

## Essay

# THE RIGHTS OF LEGISLATORS AND THE WRONGS OF INTERPRETATION: A FURTHER DEFENSE OF THE CONSTITUTIONALITY OF LEGISLATIVE SUPERMAJORITY RULES

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In 1995, the House of Representatives adopted a rule that requires a three-fifths majority of those voting to pass an increase in income tax rates.<sup>1</sup> More than two years later, debate continues over a rule whose constitutionality has been controverted in Congress, in the courts, and in academia. Although a majority of the House passed the three-fifths rule again in 1997,<sup>2</sup> several Representatives challenged its constitutionality in court.<sup>3</sup> In the academic debate, the latest entry is *Rights of Passage: Majority Rule in Congress* by Jed Rubenfeld.<sup>4</sup> Professor Rubenfeld claims that the three-fifths rule

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1. See H.R. Res. 6, 104th Cong. §106(a) (1995), reprinted in CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. No. 103-342, at 658 (1995) (Rule XXI(5)(c)).

2. See H.R. Res. 5, 105th Cong. §106(a) (1997) (re-adopting Rule XXI(5)(c) with minor modifications, but not changing the three-fifths requirement); RULES OF THE HOUSE OF REPRESENTATIVES, 105th Cong., Rule XXI(5)(c) (1997), available at <<http://lcweb.loc.gov/global/legislative/hrules/hrulestoc.html>>.

3. See *Skaggs v. Carle*, 110 F.3d 831, 832-33 (D.C. Cir. 1997). This litigation has been ongoing since 1995. See *Skaggs v. Carle*, 898 F. Supp. 1, 2 (D.D.C. 1995). In the latest round, the United States Court of Appeals for the District of Columbia Circuit declined to entertain the claim of unconstitutionality on the merits, holding that the members of Congress who had brought the suit were unable to demonstrate that they had standing to sue. See *Skaggs*, 110 F.3d at 836.

4. Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73 (1996). Professor Rubenfeld's essay has already attained a practical significance vouchsafed to few academic efforts. The one judge who reached the merits in *Skaggs v. Carle* relied in large

violates the Presentment Clause of the Constitution,<sup>5</sup> arguing that when the Clause refers to legislation that Congress has passed, the word "passed" means "passed by majority vote."<sup>6</sup>

The academic debate began when seventeen law professors, including Professor Rubinfeld, published *An Open Letter to Congressman Gingrich*.<sup>7</sup> Like Professor Rubinfeld's essay, the Open Letter also maintained that the three-fifths rule was unconstitutional, but it relied on different arguments than does Professor Rubinfeld.<sup>8</sup> We then rebutted the Open Letter in *The Constitutionality of Supermajority Rules: A Defense*.<sup>9</sup> In his essay, Professor Rubinfeld does not defend the Open Letter,<sup>10</sup> and even acknowledges that some of

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measure on Professor Rubinfeld's arguments to find the three-fifths rule unconstitutional. *See Skaggs*, 110 F.3d at 846 (Edwards, J., dissenting).

5. The relevant section of the Presentment Clause states: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States . . ." U.S. CONST. art. I, § 7, cl. 2.

6. *See* Rubinfeld, *supra* note 4, at 77-85.

7. Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L.J. 1539 (1994).

8. The Open Letter argued that the Constitution's specific supermajority requirements indicated that simple majority voting is required for the passage of ordinary legislation. *See id.* at 1541. The Open Letter also contended that a legislative supermajority rule conflicted with the intent of the Framers. *See id.* at 1540.

9. John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Supermajority Rules: A Defense*, 105 YALE L.J. 483 (1995). We argued that the Rules of Proceedings Clause, U.S. CONST. art. I, § 5, cl. 2, gives each house of Congress the authority to pass any rules that relate to its internal operations unless those rules violate some language or principle in the Constitution, and that the Open Letter had failed to provide any such language or principle. *See id.* at 485-86. 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. *See id.* at 488. Similarly, the Framers' discussions of supermajorities merely demonstrate that they did not wish to constitutionally require that bills pass with a supermajority. *See id.* at 490.

We also demonstrated that the Open Letter mistakenly claimed that a two-thirds majority was necessary to repeal the supermajority rule. *See id.* at 500-07. In actuality, House rules permitted a simple majority to waive or repeal any rule. *See id.* at 500-03. We also argued that, in any event, the Constitution requires that a majority of a house has the authority to repeal a rule. *See id.* at 503-07.

10. Professor Rubinfeld acknowledges that the principal structural and historical arguments employed by the Open Letter are not sufficient to establish its conclusions. *See* Rubinfeld, *supra* note 4, at 76-77. Indeed, Professor Rubinfeld attempts to distance himself from the Open Letter by stating that he was a "signatory" but not an "author" of the letter. *See id.* at 73. It was not obvious to us that a signatory of an essay is less committed to its reasoning than its author. If someone intends to be a "signatory" of an essay, we believe that he ought to make his status explicit and explain how it differs from authorship.

Another professor who signed the Open Letter, but now argues that the three-fifths rule is unconstitutional on different grounds, is Susan Low Bloch. *See* Susan Low Bloch, *Congressional Self-Discipline: The Constitutionality of Supermajority Rules*, 14 CONST. COMMENTARY 1, 1-5 (1997) (paper given at Tenth Annual Lawyers Convention of the Federalist

our criticisms were well taken.<sup>11</sup> Instead, he now asserts that the word “passed” in the Presentment Clause means “passed by a majority.” To support this claim, Professor Rubinfeld offers a variety of hypotheticals intended to show that a majority requirement must be read into the Clause in order to avoid absurd consequences.<sup>12</sup> For instance, he argues that our reading of the Clause would allow the House to preclude Members from voting while permitting non-members to vote.<sup>13</sup> Professor Rubinfeld also contends that we are guilty of gross inconsistency in asserting that a house can require a supermajority to pass legislation but may not insulate legislative rules from repeal by a majority.<sup>14</sup>

We write to rebut this new attack on the constitutionality of the three-fifths rule. We show that Professor Rubinfeld’s parade of horrible hypotheticals is precluded by other constitutional clauses. Most significantly, we argue that the House Composition Clause<sup>15</sup> requires that Members of the House be given the right to vote and precludes non-members from voting on the passage of legislation. We also show that our interpretation of the House Composition Clause would prevent another series of horrible hypotheticals depriving Members of their rights as legislators, whereas Professor Rubinfeld’s interpretation of the Presentment Clause would not. Further, we contend that there are strong reasons to conclude that the Framers did not use the term “passed” to mean “passed by majority vote.”

Second, we argue that there is no inconsistency in an interpretation of the Constitution that would permit Congress to pass supermajority rules but which would require those rules to be subject to repeal by a simple majority. Historical and structural principles require a majority of the legislature to have the power to repeal rules, but no such principles preclude a rule that requires supermajority

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Society) (arguing that the three-fifths rule unduly enhances the power of the House of Representatives); *Tenth Annual Lawyers Convention of the Federalist Society* (C-SPAN television broadcast, Nov. 15, 1996) (explicitly stating that she does not rely on the argument that the three-fifths rule is unconstitutional because it is anti-democratic). For our debate with Professor Bloch, see John O. McGinnis & Michael Rappaport, *House Rules: Is a Supermajority Requirement for Tax Hikes Constitutional?*, A.B.A. J., Mar. 1997, at 78.

