over an entire legal system, will produce the best results and generate the best systemic consequences. Rule-pragmatism takes a global view and doesn't muddy itself in the micro-level decisions that emanate from the application of the rule to particular cases. Case-by-case pragmatists, by contrast, have already settled on an interpretive rule: judges must "focus on the practical consequences of their decisions"<sup>11</sup> in the "*here and now*."<sup>12</sup> This latter form of pragmatism is simply not amenable to the formalism that originalism requires<sup>13</sup>—and it is only the latter case-by-case pragmatists that seem to be the central targets of McGinnis and Rappaport's argument.

As McGinnis and Rappaport acknowledge, there are many originalists who embrace originalism from the perspective of rule-pragmatism.<sup>14</sup> Originalism is routinely defended because of the systemic benefits it might afford to the rule of law, democracy, and predictability—and the way in which it constrains judicial discretion. But case-by-case legal pragmatists are "forward-looking" and reject originalism at its core; they simply cannot be convinced to embrace originalism because they do not think the past can be given power over the present and because they are deeply skeptical "about the methods by which lawyers build bridges from the past to the present."<sup>15</sup> No talk of abstract consequences can lure them to originalism because case-by-case pragmatists deny that good consequences in the "here and now" can follow from giving the past so much authority. Ultimately, case-by-case pragmatists think that originalism can never be determinate and, in any case, is "inadequate to resolve genuinely novel legal issues."<sup>16</sup> If that's right, nothing McGinnis and Rappaport have to say could win over case-by-case pragmatists as friends. To make the marriage work, McGinnis and Rappaport's originalism would need to be far more determinate and would need to make a much more substantial effort to show how today's problems can be solved with solutions from two hundred years ago.

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<sup>10</sup> *Id.* at 76 n.37.

<sup>11</sup> Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 90 (2005) (link).

<sup>12</sup> RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 71 (2003) (emphasis added).

<sup>13</sup> *See id.* at 59 ("Only in exceptional circumstances . . . will the pragmatic judge give controlling weight to systematic consequences, as legal formalism does; that is, only rarely will legal formalism be a pragmatic strategy. And sometimes case-specific circumstances will completely dominate the decisional process.").

<sup>14</sup> McGinnis & Rappaport, *supra* note 3, at 69.

<sup>15</sup> POSNER, *supra* note 12, at 71.

<sup>16</sup> *Id.* at 72; *see generally id.* at 71–73.

Thus, by running together two types of pragmatism, McGinnis and Rappaport fail to see that adding some further reasons for rule-pragmatists to embrace originalism gains them no real advantage against the type of pragmatists—case-by-case pragmatists like Richard Posner—whom they are self-consciously seeking to convince.<sup>17</sup>

## II. WHY SUPERMAJORITARIAN DECISION-MAKING CANNOT BE THE SOURCE OF THE DESIRABILITY OF THE CONSTITUTION

Even if McGinnis and Rappaport are right that their argument helpfully addresses the interpretive concerns of pragmatists, their major premise that supermajoritarian decision rules are the source of the “beneficence of the Constitution”<sup>18</sup> is not persuasive. There are two central problems with McGinnis and Rappaport’s attempt to show that supermajorities produce good results and that supermajoritarianism is what confers especial legitimacy on the Constitution. First, there is no general theory of decision rules that could confirm that the consequences that would flow from following norms entrenched by supermajority rule in 1787 would be any better than the consequences that would flow from following norms entrenched by looser majoritarian rules in 2007. Context is everything. Second, and relatedly, there is substantial reason to doubt that the Constitution enjoys any privileged status on account of its supermajoritarian genesis; many other forms of lawmaking in our polity are supermajoritarian, and McGinnis and Rappaport do not explain why laws enacted using those supermajoritarian processes cannot displace the earlier supermajoritarian achievements of the Constitution’s enactment. In any case, those achievements are themselves more complicated supermajoritarian moments than McGinnis and Rappaport seem ready to admit.