11. See Rubinfeld, *supra* note 4, at 73-74.

12. See *id.* at 78-85.

13. See *id.* at 80-84.

14. See *id.* at 88-89.

15. The House Composition Clause provides: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.” U.S. CONST. art. I, § 2, cl. 1.

support for passage of legislation.

We conclude with a discussion of methodological principles. While Professor Rubenfeld interprets the Constitution through a series of hypotheticals and appears to eschew inferences from history, structure, and purpose, we argue that these traditional interpretive canons are the only legitimate means to interpret the Constitution. Indeed, these canons are so deeply rooted that Professor Rubenfeld is forced to rely on them, even though he does so implicitly and selectively.

### I. THE PASSAGE OF BILLS

Professor Rubenfeld argues that the term “passed” in the Presentment Clause<sup>16</sup> means “passed by majority vote” and therefore the Constitution prohibits the House from adopting a different voting rule.<sup>17</sup> He acknowledges that “passed” might also be interpreted to mean “passed under the rules governing the house.”<sup>18</sup> Under that interpretation, the three-fifths rule would be constitutional, because the Constitution gives each house the power to set its own procedural rules.<sup>19</sup> Professor Rubenfeld argues, however, that if “passed” had this latter meaning, the House of Representatives could then enact certain types of legislative rules that clearly should be unconstitutional, but would not be prohibited by either the Presentment Clause or any other constitutional provision.<sup>20</sup>

Professor Rubenfeld places three types of legislative rules in this category. First, the House of Representatives could enact rules that would deprive certain Members of the right to vote on whether a bill should pass.<sup>21</sup> Second, the House could enact rules that would grant the right to vote to persons who are not Members of the House.<sup>22</sup> Fi-

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16. See U.S. CONST. art. I, § 7, cl. 2.

17. See Rubenfeld, *supra* note 4, at 76-85.

18. See *id.* at 74.

19. See U.S. CONST. art. I, § 5, cl. 2.

20. See Rubenfeld, *supra* note 4, at 79-85.

21. Professor Rubenfeld discusses two hypothetical rules that would deprive Members of their right to vote on whether a bill should pass. The “Big-Three Rule” would deprive Representatives of California, New York, and Texas from voting on the passage of bills. The “Big-Ten Rule” would limit voting on the passage of bills to Representatives from the ten largest states. See *id.* at 79-80.

22. As an example of this type of rule, Professor Rubenfeld discusses the “D.C. Rule,” which would require bills that affect the District of Columbia to secure the approval of its Mayor in order to pass the House. See *id.* at 82-83.

nally, the House could pass rules that would condition passage of a bill in the House on actions taken by the Senate.<sup>23</sup>

According to Professor Rubinfeld, if the Presentment Clause is interpreted to require majority voting, then each of these types of rules is unconstitutional. A majority voting rule permits the passage of a bill only if it is supported by a majority of the Members of each house that are present. Therefore, no Member who is present may be deprived of his vote and only Members may vote. By contrast, if the Presentment Clause permits the House to choose any voting rule, then Professor Rubinfeld argues that one must either find these rules to be constitutional or invent a prohibition, deriving it “from the penumbras and emanations of other provisions.”<sup>24</sup>

In this section, we argue that Professor Rubinfeld is mistaken. First, we demonstrate that Professor Rubinfeld has not supplied any reason to interpret the Presentment Clause to mandate majority rule, because each of the three types of rules violates other constitutional provisions. We also show that the constitutional provisions on which we rely would bar other equally problematic rules that his interpretation of the Presentment Clause is powerless to preclude. Finally, we argue that it is unlikely that the Framers would have used the term “passed” to mean “passed by majority vote.” In the legal and linguistic context of the framing, the preferred meaning of the term “passed” did not imply passage by a majority.

#### A. *The Right to Vote*

Although Professor Rubinfeld argues that it is the Presentment Clause which prohibits the House from either depriving Members of their right to vote on whether a bill should pass or providing non-members with this right, these prohibitions are actually imposed by the House Composition Clause. The House Composition Clause provides that the “House of Representatives shall be composed of Members chosen every second Year by the People of the several states.”<sup>25</sup> The Clause establishes two fundamental principles about the House: the House is *composed of* Representatives and these Representatives are deemed to be *Members* of the House.

The language in the House Composition Clause describing Rep-

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23. The conditional rule discussed by Professor Rubinfeld is the “two-thirds-two-thirds” rule, which we address below. See *infra* Part I.C.

24. Rubinfeld, *supra* note 4, at 82.

25. U.S. CONST. art. I, § 2, cl. 1.

representatives as Members of the House does not merely indicate that Representatives are part of the House. Rather, the use of the traditional term "Member" suggests that the Framers were conferring on Representatives the historic rights of members of a legislative assembly. The most important of these rights is the exclusive right of members to vote on whether a bill should pass. Historically, members of Anglo-American legislatures have had this right and non-members have not.<sup>26</sup> When the Framers made Representatives Members of the House, they were assuming that Representatives would have the exclusive right to vote on bills.<sup>27</sup> This conclusion is reinforced by the language of the Clause, which states that the "House of Representatives shall be composed of Members." If the House consists solely of Members, then only Members may vote on decisions such as whether to pass a bill.<sup>28</sup>

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26. The exclusive right of members to vote on the passage of bills was recognized in Parliament during the 18th century and in the first Congress. The traditional rule in the House of Commons was that members had both the right and the duty to vote. See THOMAS JEFFERSON, A MANUAL OF PARLIAMENTARY PRACTICE (2d ed. 1812) [hereinafter JEFFERSON, PARLIAMENTARY PRACTICE], reprinted in JEFFERSON'S PARLIAMENTARY WRITINGS 353, 407 (Wilbur Samuel Howell ed., 1988); THOMAS JEFFERSON, PARLIAMENTARY POCKET-BOOK, [hereinafter JEFFERSON, PARLIAMENTARY POCKET-BOOK] reprinted in JEFFERSON'S PARLIAMENTARY WRITINGS, *supra*, at 47, 90-91; LUTHER STEARNS CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA 156-59, 692-93, 696-99, 717 (Boston: Little, Brown & Co. 2d ed. 1856); see also 2 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 140 (1786) (noting that when a division is to be had, "all Members who were in the House, must be told [to vote] on one side or the other, and cannot be suffered to Withdraw"). The House of Commons also restricted the right to vote on bills to members. See CUSHING, *supra*, at 156, 698-99; see also HATSELL, *supra*, at 140 (noting that all strangers had to be removed before the House proceeded to a division).

The duty of Members to vote was also recognized by the rules adopted by the House of Representatives in the First Congress. See, e.g., 1 ANNALS OF CONG. 99 (Joseph Gales ed., Gales & Seaton 1834) (stating that every Member in the House is obligated to vote when a question is put); H.R. DOC. NO. 103-324, at 14 (1994) (same). These rules also indirectly indicated that only Members may vote. See, e.g., 1 ANNALS OF CONG., *supra*, at 98-102 (referring several times to the duty of Members to vote, and making no mention of votes by other persons). The exclusive right of Members to vote on the passage of bills remains the rule today. See RULES OF THE HOUSE OF REPRESENTATIVES, *supra* note 2, Rule VIII(3).

27. Traditional legislative rules did prohibit a member from voting on any question "of which he is immediately and particularly interested." 1 ANNALS OF CONG., *supra* note 26, at 99; CUSHING, *supra* note 26, at 692; HATSELL, *supra* note 26, at 119-22. This limitation reflects the ancient principle that no man may be a judge in his own case. See THE FEDERALIST NO. 10, at 58 (James Madison) (Henry B. Dawson ed., 1891). It continues to be part of the House Rules. See RULES OF THE HOUSE OF REPRESENTATIVES, *supra* note 2, Rule VIII(1).

28. We also believe that the Constitution forbids the House from conferring one vote on some Members while providing more than one vote to other Members. First, traditionally each member of the legislature had an *equal* number of votes—one. See CUSHING, *supra* note 26, at

This interpretation of the House Composition Clause derives support not only from text and history, but also from purpose and structure. The Framers would certainly have intended that Members of the House have the exclusive right to vote on bills. If the House could deprive Representatives from certain states of the right to vote on bills or could assign that right to non-members of its choosing, a majority of the House could circumvent the carefully crafted structure established by the Framers to govern national legislation. This structure maintained important compromises that were essential to the Constitution's creation, such as the equilibrium between large and small states. The structure also protected minorities by making it more difficult for unjust legislation to pass.<sup>29</sup> It is inconceivable that the Framers would have permitted a majority of the House to subvert this arrangement.<sup>30</sup>

The structure of the Constitution also supports this interpretation. First, constitutional clauses that regulate Members of Congress confirm that only Members have the right to vote on bills. Article I, Section 5 of the Constitution states that "the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal" of the house.<sup>31</sup> This clause suggests that only Members may vote, because it requires that only the votes of Members be recorded. If the Framers believed that non-members could vote, they no doubt would have required that the "Yeas and Nays of all persons voting" be recorded.

The Incompatibility Clause, which provides that "no Person holding any Office under the United States shall be a Member of either House during his Continuance in Office," also suggests that non-

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696-99; JEFFERSON, PARLIAMENTARY PRACTICE, *reprinted in* JEFFERSON'S PARLIAMENTARY WRITINGS, *supra* note 26, at 407; JEFFERSON, PARLIAMENTARY POCKET-BOOK, *reprinted in* JEFFERSON'S PARLIAMENTARY WRITINGS, *supra* note 26, at 90-91. Second, equal voting rights accords with the traditional legislative principle of "the perfect equality of all members of the House." 1 JOSEPH REDLICH, THE PROCEDURE OF THE HOUSE OF COMMONS 49 (1907); *see id.* at xxxi. Finally, it would be absurd for the Constitution to protect the equality of Members by prohibiting the House from depriving a Member of his right to vote, but allowing the House to circumvent this restriction by conferring more than one vote on other Members.

29. *See* THE FEDERALIST NO. 10, *supra* note 27, at 62-64.

30. In contrast, the three-fifths rule cannot fundamentally disturb these compromises because, under that rule, all Members, and only Members, retain the basic right to vote. While the rule may advantage some states on particular issues, the potential for some advantage is created by all rules. For instance, providing substantial power to committee chairmen may give greater leverage to those states with greater average longevity of service among their representatives.

31. U.S. CONST. art. I, § 5, cl. 3.

members may not vote.<sup>32</sup> The purpose of the Incompatibility Clause is to prohibit individuals who are serving in Congress from also holding executive or judicial offices.<sup>33</sup> If the Framers believed that non-members could be given the right to vote, it is very unlikely that they would have applied the restrictions in the Clause simply to Members of Congress. There is little reason to prohibit Members of Congress from holding executive or judicial offices, while simultaneously allowing non-members who vote to hold those offices.

Second, the principles governing other constitutional offices also suggest that Members of Congress enjoy the traditional powers possessed by members of legislatures. When the Constitution establishes a traditional office, we often infer that it confers some of the traditional powers of that office. For example, the Constitution provides federal judges with the immunity from damage actions for wrongful decisions that judges traditionally enjoyed at common law.<sup>34</sup> Thus, if Congress passed a law that sought to eliminate this traditional immunity, it would no doubt be unconstitutional, even though no constitutional provision expressly confers the immunity. The immunity is simply one of the attributes of being a judge.

Conversely, when the Constitution establishes an office, we also often make the inference that no other person may exercise the powers of that office. Suppose that Congress passed a law that gave the Governor of North Carolina the right to vote on the resolution of Supreme Court cases, but expressly stated that he would be neither a Justice nor a member of the Court. Clearly, that law would be unconstitutional, because it would purport to confer the power of a Supreme Court Justice on a person who had not been properly appointed to the office.<sup>35</sup>

Curiously, Professor Rubinfeld appears to take the opposite position in his discussion of the hypothetical rule that would give the Mayor of the District of Columbia the right to disapprove House bills affecting the District. Professor Rubinfeld suggests that the rule

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32. U.S. CONST. art. I, § 6, cl. 2.

33. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047 (1994).

34. See *Butz v. Economou*, 438 U.S. 478, 508-09 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872).

35. Cf. *Buckley v. Valeo*, 424 U.S. 1, 124-26 (1976) (per curiam) (noting that the determination of whether a person is an "Officer of the United States" within the meaning of the Appointments Clause turns on the authority the person exercises, not on the name given to his position).

would not violate the House Composition Clause because “[t]he House would not be saying that the Mayor of the District was a ‘Member’ of the House, merely that his approval of legislation was necessary” to pass a bill.<sup>36</sup> Under this logic, the Governor of North Carolina could vote on Supreme Court cases, because Congress would not be saying the Governor was a Justice, merely that he may vote on cases.

Professor Rubinfeld makes two principal arguments against our interpretation of the House Composition Clause, but neither is persuasive. First, he argues that the “obvious purpose” of the Clause is to specify that Representatives have two-year terms and are to be popularly elected.<sup>37</sup> Apparently, Professor Rubinfeld reads the Clause as if it stated “Representatives shall be chosen every second year by the people of the several states.” This interpretation ignores the first part of the Clause which states that the “House of Representatives shall be composed of Members.” There is no warrant to ignore a part of the Clause that stands grammatically and logically on its own.