### A. *Context is Everything*

The practical consequences of a decision rule cannot be assessed without attention to the context in which that decision rule operates. For example, suppose we ask which decision rule—supermajoritarianism in 1787 or majoritarianism in 2007—would achieve the best results in achieving rules to entrench the practice of research in medical science for the future. Almost no sane person would choose the former. Suppose, instead, we ask which decision rule should be used to settle debates about race by entrenching norms for the foreseeable future. Again, it is hard to see the consequen-

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<sup>17</sup> Of course, not all rule-pragmatists are originalists, and McGinnis and Rappaport might convince a few such rule-pragmatists to join them. But I would imagine that the rule-pragmatists would want to hear a lot more about exactly which sorts of good consequences originalism can achieve. In any case, as I think even McGinnis and Rappaport would agree, rule-pragmatists have not, as a group, been opposed to originalism in the way case-by-case pragmatists have. Accordingly, the need for matchmaking between originalists and rule-pragmatists hardly seems like a pressing academic concern.

<sup>18</sup> McGinnis & Rappaport, *supra* note 3, at 74-75.

tialist benefit of choosing supermajoritarianism in 1787, even if we are prepared to agree that supermajoritarianism in 2007 could produce better results than mere majoritarianism in 2007.<sup>19</sup> The choice of decision rule is very context-sensitive, where context is understood temporally.

But context is important even if we ignore temporal specificity in how we frame the question, because the subject matter to which a decision rule will apply has a significant effect on the optimality of the chosen decision rule as well. Adrian Vermeule, for example, highlights that *submajority* rules—or superminoritarian decision rules—are especially useful for agenda-setting (like the famous “Rule of Four” allowing four of nine Supreme Court justices to grant a writ of certiorari or the rules of direct democracy that allow a small minority of citizens to get a ballot initiative considered by the whole electorate) and as an accountability-forcing mechanism (like the so-called “Journal Clause,”<sup>20</sup> which allows a small set

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<sup>19</sup> McGinnis and Rappaport’s justifications for binding blacks and women to the Constitution—despite their exclusion from the supermajoritarian rules that purportedly legitimized the Constitution itself—are extremely weak. See *id.* at 79-81.

It suffices to say that given McGinnis and Rappaport’s focus on constitutional *enactment* as the primary justificatory moment, it is a bit of a cheat to smuggle in a justification for the document that arises only because later provisions somehow purify the original enactment of its defects. More ironic is that the full purification happens neither according to the very Article VII supermajority requirements that they think give the Constitution its supermajoritarian credibility, see *id.* at 73, nor according to Article V’s supermajority requirements for constitutional amendment. Indeed, McGinnis and Rappaport find it relevant for the Constitution’s legitimacy, for example, that blacks are now equal thanks to the Voting Rights Act of 1965 and that women are now equal thanks to the Supreme Court’s construction of the Fourteenth Amendment. See *id.* at 80-81. It turns out that plain-old legislation and “judicial activism”—processes that are rather different from the supermajoritarian processes that rest at the center of the Constitution’s legitimacy for McGinnis and Rappaport—legitimize the Constitution itself! Just how these post-enactment moments work to cleanse the original sin of exclusion retroactively is not well specified in their paper.

Moreover, their suggestion that we ought to worry about the exclusion of women from the founding supermajoritarian big bang of beneficence less than the exclusion of blacks therefrom is unsupported by authority and borders on the offensive: they claim that “women were virtually represented at the time by their male relatives” and that “many women apparently believed that they should not have the right to participate.” *Id.* at 80 (citing no authority).

Finally, in their discussion of exclusions, McGinnis and Rappaport evade one of the most interesting interventions in the voting rule literature, one that presents yet another challenge to their project. See Adrian Vermeule, *Absolute Voting Rules* (University of Chicago, Public Law Working Paper No. 103, 2005), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=791724](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=791724) (link). Vermeule argues, “[t]o say that the voting rule should be ‘a majority’ or ‘a supermajority’ is an underspecified statement, like saying ‘X is more than’ or ‘three multiplied by.’ If a voting rule is to be coherently stated, one must ask ‘a majority (or supermajority) of what?’” *Id.* at 3. In particular, Vermeule demands that those favoring “supermajoritarian” rules specify their preferred “multiplicand,” which is usually either a supermajority of “(1) those present and voting or (2) the whole membership of the institution . . .” *Id.* at 4. As Vermeule’s paper makes clear, the choice can be quite consequential—and McGinnis and Rappaport simply don’t engage the question of the appropriate multiplicand, which is central to their claim that supermajoritarianism itself confers legitimacy despite great exclusions from the moment of enactment. Thanks to Seth Barrett Tillman for discussion on this last point.

<sup>20</sup> U.S. CONST. art. I, § 5, cl. 3 (link).

of legislators to demand a roll-call vote in the House or Senate, or House Rule XI, which allows a small group of committee members to call witnesses at hearings).<sup>21</sup> Thus, depending on the type of decision at issue, a decision rule that requires only a *superminority* of the population to agree may be sufficient for “good” results. It all depends on what one is trying to accomplish—and nothing guarantees that supermajority rules will produce the right results in all contexts.<sup>22</sup>

Thus, McGinnis and Rappaport have the burden to show that *constitutional* provisions in particular will be better when they are subject to supermajoritarian decision rules. Yet even for this potentially plausible claim, there are several basic counterarguments (beyond the temporal difficulty) that they barely confront. There are a series of criticisms of supermajority rules that apply with substantial force, even in the very context in which McGinnis and Rappaport apply them.<sup>23</sup> These difficulties with supermajoritarianism at least suggest that we cannot be guaranteed good results simply by embracing a supermajoritarian decision rule. Let me elaborate upon two specific criticisms of supermajoritarian decision rules and how they undermine McGinnis and Rappaport’s argument.

First, supermajoritarian rules are widely criticized as potentially tending to privilege the status quo.<sup>24</sup> Assuming that we want to live in a democratic society where self-governance is a paramount political end, decision rules that privilege the status quo should be counter-indicated. One could, to be sure, avoid this critique if the status quo were always acceptable and if

<sup>21</sup> See Adrian Vermeule, *Submajority Rules: Forcing Accountability upon Majorities*, 13 J. POL. PHIL. 74 (2005) (link).

<sup>22</sup> Of course, McGinnis and Rappaport already know all this. In their earlier articles on supermajoritarianism, they develop a much more nuanced approach to supermajoritarianism—one that acknowledges that supermajoritarian benefits accrue only in particular contexts. See, e.g., McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 1, at 728.

<sup>23</sup> Elsewhere, I’ve catalogued critiques routinely offered against supermajority rule, ones that find no rebuttal in McGinnis and Rappaport’s Essay, despite their potential application to the particular context of Constitution-making. Supermajoritarian decision rules for constitutional choices can:

- result[] in compromises no one really wants because ideas and policies get thinned out to garner substantial agreement
- privilege[] the status quo . . .
- [fail to] result in higher likelihood of “correct” answers because just as the probability of correct decision[s] increases with move toward unanimity [away from simple majority rule], so does the probability that the minority is wrong increase; accordingly, providing the minority veto power may be unwise
- [lead to] coalition-building [that] reifies groups and can be balkanizing
- [be] no better than simple majority at avoiding Condorcet losers (i.e., choices that might win in a ranking system but that would fail in pair-wise competition with other choices).

Leib, *supra* note 2, at 153–54.

<sup>24</sup> See ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 140–41 (1989); Amy Gutmann, *Deliberative Democracy and Majority Rule: Reply to Waldron*, in *DELIBERATIVE DEMOCRACY & HUMAN RIGHTS* 227, 230 (Harold Hongju Koh & Ronald C. Slye eds., 1999) (“To give a minority veto power is morally more dangerous in the legislative arena than it is in criminal trials . . .”).

“attractive baselines” were the background from which supermajoritarian rules constrain change.<sup>25</sup> This is, after all, the gambit of constitutional democracy.

However, it is not clear if such a defense can be mounted of the supermajoritarian process that produced the Constitution itself—the very focus of McGinnis and Rappaport’s argument about its beneficence. Failure to achieve agreement on the Constitution would probably have left the states stuck with the Articles of Confederation—or (worse?) no Union at all. Given McGinnis and Rappaport’s encomium to the goodness of the Constitution, they would not likely consider the failure to agree on its provisions an attractive baseline. Given that the status quo at the time of ratification wasn’t very good, supermajoritarian rules were potentially suboptimal in the very moment of regime formation that is so central to McGinnis and Rappaport’s argument.