Professor Rubinfeld also claims that the language of the Senate Composition Clause argues against our interpretation of the House Composition Clause.<sup>38</sup> Because the Constitution expressly states that each Senator has one vote, but not that each Representative has one vote, Professor Rubinfeld argues that we are committed to the view that the Constitution does not confer the right to vote on each Representative.<sup>39</sup> But this argument is flawed, because there were other compelling reasons for the Framers to have expressly spelled out that each Senator received only one vote. The Senate is the branch of the legislature that represents the states. Each state has equal representation in the Senate and Senators were originally chosen by the state legislatures.<sup>40</sup> Indeed, under the Articles of Confederation, which governed the nation before the Constitution was ratified, each state had only a single vote, even though the state might have had numerous representatives.<sup>41</sup> If the Constitution had not expressly indicated

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36. Rubinfeld, *supra* note 4, at 82 n.33.

37. *Id.*

38. The Senate Composition Clause provides that the “Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.” U.S. CONST. art. I, § 3, cl. 1.

39. See Rubinfeld, *supra* note 4, at 82.

40. See U.S. CONST. art. I, § 3, cl. 1.

41. See ARTICLES OF CONFEDERATION art. V (U.S. 1777) (providing each state with one

that each Senator had one vote, it might plausibly have been concluded that each state would have a single vote in the Senate to be exercised jointly by its Senators.<sup>42</sup> By contrast, representation in the House of Representatives was based on population, so there was no need for the Framers to expressly provide that each Member of the House would have a single vote.

We conclude that the House Composition Clause guarantees to each Representative the exclusive right to vote on whether a bill should pass. Thus, Professor Rubenfeld's attempt to argue that we are committed to interpreting the Presentment Clause to require majority voting fails. As we now show, it is Professor Rubenfeld who is committed to our interpretation of the House Composition Clause.

### B. Other Rights of Members

Professor Rubenfeld's main argument relies on the premise that the Framers would not have permitted the House to pass rules that either deny Representatives the right to vote on bills or confer that right on persons other than Representatives.<sup>43</sup> What Professor Rubenfeld does not recognize is that his interpretation of the Presentment Clause would permit equally troubling rules that our interpretation of the House Composition Clause would prohibit.

Consider a variant of the "Big-Three Rule" that Professor Rubenfeld discusses.<sup>44</sup> Under this variation, which we will call the Procedural Big-Three Rule, no Member of the House from California, New York, or Texas may vote on whether to pass any rule of proceeding of the House. This rule would be devastating to Members from these three states, because House rules govern a wide range of House proceedings, including which bills will actually be voted on by the House, and the power of committees.<sup>45</sup> One who believes that the Big-Three Rule is unconstitutional should also believe the Procedural Big-Three Rule is unconstitutional.

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vote in Congress, but requiring that each state be represented by at least two, and no more than seven, delegates).

42. Although the Senate Composition Clause does not say so expressly, other constitutional clauses clearly indicate that Senators are Members of the Senate. See, e.g., U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members . . ."); *id.* art. I, § 5, cl. 2 ("Each House may . . . punish its Members . . .").

43. See Rubenfeld, *supra* note 4, at 81-83.

44. As described above, the Big-Three Rule would prevent Representatives from California, New York, and Texas from voting on the passage of bills. See *supra* note 21.

45. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 252 (1989).

Professor Rubenfeld, however, has no way to find this rule unconstitutional, because it would not violate his interpretation of the Presentment Clause. Under his view, the Presentment Clause merely requires that each house use a simple majority voting rule to determine whether a bill passes.<sup>46</sup> It does not apply to votes on whether to pass rules. These decisions are governed by the Rules of Proceedings Clause, which does not use the term “pass.”<sup>47</sup>

The Procedural Big-Three Rule, however, is easily found unconstitutional under our interpretation of the House Composition Clause. In making Representatives Members of the House, the Framers provided them with the fundamental rights traditionally enjoyed by members of legislative assemblies. While one of these rights is the exclusive right to vote on the passage of bills, another is the exclusive right to vote on rules of proceedings.<sup>48</sup> As with the right to vote on bills, the Framers certainly would have intended that Members have the exclusive right to vote on rules of proceedings to protect the structure that the Framers designed to govern legislation.

In addition to the rights to vote on bills and rules of proceedings, we also believe that Representatives possess various other rights that members of legislatures have traditionally enjoyed, including the exclusive rights to make motions, to introduce bills, and to object to violations of the rules.<sup>49</sup> We doubt that Professor Rubenfeld would

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46. See Rubenfeld, *supra* note 4, at 78.

47. See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the Rules of its Proceedings . . .”).

48. The traditional right of Members to vote was not limited to voting on the passage of bills. Rather, that right extended to all votes in the full House, including votes on rules of proceedings. See, e.g., 1 ANNALS OF CONG., *supra* note 26, at 99-100 (establishing rules for voting on “any question,” and requiring every member present in the House to vote when “a question” is put); CUSHING, *supra* note 26, at 693 (discussing the “duty of the members of our legislative assemblies to vote in all questions that may arise therein . . .”); JEFFERSON, PARLIAMENTARY PRACTICE, *supra* note 26, reprinted in JEFFERSON’S PARLIAMENTARY WRITINGS, *supra* note 26, at 404-07 (indicating the wide variety of matters on which the votes of members of the House of Commons were taken).

49. See CUSHING, *supra* note 26, at 312-13, 802-04; 1 HATSELL, *supra* note 26, at 87. The traditional rights of members to make motions and to introduce bills were not unlimited; these rights were subject to limitations designed to further the orderly conduct of legislative business. See, e.g., CUSHING, *supra* note 26, at 803 (noting that the introduction of bills in House of Commons requires leave of the House). Indeed, there is a strong argument for interpreting these rights as mainly prohibiting a house from discriminating against certain Members. This interpretation would allow the houses wide discretion to establish rules while preserving the core of the legislative structure established by the Framers. The interpretation also derives support from the traditional legislative principles of protecting the minority and “the perfect equality of all members.” REDLICH, *supra* note 28, at 49.

deny that a rule attempting to deprive a Representative of one these rights would be unconstitutional. Yet, none of these rights can be derived from the Presentment Clause. They flow naturally, however, from the House Composition Clause.<sup>50</sup>

C. *The Two-Thirds-Two-Thirds Rule*

Professor Rubinfeld also argues that our interpretation of the Presentment Clause would allow the House to pass a rule that he calls the “two-thirds-two-thirds” rule.<sup>51</sup> Under this rule, a bill is deemed to pass the House if it secures a two-thirds vote of the House, provided that it also secures a two-thirds vote of the Senate.<sup>52</sup> If the bill does not receive a two-thirds vote in the Senate, it is deemed not to have passed the House, even though it may have actually received a two-thirds vote in the House. Once again, Professor Rubinfeld argues that this rule is unconstitutional and that the only legitimate way to reach this conclusion is to interpret the Presentment Clause to mandate majority voting.<sup>53</sup> In his view, the Clause requires “every bill which shall have passed the House and Senate by majority vote” to be presented to the President.