Second, supermajoritarian rules can be problematic when the members of the supermajority differ from the superminority or from those to be governed in important respects. Again, here, more context would be helpful in ascertaining the appropriate decision rule: if a supermajority of constitutional enactors or ratifiers were, say, white property owners with a soft spot for god, perhaps many of the purported benefits of deliberation and coalition-building that supermajoritarian rules are supposed to provide would fail to work their magic on constitutional questions related to race, property, and god. Thus, we must know more about who, specifically, is making a given decision and what, specifically, they are making that decision about to be able to assess whether the virtues of a particular decision rule accrue to a decisional context.<sup>26</sup> These details remain underdeveloped by McGinnis and Rappaport.

*B. Privileging Supermajoritarian Decision Rules Does Not Necessarily Give the Constitution Any Special Status in Our Constellation of Legal Authority*

There are a series of difficulties associated with McGinnis and Rappaport’s effort to confer upon the Constitution especial legitimacy owing to its supermajoritarian genesis. In short, the Constitution’s enactment procedures may not be as supermajoritarian as they assume—and they may not

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<sup>25</sup> The “attractive baselines” argument is developed in McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 1, at 742.

<sup>26</sup> See Gutmann, *supra* note 24, at 230 (“The likelihood of achieving justifiable agreement [with supermajority rules] differs depending on what the issue is and who the deliberators are.”). In my recent article that aims to apply McGinnis and Rappaport’s insights to jury decision rules, context-sensitivity led me to embrace supermajoritarian rules for conviction by the criminal jury but to reject them for acquittal. The same considerations do not apply to the decision to acquit, so I don’t think it is appropriate to require jurors to reach consensus on acquittal beyond simple majority agreement. See Leib, *supra* note 2, at 187–88.

be particularly distinctive, as compared with other supermajoritarian forms of lawmaking in our polity.

Granted, the original Constitution could be enacted only through Article VII, which required that ratification be effected in nine states. From one perspective, one cannot deny that this is a supermajoritarian hurdle.<sup>27</sup> Yet by focusing upon a different aspect of enactment, one can see how unstable this evidence of supermajoritarianism is: instead, we might reasonably focus upon the decision rule that controlled the ratification process in the nine states. It turns out that the decision rule operating in that part of the enactment process is not really supermajoritarian. Consider Akhil Amar's analysis of Article VII:

[T]he key voting rule in Article VII is simple majority rule, and not supermajority rule, as might be inferred from a too casual glance at its seeming 9/13 voting rule. The focus on 9/13 is misleading. To begin with, this is not a true voting rule at all, since the four dissenting states would not be bound by the nine affirmative states. The true voting rule occurs within each state, where a simple majority did bind dissenters. Given that each state was sovereign prior to ratifying the Constitution, the place to look for the key voting rule is within each state, where a simple majority of the sovereign people did alter or abolish their pre-existing constitution. The 9/13 provision is thus best understood as a substantive condition subsequent, modifying what, precisely, the people of each state were voting for: a new constitution if and only if eight other states agreed, so that the new scheme could achieve a workable critical mass.<sup>28</sup>

When looked at through this lens, it is hard to put so much weight on supermajoritarian decision rules at the time of enactment—for they are not consistently applied to the procedures of enactment.

A similar problem surfaces in the amendment provisions in Article V. Although ratification of amendments requires consent of three-fourths of the states (whether through state conventions or state legislatures), the federal Constitution itself does not require any supermajoritarian constraint within the statewide decision-making process.<sup>29</sup> In sum, it can't be supermajoritarianism itself that confers legitimacy—and McGinnis and Rappaport seem to care about only one aspect of the enactment and amendment processes.<sup>30</sup>

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<sup>27</sup> Indeed, McGinnis and Rappaport want us to believe that this was a *double* supermajoritarian hurdle because "a supermajority of states also had to support the Constitutional Convention in the first place." McGinnis & Rappaport, *supra* note 3, at 73.

<sup>28</sup> Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 487 n.112 (1994) (emphasis omitted).