We also believe that the two-thirds-two thirds rule is unconstitutional, but conclude that its infirmity lies elsewhere. The rule is un-

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50. The rights of territorial delegates appear to constitute an exception to the exclusive right of Members to exercise various powers. Historically, delegates from United States territories have exercised several powers of Members. These powers have included, at different times, the right to engage in debate, to serve on committees, and to vote on committees, but never to vote in the full house. See *Michel v. Anderson*, 14 F.3d 623, 629 (D.C. Cir. 1994); 2 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES* 861-68 (1907).

The House's refusal to provide voting rights to territorial delegates in the full House provides additional support for our conclusion that such voting rights are restricted to Members, but the conferral of other rights on these delegates does suggest an exception to the principle that Members have exclusive rights. Nonetheless, this exception is a limited one and does not unravel our interpretation of the House Composition Clause. The practice of limiting the rights of delegates has a long history, dating from early Congresses. See *Michel*, 14 F.3d at 630-32; HINDS, *supra*, at 861-68. There is also a long history of exceptions to the application of separation of powers principles to the territories. See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (holding that territorial courts are not subject to the requirements of Article III); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 877-907 (1990) (discussing inconsistencies between territorial structures and constitutional mandates). Thus, the historical and structural arguments that support limited rights for territorial delegates suggest that even these rights may not be exercised by any other person. See *Michel*, 14 F.3d at 630.

51. See Rubinfeld, *supra* note 4, at 84.

52. See *id.*

53. See *id.* at 85.

constitutional because it permits the House to effectively impose a two-thirds supermajority rule on the Senate, despite the fact that the Constitution allows the Senate to establish its own rules.<sup>54</sup> The root of the rule's unconstitutionality can be exposed by reviewing other rules that one house may use to burden the operations of another. Consider rules under which the House of Representatives refuses to bring to the floor bills passed by the Senate unless the Senate abolishes all its standing committees or moves its meetings out of the Capitol. These rules would not violate the Presentment Clause or any other express constitutional provision, so Professor Rubenfeld would seem obliged to find them constitutional. They are problematic, however, because the House is exercising its authority under the Rules of Proceedings Clause to burden the Senate's authority to make its own rules.

The well-established jurisprudence of unconstitutional conditions places limits on the government's power to provide benefits only on the condition that an individual relinquish his constitutional rights. This jurisprudence has been extended to limit the power of one part of government to provide benefits to another part only on the condition that the latter forego exercising its constitutional powers.<sup>55</sup> The doctrine can therefore be applied to the relationship between the two legislative houses. Because the Constitution does not require the House to pass or even to consider bills that are passed by the Senate, the House provides a benefit to the Senate when it agrees to consider such bills. Under the two-thirds-two-thirds rule, the House provides this benefit to the Senate only on the condition that the Senate does not exercise its constitutional right to pass bills by a mere majority vote.

Professor Rubenfeld argues that the conditional character of the two-thirds-two-thirds rule is not the source of the constitutional problem. He correctly observes that each house often adopts joint rules that are conditioned on its counterpart adopting the same rule.<sup>56</sup>

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54. See U.S. CONST. art. I, § 5, cl. 2 (providing that "[e]ach House may determine the Rules of its Proceedings" (emphasis added)).

55. See 13 Op. Off. Legal Counsel 258, 261-63 (1989) (concluding that proposed legislation contained an unconstitutional condition that abridged the President's constitutional power to conduct covert actions). One of us has recently discussed the application of the doctrine of unconstitutional conditions to government entities and argued that the Line Item Veto Act places an unconstitutional condition on the President's power to veto bills. See Michael B. Rappaport, *Veto Burdens and the Line Item Veto Act*, 91 NW. U. L. REV. 771, 778-90 (1997).

56. See Rubenfeld, *supra* note 4, at 84.

His argument mistakenly assumes, however, that conditions are either all constitutional or all unconstitutional. It is generally recognized that some conditions are unconstitutionally burdensome while others are not.<sup>57</sup>

Distinguishing between constitutional and unconstitutional conditions has often proved to be an extremely difficult task, but in this case the distinction seems plain enough. Joint rules are adopted in an effort to coordinate action between the houses. Each house agrees to depart from the rule it would otherwise adopt to reach a set of rules acceptable to both houses. While joint rules involve a mutually acceptable arrangement to promote common purposes, the two-thirds-two-thirds rule is an attempt by the House to determine the voting rule of the Senate.<sup>58</sup> Thus, the joint rules traditionally passed by the houses are constitutional; the two-thirds-two-thirds rule is not.<sup>59</sup>

#### D. *The Meaning of "Passed"*

Professor Rubinfeld's argument proceeds in two steps. First, he asserts that the text does not provide any reason to doubt that "passed" in the Presentment Clause could as easily mean "passed by majority vote" as "passed under the rules governing the House."<sup>60</sup> Then he argues that structure and purpose support the former meaning.<sup>61</sup> While we have refuted the second step of his argument,

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57. See RICHARD EPSTEIN, *BARGAINING WITH THE STATE* 5 (1993); Seth Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1297-98 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

58. Once one recognizes that the two-thirds-two-thirds rule places an unconstitutional condition on the Senate's powers, it is possible to imagine various rules that would raise similar concerns, but would not be addressed by the Presentment Clause. For example, imagine a House rule that prevented the House from voting on certain types of bills unless the Senate confirmed a particular nominee to the Supreme Court, or a Senate rule that required the Senate to refuse to confirm all nominees unless the House impeached a certain executive officer, or a Senate rule that required the Senate to refuse to advise on and consent to treaties unless the House conducted a particular legislative investigation.

59. Although we do not explore the issue, the two-thirds-two-thirds rule may also be unconstitutional for the same reason that the D.C. Rule is unconstitutional—because it deprives Members of the House of their *exclusive* right to vote on bills in the House. See *supra* notes 25-36 and accompanying text. The two-thirds-two-thirds rule appears to allow Senators to determine whether a bill passes the House, but Senators are no more Members of the House than is the Mayor of the District of Columbia.

60. See Rubinfeld, *supra* note 4, at 74-78.

61. See *id.* at 78-85.

we believe that the first step is also mistaken.<sup>62</sup>

Professor Rubinfeld provides two reasons to support his claim that “passed” could mean “passed by majority vote.” First, he argues that majority rule was the “established practice of the British Parliament and was regarded as the ‘natural’ rule for all assemblies.”<sup>63</sup> Thus, when the Framers used “passed,” everyone would have understood that they meant “passed” according to the prevailing rule.<sup>64</sup>

Although majority rule did govern the British Parliament, Professor Rubinfeld’s argument runs into trouble on this side of the Atlantic. Before the Constitution was ratified, the United States was governed by the Articles of Confederation. The Articles established a Congress composed of representatives from each of the states, with each state having one vote. Significantly, the Articles imposed a supermajority rule on Congress’s exercise of many of its powers.<sup>65</sup>

The Articles’ use of a supermajority rule argues strongly against Professor Rubinfeld’s claim that the Framers used “passed” to mean “passed by majority vote.” The Framers would have expected the Constitution to be interpreted against the backdrop of the Articles. Because the Articles employed a supermajority rule,<sup>66</sup> the Framers would not have simply assumed that everyone would understand that

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62. While this section presents arguments why “passed” should not be read to require majority voting, we do not repeat here the additional arguments supporting this conclusion that we presented in our earlier article. See McGinnis & Rappaport, *supra* note 9, at 485-500.