<sup>29</sup> See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 774 (1994) ("Most remarkable is what was *not* said in antebellum debates. Almost no one denied that . . . the proper voting rule for popular sovereignty in making or changing constitutions is simple majority rule. *Almost no one, for example, argued that conventions or popular ratification must be supermajoritarian.*")

<sup>30</sup> They might reply that national supermajorities would likely still be necessary to achieve the Arti-

Yet suppose supermajority rule did, in fact, confer some special democratic legitimacy on rules that pass through such a difficult hurdle. If that were the case, why shouldn't all laws that command widespread agreement be entitled to the same kind of deference constitutional provisions get under McGinnis and Rappaport's theory? Indeed, all laws partake of the form of norm entrenchment—and many of our most important laws enjoyed some kind of supermajoritarian agreement. For example, the Civil Rights Act of 1964<sup>31</sup> passed the House by a vote of 289 to 126 (a near 70% supermajority) and the Senate by a vote of 73 to 27 (a 73% supermajority).<sup>32</sup> The norms the Act embodies have achieved widespread consensus and entrench antidiscrimination norms throughout our polity. Is there any reason that such a law should receive any less deference or respect than constitutional provisions from the perspective of supermajoritarianism? Indeed, if two supermajoritarian enactments conflict, why shouldn't the last in time control? As I show below, it is not enough to say that statutes, unlike constitutional provisions, are effectively capable of repeal by mere majorities; in any case, if supermajoritarian *genesis* is the linchpin, as it often seems to be for McGinnis and Rappaport, nothing about the possibility of repeal can undermine the extra legitimacy supermajoritarian consensus should be able to afford.

There are bigger headaches for McGinnis and Rappaport to confront even if we grant them that supermajoritarianism confers especial legitimacy. As they themselves emphasize in their 2002 article, what we think of as our standard “majoritarian” legislative process in the United States is actually supermajoritarian in a meaningful sense: Bicameralism and presentment are themselves forms of supermajoritarianism that depart from pure majoritarianism.<sup>33</sup> Thus, even the attempt to distinguish constitutional provisions from “mere” statutes based on the deeper entrenchment and difficulty of repeal associated with constitutional provisions is suspect: both types of laws are entrenched and cannot be repealed without commanding a supermajority. It is not enough to say that one is *more* supermajoritarian

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cle VII and Article V thresholds. Perhaps—but perhaps not. Nothing in the enactment and amendment rules requires it, and the differences between small population states and large population states is not merely a modern anomaly.

<sup>31</sup> Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 1981–2000h (2000)) (link).

<sup>32</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 22–23 (3d ed. 2001).

<sup>33</sup> See, e.g., McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 1, at 712–16 (citing JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 233–48 (1962)); DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 193–95 (1996); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 956; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 74–75 (2001); see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1557 (1990) (“Bicameralism forces majorities to seek broader coalitions. It imposes something like a supermajoritarian voting rule.”).

than another, for it needn't always be true. A statute passed unanimously is still only a statute. In any event, McGinnis and Rappaport do not furnish us with any sliding scale that would enable us to rank how much respect to afford a legal enactment based on the degree of consensus it commands.

What this means for McGinnis and Rappaport's thesis is that they need a more careful definition of the kind of supermajority rules that give enactments their special character.<sup>34</sup> If all legislation is supermajoritarian, why should the mere ability to convince nine states (using internally majoritarian processes and allowing the ultimate exclusion of those states who failed to ratify) in 1787 command any special deference or legitimacy?<sup>35</sup> If the procedure of supermajoritarianism is what ensures good results, it is far from clear why we should limit our vigorous and strict enforcement of supermajoritarian norms to the Constitution itself.

### III. WHY SUPERMAJORITARIANISM DOES NOT REQUIRE AN ORIGINALIST INTERPRETIVE METHODOLOGY

The final piece of McGinnis and Rappaport's argument is similarly unavailing. The core of this part of their argument is that since agreement upon the original meaning of the text was ostensibly necessary to pass through the supermajoritarian threshold for enactment, future interpreters must limit themselves to that meaning to pay respect to the very source of the Constitution's beneficence.<sup>36</sup> This argument does not succeed for a number of reasons.

In the first place, McGinnis and Rappaport claim that all interpretation of the Constitution's provisions (ambiguous and otherwise) must be guided by "interpretative rules with which [the drafters and ratifiers] were familiar."<sup>37</sup> This argument is predicated on McGinnis and Rappaport's belief that the drafters' and ratifiers' interpretive conventions are binding and conform to original meaning originalism. Yet it is not at all clear why the founding generation's interpretive conventions are necessarily binding or that they were originalist in the style of original meaning originalism.

McGinnis and Rappaport's claim relies on controversial assumptions

<sup>34</sup> This is similar to the challenge supermajoritarians often hear: "Any theory that might justify the use of a three-fifths (60%) or two-thirds (66.6%) decision rule should be equally effective at justifying a nine-tenths (90%) decision rule, or even the rule of a single person (99.9999%)." Brett W. King, *Wild Political Dreaming: Historical Context, Popular Sovereignty, and Supermajority Rules*, 2 U. PA. J. CONST. L. 609, 611 (2000).

<sup>35</sup> Arguably, the procedures of standard legislation might often be more supermajoritarian than constitutional provisions because bills may be subject to Senate Rule V, requiring unanimous consent of all Senators to achieve consideration on the floor of the Senate chamber. See ESKRIDGE ET AL., *supra* note 32, at 32 (explaining how Senate Rule V operates as a supermajoritarian vetogate).

<sup>36</sup> See McGinnis & Rappaport, *supra* note 3, at 74-76.

<sup>37</sup> *Id.* at 74.

about what “the drafters and ratifiers” believed—and it seems to be their burden to show us just what interpretive conventions the framers shared. They do not meet their burden, leaving us wondering whether those players, by contrast, might have understood that the enterprise of drafting a Constitution to endure for the ages could very well lead to open-textured or ambiguous provisions being subjected to interpretive conventions they could not yet anticipate. Since it was a Constitution they were establishing, they might have understood that a prolix code would have been inappropriate and that it would be for future generations to expound upon the very vague and general aspirations announced in the document.<sup>38</sup>

Or, perhaps the drafters and ratifiers chose ambiguous terms in various places as a form of delegation to future generations.<sup>39</sup> Legislators routinely fail to agree on the definition of a core term in a statute, leaving substantial holes in their enactments;<sup>40</sup> sometimes they can be, or must be, presumed to delegate the interpretation of such ambiguities to agencies and courts.<sup>41</sup> In

<sup>38</sup> See *McCulloch v. Maryland*, 17 U.S. (Wheat.) 316, 407 (1819) (link) (“A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American constitution, is not only to be inferred from the nature of the instrument, but from the language.”).

<sup>39</sup> Certainly, some ratifiers were all too aware that deep ambiguities in the document seemed to give free rein to future federal authorities to do whatever they wanted. Despite this awareness, they voted to ratify. See H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 912 n.143 (1985) (explaining the views of Edmund Randolph, a delegate in Philadelphia, who ultimately played an important role in getting Virginia to ratify the document despite his misgivings about serious vagueness and ambiguity injurious to the states). This evidence suggests that some drafters and ratifiers might have recognized that the Constitution would not be fully interpreted in light of contemporaneous interpretive conventions. And there is much more evidence in Powell’s article that tends to show that many Anti-Federalists were deeply concerned about the radical interpretive freedom the Constitution gave to future Congresses and members of the federal judiciary. The views of these important members of the founding generation are surely relevant in ascertaining the interpretive conventions prevalent at the time of enactment and how they were expected to be applied to the Constitution’s open-textured and ambiguous provisions.

<sup>40</sup> Consider, for example, Congress’s “failure” to define the term “discrimination” in the antidiscrimination provisions of the Civil Rights Act of 1964. See *United Steelworkers of America v. Weber*, 443 U.S. 193, 239–43 (1979) (Rehnquist, J., dissenting) (link) (noting Congress’s failure to define the word “discriminate” in the Civil Rights Act of 1964 and trying to derive its meaning not from the statute directly but from legislative history). Gaps in legal text virtually guarantee that the judicial function and judicial power will require more than simple law-application. See, e.g., *Rex v. Liggetts-Findley Drug-Stores Ltd.*, [1919] 3 W.W.R. 1025 (rejecting an argument that because a statute required drug shops to close by 10 P.M., but did not specify that they must remain closed for any period of time, the statute thus left open the possibility that the shop owner could reopen at 10:10 P.M.); see also *ESKRIDGE ET AL.*, *supra* note 32, at 100 (“Can we expect Congress, drafting statutory language in an environment of imperfect information and substantial time pressure, to anticipate specific questions that will arise under the law, or is it more realistic to expect general statements of policy that will require agencies and courts to use discretion in executing and interpreting law?”).