63. Rubinfeld, *supra* note 4, at 77.

64. *See id.*

65. *See* ARTICLES OF CONFEDERATION art. IX, § 6 (U.S. 1777) (requiring a vote of 9 out of 13 states to take various actions, including engaging in war, entering into treaties, coining money, borrowing money, and appropriating money).

66. The Articles were not the only document in the post-Revolutionary War period to employ supermajority rules. Even a brief review of the early state constitutions shows that they departed from the voting rule that mandates a majority of the quorum to pass a bill. *See, e.g.*, DEL. CONST. of 1792, art. VI, § 1 (requiring two-thirds of each house to establish a court); GA. CONST. of 1798, art. I, § 17 (requiring two-thirds of each house to reintroduce a bill that was rejected by either house); *id.*, art. I, § 24 (requiring two-thirds of the general assembly to pass a gratuity for any person); *id.* art. III, § 9 (requiring two-thirds of each house to pass divorce acts); N.H. CONST. of 1784, pt. II, arts. 20, 37 (requiring a supermajority to pass a bill when less than a specified number of the members of each house are present); N.J. CONST. of 1776, art. III (requiring a majority of all the representatives, not simply of the quorum, to pass all bills); N.Y. CONST. of 1777, art. VI (requiring two-thirds of each house to eliminate voting by ballot in general elections); R.I. CONST. of 1841, art. IX, § 8 (requiring assent of two-thirds of each house to appropriate public money for local purposes, or to create or alter a corporation); VT. CONST. of 1786, ch. II, § IX (requiring a quorum of two-thirds for consideration of tax-raising measures). For a useful compilation of current and historical state constitutions, see generally SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS (William F. Swindler ed., 1973).

legislatures always pass bills by majority vote.<sup>67</sup> Thus, if the Framers had intended to mandate majority voting, they would have done so explicitly.<sup>68</sup>

The second reason why Professor Rubinfeld believes that “passed” can mean “passed by majority vote” is that “[d]ictionaries of older American and English usage define ‘pass’ in just such terms.”<sup>69</sup> Professor Rubinfeld, however, supports this claim with but a single citation from a dictionary published a hundred years after the framing of the Constitution.<sup>70</sup> By contrast, our research suggests that the preferred meaning of “passed” did not require a majority vote. The most important lexicographical source—Samuel Johnson’s dictionary, published in 1786—defines “pass” simply as “[t]o be enacted.”<sup>71</sup> While there is evidence that “passed” was sometimes used to imply a majority vote,<sup>72</sup> this was apparently a secondary meaning

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67. The Articles also support our conclusion in another way. In addition to requiring Congress to secure a supermajority to exercise certain powers, the Articles stated that for the exercise of other powers, nothing could be determined “unless by the votes of a majority of the United States in Congress assembled.” ARTICLES OF CONFEDERATION art. IX, § 6 (U.S. 1777). That the drafters of the Articles made this majority voting explicit also casts doubt on Professor Rubinfeld’s claim that everyone would have understood that “passed” meant “passed by majority vote.” The drafters’ inclusion of a specific majority requirement shows that they recognized that other voting rules were possible.

68. Other structural arguments also cast doubt on Professor Rubinfeld’s claim that “passed” means “passed by majority vote.” First, consider the Residual Presentment Clause, which provides that “Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary” must be presented to the President in the same way that a bill is required to be presented. U.S. CONST. art. I, § 7, cl. 3. The Clause was inserted to ensure that Congress could not circumvent the presentment requirement by calling proposed legislation by a name other than “bill.” See Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 NW. U. L. REV. 735, 752 (1993). Thus, the same rules that govern the passage of bills should apply under this Clause, yet the Clause does not use the term “passed.” Instead, it uses “concurrence,” which is hard to interpret as requiring a majority vote. Second, the Presentment Clause itself uses the term “passed” in a manner that cannot possibly mean “passed by a majority vote.” See U.S. CONST. art. I, § 7, cl. 2 (if “two thirds of that House shall agree to pass the Bill”); Rubinfeld, *supra* note 4, at 78. It is unlikely that the Framers would have used the term “passed” in two different ways in the same clause.

69. Rubinfeld, *supra* note 4, at 77.

70. See *id.* (citing 2 STEWART RAPALJE & ROBERT E. LAWRENCE, A DICTIONARY OF AMERICAN AND ENGLISH LAW 935 § 4 (1888)).

71. SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 8G (London 1786). A later American edition of Johnson’s dictionary also does not define “pass” as enacted by majority vote. See SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia 1805).

72. In the 1828 edition of Webster’s dictionary, the first meaning of “pass” is “[t]o be enacted,” while the second meaning is “to receive the sanction of a legislative house or body by a majority of votes.” 2 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 31 (New York, S. Converse 1828).

of the term.<sup>73</sup>

## II. THE DISTINCTION BETWEEN ORDINARY RULES AND INSULATED RULES

Professor Rubenfeld also claims that it is inconsistent for us to conclude that the Constitution requires a majority of the House to have the power to repeal a supermajority rule while denying that the Constitution requires majority vote to pass legislation.<sup>74</sup> Indeed Professor Rubenfeld states that we are “vulnerable to a charge of self-contradiction, or at least to a charge of invoking on [our] own behalf the very rhetorical moves that [we] would disallow to [our] opponents.”<sup>75</sup> These are strong statements and we are surprised that Professor Rubenfeld makes them without even a paragraph of response to the five pages of arguments on this matter in our original essay. We believe that the structure, purpose, and history of the Constitution provide compelling support for a principle that requires a majority to be able to repeal rules. There are no similar arguments available to support a constitutional principle that would preclude supermajority rules subject to repeal. Such arguments do not constitute “rhetorical moves” but instead are the traditional stuff of consti-

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73. Even if “passed” were understood to mean “passed by majority vote,” it would not necessarily follow that the Presentment Clause precluded legislative supermajority rules. The Clause provides: “Every Bill which shall have passed the House of Representatives and the Senate, shall, *before it becomes a Law*, be presented to the President of the United States.” U.S. CONST. art. I, § 7, cl. 2 (emphasis added). Under one reasonable interpretation, this language requires that all bills that are presented to the President must have received a majority in each house, but does not mandate that all bills that receive a majority in each house must be presented to the President. This interpretation would allow supermajority rules, because all bills that would be sent to the President under supermajority rules would have secured at least a majority in both houses. This view also finds support from the apparent purpose of the Clause: It is written as if it were designed to establish and protect the President’s veto powers. This power is not in any way impaired by legislative supermajority rules. Indeed, supermajority rules mean that the President will have to wield his veto authority less often. This interpretation comports not only with the text of the Clause, but also its placement next to other provisions drafted to make sure that Congress cannot circumvent the President’s veto authority. See U.S. CONST. art. I, § 7, cl. 3 (assuring that President has authority to veto congressional enactments, however styled).