<sup>41</sup> See, e.g., *ESKRIDGE ET AL.*, *supra* note 32, at 572 (citing HENRY HART, JR. & ALBERT SACKS,

any case, it continues to remain unclear how supermajoritarianism, in particular, illuminates this age-old debate between originalists and non-originalists.

Indeed, in a more recent work, McGinnis and Rappaport openly acknowledge that their account of original interpretive conventions has not been “fully developed.”<sup>42</sup> In fact, they offer virtually no authority for, or systematic investigation into, how we might come to know the content of the framers’ and ratifiers’ interpretive conventions.<sup>43</sup> Given this underdevelopment, it is most difficult to embrace their claims about all the good consequences that will flow from their originalist methodology when they can’t even give us a most basic sense of the actual results their technique would produce.

Of course, it is perfectly plausible, in theory, to imagine that we might someday be able to divine an exhaustive list of the drafters’ and ratifiers’ interpretive conventions. Still, in practice, there is reason to be skeptical about the prospect because we are bound to run into aggregation problems. Supposing that the founding generation did not unanimously share interpretive conventions,<sup>44</sup> which rules help us decide among divergent ones? If Framer A is an original meaning textualist, Ratifier B is a purposivist that thinks all ambiguities should be resolved with recourse to the most general principles in the Preamble, and Drafter C likes a form of dynamic interpretation, how do we aggregate these interpretive preferences into a coherent set of “originalist” interpretive principles? Must an interpretive convention command a supermajority? To the extent that we have evidence of the founding generation’s interpretive conventions, we have some evidence of an original public meaning approach to interpretation<sup>45</sup> and a more eclectic

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THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 147, 362–403, 545–70 (William Eskridge, Jr. & Philip Frickey eds. 1994) for the proposition that legislatures sometimes need to enact very broadly worded standards rather than specific rules, and that enacting ambiguous or vague provisions “essentially delegat[es] rulemaking responsibilities to courts [and] agencies”).

<sup>42</sup> John O. McGinnis & Michael B. Rappaport, *Original Interpretive Principles as the Core of Originalism* 9 (San Diego Legal Studies Paper No. 07-82, 2007), available at <http://ssrn.com/abstract=962142> (link).

<sup>43</sup> In this more recent work, McGinnis and Rappaport cite Powell to instruct us on the interpretive conventions of the founding generation. *Id.* at 8 (citing Powell, *supra* note 39). And Powell at least provides McGinnis and Rappaport some useful support when he announces: “Although the Philadelphia framers did not discuss in detail how they intended their end product to be interpreted, they clearly assumed that future interpreters would adhere to then-prevalent methods of statutory construction.” Powell, *supra* note 39, at 904. Moreover, there is much material in Powell that dovetails neatly with McGinnis and Rappaport’s sympathy for original meaning originalism (though the evidence is far from univocal on the question). However, even if these excavations are historically accurate, McGinnis and Rappaport still need an argument for why any of this history should matter. And supermajoritarianism cannot fill that gap.

<sup>44</sup> As Powell argues, at the time of the enactment of the Constitution, “there were sharp disagreements over which interpretive approach was acceptable.” Powell, *supra* note 39, at 912.

<sup>45</sup> *Id.*

approach to reading legal texts.<sup>46</sup> The business of synthesizing all this evidence into a neat package of originalist interpretive conventions remains undone.