In contrast to the support for this reading of the Presentment Clause, Professor Rubenfeld has presented no argument for his view that the Presentment Clause requires all bills that have received a majority of votes in each house to be presented to the President. His arguments based on the possibility of rules like the Big-Three Rule are ineffective, because these rules would be unconstitutional under either interpretation.

74. See Rubenfeld, *supra* note 4, at 88-89.

75. *Id.* at 88.

tutional interpretation.<sup>76</sup>

Congress's lack of power to insulate a rule from repeal is rooted in the most fundamental structural feature of any constitutional system—the distinction between constitutional law and rules or legislation that are not embedded in the Constitution.<sup>77</sup> Just as a constitutional system founded on a tripartite system of government does not contemplate a fourth branch,<sup>78</sup> so a system founded on a distinction between the Constitution and a law enacted under the Constitution does not contemplate quasi-constitutive law.

Consider first an example of legislation. If Congress were to enact irrepealable legislation that made the penalty for selling drugs life imprisonment without parole, its action would have in effect transformed an ordinary penalty of criminal law into a provision that was more deeply embedded than the Constitution, which can be changed by a two-thirds vote of the Congress and three-quarters of the state legislatures.<sup>79</sup> Similarly, if a single house of Congress were to pass a rule requiring a supermajority for the enactment of tax legislation and to make that rule irrepealable, its action would also have the effect of making that rule less subject to change than the Constitution.

Once it is clear that an irrepealable rule would violate this basic structural principle, it is a short step to conclude that rules must be repealable by a majority. Even rules that stop short of being absolutely irrepealable, such as rules that may only be repealed by a supermajority, must be rejected as a form of quasi-constitutive law. Such rules cannot be distinguished in a principled manner from constitutional provisions, because the Constitution itself may be amended by a supermajority of Congress and the state legislatures.<sup>80</sup> All rules that cannot be repealed by a majority represent an attempt by a majority of one house to give its views a permanent status without going through the intricate amendment process required to en-

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76. Indeed, on grounds very similar to those set forth in our original essay, two other scholars have recently defended the constitutionality of the filibuster rule in the Senate while challenging the constitutionality of the Senate rule that allows a minority to prevent a change in the filibuster rule. See Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 247 (1997) (arguing that entrenchment of the filibuster violates the principle that "[o]ne legislature cannot bind subsequent legislatures").

77. For further discussion of this distinction, see McGinnis & Rappaport, *supra* note 9, at 505-06.

78. See, e.g., *Ameron v. United States Army Corps of Eng'rs*, 787 F.2d 875, 892 (3d Cir. 1985) (Becker, J., concurring in part) ("Even a living constitution cannot grow a new branch.").

79. See U.S. CONST. art. V.

80. See *id.*

trench the views of one generation against those of future generations.

Majority power over repeals is also a necessary corollary of the principle of equality between legislatures. If one legislature were able to insulate a repeal by any degree of supermajority, it would reduce the power of subsequent legislatures beneath the power that the prior legislature enjoyed. This fundamental principle was so well recognized in Blackstone<sup>81</sup> and other writings at the time of the Framing<sup>82</sup> that it is an easy step to incorporate it as part of the understanding of legislative power and hence the content of Congress's authority under the Rules of Proceedings Clause.

In contrast, there is no significant historical or structural support for the principle that legislation must be passed by ordinary majority vote. To the contrary, we have shown that supermajority rules were well known at the time of the Framing both in the Articles of Confederation and in state constitutions.<sup>83</sup> Moreover, Luther Cushing, the leading parliamentarian of the early nineteenth century, noted that legislatures sometimes passed legislative supermajority rules.<sup>84</sup> Finally, legislative supermajority rules are also not open to any structural objections. Because such rules can be repealed by a majority, they cannot be condemned as a form of quasi-constitutive law.

Repealable supermajority rules nevertheless perform a useful function and cannot be dismissed as merely hortatory, as Professor Rubenfeld seeks to do. The repealability of a rule does not in general make it ineffective: for instance, the committee system itself is established by repealable rules but no one doubts its pervasive effects in shaping legislation.<sup>85</sup> Supermajority rules in particular represent a public precommitment by the majority to a policy—in this case to a policy disfavoring tax increases.<sup>86</sup> Political structures often gain much of their practical efficacy from their ability to focus public attention on a particular issue. While the supermajority rule may always be

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81. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*90.

82. See, e.g., THE FEDERALIST NO. 78, at 543 (Alexander Hamilton) (Henry B. Dawson ed., 1891) (suggesting that legislatures at different times possessed "equal authority").

83. See *supra* notes 65-66 and accompanying text.

84. See CUSHING, *supra* note 26, at 168. Cushing argued that legislative supermajority rules were not in any real sense a departure from majority rule, because such rules were adopted by a majority vote. See *id.*

85. See, e.g., Kenneth A. Shepsle & Barry A. Weingast, *The Institutional Foundations of Committee Power*, 81 AM. POL. SCI. REV. 85, 100-02 (1987) (discussing the manner in which the committee system influences the content and structure of legislation).

86. See McGinnis & Rappaport, *supra* note 9, at 510.

repealed, the public commitment makes it more politically costly to do so than to simply vote for a tax increase. Further evidence of the real world effects of the rule is provided by the lawsuit filed against it: If the rule were without effect, these Representatives would not be bitterly opposed to it.

### III. MATTERS OF INTERPRETATION

In addition to our specific disagreements with Professor Rubenfeld, we believe that constitutional issues of methodology may divide us. We cannot be sure of this, because he is not explicit about his mode of constitutional interpretation.<sup>87</sup> As far as we can tell, his method appears to be basically originalist or textualist in at least this limited sense: He eschews arguments based on policies or values, evolving or otherwise.<sup>88</sup> But he appears to practice a textualism or originalism of linguistic isolation. His analysis centers almost entirely on the word “pass” in the Presentment Clause and his manner of divining its meaning is to spin out a variety of imaginative hypotheticals.

We believe that his method of interpretation is misguided. The proper method of interpreting the Constitution begins with a consideration of the text. Where it is ambiguous, as Professor Rubenfeld suggests it is here, it is necessary to systematically canvass the arguments based on structure, purpose and history relevant to the dis-

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87. In particular, Professor Rubenfeld does not appear to rely on the distinctive method of construction advanced in his recent article on constitutional interpretation. See Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1122 (1995) (advancing an interpretive method that he describes as “neither originalist, literalist, processualist, nor fundamentalist”). Professor Rubenfeld argues that constitutional provisions should be interpreted to cover the “paradigm cases” the Framers had in mind while drafting them. See *id.* at 1169. He also claims, however, that interpretation must be supplemented by the implications of the commitments the provisions embody as these commitments unfold through American history—a process that Professor Rubenfeld labels “commitmentarian.” See *id.* at 1172. The arguments that Professor Rubenfeld makes against the three-fifths rule do not appear to rest on a commitmentarian process unfolding through history, for they would apply as well in 1787 as they would today.