Indeed, even if we had clear and univocal authority on the framers' and ratifiers' interpretive conventions, it remains true that nothing about supermajoritarianism requires us to respect them. On the contrary, there is an equally plausible argument that supermajoritarian agreement should lead to *dynamic* rather than originalist interpretation. This is, perhaps, one lesson of William Eskridge and John Ferejohn's provocative essay on "super-statutes"—statutes that command widespread acceptance over time and become part of our fundamental law as quasi-constitutional norms.<sup>47</sup> "Super-statutes" need not achieve formal Article V supermajoritarian agreement, of course, but are similarly legitimated based upon the deliberation-enhancing qualities of broad agreement over time.<sup>48</sup>

And what do Eskridge and Ferejohn have to say about the sorts of interpretive methods that are appropriate for such "supermajoritarian" forms of lawmaking? In the first instance, they clearly show that, as a descriptive matter, courts tend not to approach such legal imperatives in an originalist fashion.<sup>49</sup> This indicates, perhaps, that we have a well-entrenched practice of treating high-consensus laws as particularly apt for dynamic interpretation: "[A] super-statute will generally be applied in a purposive rather than simple text-bounded or originalist way. It will generate a dynamic common law implementing its great principle and adapting the statute to meet the challenges posed to that principle by a complex society."<sup>50</sup>

But there is also a normative dimension to the practice of treating supermajoritarian laws with non-originalist tools. The "supermajoritarian" genesis of these laws that achieve widespread acceptance is part of the very reason they command dynamic and non-originalist interpretation in the courts. That is, precisely because agreement about such basic entrenchments is meant to endure for the ages and adapt to new circumstances, originalism is inappropriate. To be sure, widespread agreement is often only possible at such high levels of generality, and that helps explain why those agreeing to highly abstract principles would themselves embrace dy-

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<sup>46</sup> See ESKRIDGE ET AL., *supra* note 32, at 671–73 (summarizing the founding generation's eclectic approach to statutory interpretation, which included considerations of "equity"); see also Powell, *supra* note 39, at 887 (suggesting that the interpretive conventions of some of the drafters and ratifiers of the Constitution evidenced a "willingness to interpret the constitutional text in accordance with the common law principles that had been used to construe statutes").

<sup>47</sup> See generally William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001) (link) (developing the idea of a super-statute that wins broad consensus and commands dynamic, rather than originalist, interpretation in the courts).

<sup>48</sup> *Id.* at 1271 (arguing that the entrenched norms of super-statutes "form under conditions of consensus" and require "a continuing process of deliberation" and "consensus-building").

<sup>49</sup> *Id.* at 1234.

<sup>50</sup> *Id.*

namic interpretation; originalism's formalism would betray the broad norms that are supposed to be applied in the future to novel legal problems.<sup>51</sup> Eskridge and Ferejohn enable us to see that supermajoritarianism can be used to defend non-originalist modes of interpretation as well.

Of course, McGinnis and Rappaport can disagree and continue to insist that all supermajoritarian lawmaking should be susceptible only to originalist interpretation. I have offered no especially good reason to prefer Eskridge and Ferejohn to McGinnis and Rappaport. But neither McGinnis and Rappaport's reliance on original expectations about interpretative conventions nor their reliance solely on supermajoritarianism itself neatly produces their conclusions. They still have to engage in the same debates constitutional theorists have been having for ages about originalism and non-originalism.

### CONCLUSION

McGinnis and Rappaport have made multiple contributions to many important legal and political debates with their careful attention to the design and desirability of supermajoritarian rules in our practices of self-government. There is no doubt that they will continue to illuminate many questions of institutional design in our polity with their ongoing and sustained attention to the most fundamental issue of the choice of appropriate decision rules in democratic decision-making. But their most recent effort is unpersuasive. They have not really shown how supermajoritarianism helps illuminate the interpretive debate between originalists and non-originalists; why it will make originalists and pragmatists friends; or what about it, standing alone, gives us any special insight into the desirability and legitimacy of the Constitution.

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<sup>51</sup> Another interesting aspect of Eskridge and Ferejohn's essay is their claim that super-statutes will have a "gravitational pull on constitutional law itself." *Id.* at 1232, 1236. This highlights the challenge I offered earlier in this Essay: supermajoritarianism's legitimating force (if indeed it does do something to confer legitimacy) cannot be isolated to constitutional enactment and Article V amendment. Rather, our society will come to agreement and deliberative consensus on new principles that themselves will have special legitimacy. And these new equilibria should have and do have effects on the interpretation of the Constitution itself. *Id.* at 1267-76. This tends to show that a thoroughgoing commitment to supermajoritarianism does not rest well with originalism. If McGinnis and Rappaport want us to be originalists, supermajoritarianism surely doesn't get us there directly.