88. Professor Rubenfeld, however, wrongly suggests that we relied on policy arguments to support our view that the three-fifths rule is constitutional. See Rubenfeld, *supra* note 4, at 75. Although we did indicate that the three-fifths rule was good policy, we made clear that our policy views were entirely distinct from our defense of the rule’s constitutionality. See McGinnis & Rappaport, *supra* note 9, at 508 (“We believe that the three-fifths rule not only passes muster as a matter of positive constitutional law but also advances important policy goals, including the cause of democratic self-governance.”).

puted constitutional issue.<sup>89</sup>

Arguments from structure are essential if we are to read a constitution as we should—holistically.<sup>90</sup> A constitution is not designed to provide a laundry list of unrelated provisions, but to establish an integrated system.<sup>91</sup> Thus, whenever a provision is ambiguous, we properly read it in light of the rest of the document.<sup>92</sup> Sometimes other specific provisions shed light on a dispute over the meaning of a particular clause. For instance, our view that the House Composition Clause permits only Members to vote is bolstered by other clauses such as the Incompatibility Clause, which presuppose that voting is limited to Members.<sup>93</sup> Sometimes inferences from the document as a whole, rather than from specific provisions, are relevant. For instance, we suggest that the distinction between constitutional law and ordinary legislation that pervades the entire Constitution provides strong reasons for concluding that the Constitution permits supermajority rules that can be repealed by a majority but prohibits supermajority rules that are insulated from such repeals.<sup>94</sup>

Arguments from purpose are also essential to resolving ambiguities if we are to read the Constitution to advance its core function—the establishment of a system of political governance.<sup>95</sup> Given the requisites necessary to a functioning legislature, it is natural to read the House Composition Clause to guarantee voting and other rights to members of the legislature.<sup>96</sup> Because a legislature requires voting rights on procedure as well as substance, no interpretation of the Pre-

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89. Structure, purpose, and history are the traditional methods for resolving questions that are not answered by the text. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*59-62; see also Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1486-87 (1987) (offering this tripartite approach to constitutional interpretation).

90. See Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155, 1216 (1987) (defending structural interpretation in light of need to construe the Constitution holistically).

91. See Frank H. Easterbrook, *Unitary Executive Interpretation*, 15 CARDOZO L. REV. 313, 325 (1993) (postulating that structural arguments help correct "tunnel vision" that results from focusing on a single provision).

92. The preeminent case exemplifying such an approach is, of course, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) (noting that an interpretation of the enumerated powers depends "on a fair construction of the whole instrument").

93. See *supra* text accompanying notes 32-33.

94. See *supra* notes 77-84 and accompanying text.

95. See Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347, 351 (1994) (arguing that the Constitution must be interpreted in light of its overriding purpose of establishing a system of constitutional governance).

96. Cf. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (evaluating a separation of powers issue based on the Framers' purpose in dividing federal power between the three branches).

sentment Clause can sustain these requisites. Professor Rubenfeld thus lacks a persuasive rationale for reading a majority requirement into the Clause.<sup>97</sup>

History also helps resolve ambiguities because the Constitution established its system of political governance against the backdrop of the English constitution—itsself a distillation of established practices rather than a written document.<sup>98</sup> In our construction of the House Composition Clause, we looked to practices of the English Parliament to help understand what were the necessary rights of legislators.<sup>99</sup> Moreover, the discovery of the equality of parliaments as a background structural principle to the American Constitution provides an additional reason to conclude that Congress may not insulate its rules from repeal.<sup>100</sup> The Constitution was also written against the background of the Articles of Confederation. The Articles demonstrate that majority rule was not presumed in national legislative assemblies in America but rather was expressly established where intended. The presence of majoritarian requirements in the Articles is an important argument against reading such requirements into the Constitution in the absence of a textual provision.

Of course, arguments based on structure, purpose, and history depend on judgment. Some of these arguments are stronger than others and sometimes difficult questions arise as to whether such arguments are strong enough to affect the meaning of a less than pellucid constitutional provision.<sup>101</sup> But it is hardly surprising that disciplined judgment is necessary to interpretation, as that is the art that constitutes judging.

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97. See *supra* notes 43-50 and accompanying text.

98. See, e.g., *Loving v. United States*, 116 S. Ct. 1737, 1745 (1996). The *Loving* Court noted that “[t]he historical necessities and events of the English constitutional experience . . . were familiar to [the Framers] and inform our understanding of the purpose and meaning of constitutional provisions.” *Id.* at 1747-48. See generally James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1324 (1991) (arguing that “understanding the jurisprudence of the American revolution requires . . . a wide acquaintance with a great deal of western legal history”).

99. See *supra* note 26 and accompanying text.

100. See *supra* text accompanying notes 81-82.

101. Cf. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1228 (1987) (discussing the necessity of assigning a relative weight to each category of constitutional argument). Although we do not accept Professor Fallon’s view that a wide range of considerations, including contemporary policy concerns, are legitimate factors in constitutional interpretation, we do agree that one of the main tasks for constitutional interpretation is the construction of a coherent balance among the factors that are legitimate.

What is striking to us is that Professor Rubenfeld spends little of his essay disputing the judgments that we reached about supermajority rules. Instead, he refers pejoratively to our analysis as resting on “emanations” and “penumbras”<sup>102</sup>—pejoratives that might be applied to his own argument that the word “pass” emanates a principle of “passed by majority vote.” But, as we have shown, our interpretation is actually based on structure, purpose and history. Indeed, the power of such traditional constitutional methodology becomes apparent, because he cannot avoid it. While he casts his principal argument in terms of hypotheticals, its essence—that the Framers would have rejected a system that permitted Members to be deprived of their votes—is nothing but an argument based on purpose and intent, albeit one based largely on assertions. The flaw of Professor Rubenfeld’s essay ultimately may be not that he employs an indefensible methodology, but that he is not sufficiently self-conscious about its application to practice it comprehensively. Only by a comprehensive investigation of the structure, purpose, and history of the Constitution can we reach measured judgments about subtle and difficult constitutional issues.

#### CONCLUSION

The three-fifths rule is constitutional. Under the Rules of Proceedings Clause, the House of Representatives has the authority to pass any rule relating to its operations unless it violates some language or principle in the Constitution. Despite Professor Rubenfeld’s arguments, the Presentment Clause does not supply such language, because there is no evidence that “passed” means “passed by majority vote.” Nor is there any need to interpolate a majority requirement in the Clause in order to prevent rules that would permit outrageous results, such as voting by non-members. Other constitutional provisions comfortably provide the principles that assure that the legislature can fulfill its core function of democratic deliberation.

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102. See Rubenfeld, *supra* note 4, at 85.