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Congressional Self-Discipline: The Constitutionality of Supermajority Rules

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14 Const. Commentary 1-6 (1997)
But Cf. . . .

CONGRESSIONAL SELF-DISCIPLINE: THE CONSTITUTIONALITY OF SUPERMAJORITY RULES

Congress needs to be more disciplined. It has at times become sloppy and even cavalier. When, for example, Congress enacted the federal Gun-Free School Zone Act of 1990, it was asking for trouble. Neither the legislation nor the legislative history said anything about any effect on interstate commerce. It was therefore not surprising to see the Supreme Court strike the law down in United States v. Lopez. So I agree that Congress should be more responsible and more respectful of its constitutional constraints.

I also believe the budget deficit is a serious problem. The numbers are fairly staggering. According to the Congressional Budget Office (CBO), in the 192 years from 1789 through 1981, the total national debt reached $1 trillion dollars. In the 15 years since 1981, it has multiplied 5 times, reaching the 5 trillion dollar level by 1996. Without significant reform, the CBO says that number will grow by an additional 1 trillion dollars in the next 4 years.

But I believe we should be wary of crafting new constitutional and quasi-constitutional limitations. Many of the proposed constitutional amendments, such as a balanced budget amendment, are in my opinion unwise; many of the quasi-constitutional statutory fixes, such as the supermajority requirement for tax increases, are both unwise and unconstitutional.

Let me address the specifics of House Rule XXI(5)(c), the supermajority requirement that the 104th Congress adopted as one of its internal rules of proceeding. The Rule provides: "No

1. This is a paper given at the Tenth Annual Lawyers Convention of the Federalist Society, held in Washington D.C., November 14-16, 1996. The name of the Conference was "Prospects for Constitutional Reform: Congress, The Courts, and The Case for Self-Discipline." The name of the panel was "Disciplining Congress: The Taxing and Spending Powers."
6. Id.
7. Id.
bill increasing a federal income tax rate shall be considered as passed except by 3/5 vote."8 The goal is, obviously, to make it more difficult to get tax increases passed. I question the wisdom of having such a rule, especially when there is no corresponding impediment to spending bills. But more importantly, I believe the House cannot constitutionally adopt such a rule.

Proponents of the rule point out that under Article I, section 5 of the Constitution, each house may determine the rules of its proceedings; and, they argue, that is all the House has done here. But the supermajority requirement contained in Rule XXI(5)(c) is not merely a rule of internal procedure. It is, in effect, a "presentment" rule. Unlike the Senate's filibuster rule, which governs when things come to a vote,9 House Rule XXI(5)(c) determines when things get presented to the other chamber and to the President. Article I, section 7 of the Constitution defines how a law is to be enacted. In particular, the Presentment Clause provides that "[e]very 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."10 What the House has done in Rule XXI(5) is to define the word "passed" in the Presentment Clause.

Both sides of the debate agree on one proposition: the presumption is that "passed" means agreed to by a majority of a quorum. The question is whether either house can, by an internal rule of proceeding, change that meaning and insist that "passed" requires something more than a majority.

It is not an easy question. There are good arguments on both sides. But, on balance, I am persuaded that the better argument is that neither chamber can define "passed" to require more than a majority. In particular, I believe that the House's adoption of Rule XXI(5) unconstitutionally aggrandizes its own power and intrudes on the powers of the Senate and the President. Let me explain.

Obviously nothing in the constitutional text explicitly denies either house the power to require a supermajority. But that is true of many constitutional limits we infer from the structure of the Constitution. In INS v. Chadha,11 for example, notwithstanding no mention of legislative vetoes in the Constitution, the

8. Rules of the House of Representatives, Effective for One Hundred Fourth Congress (Jan. 4, 1995) [hereinafter "Rules"] (emphasis added.)
9. Senate Rule XXII requires a 60% vote to invoke cloture and to amend the rule itself. Senate Manual (Rule XXII).
Supreme Court found that the legislative veto violates the Constitution. Similarly, in United States v. Nixon, even though nothing in the Constitution says anything about executive privilege, the Supreme Court still inferred such a privilege from the text and structure of the Constitution.

The question is: even though the Constitution does not explicitly prohibit either house from requiring a supermajority to pass a bill, is such a requirement "consistent with the purposes of Art. I and the principles of separation of powers?" I believe it is not. Article I, Section 7, the provision that defines how a law is to be enacted, is a carefully crafted mechanism in which the framers struck a balance between large and small states, between the House and the Senate, and between Congress and the President. By adopting the 3/5 rule in 1994, the House upset this carefully constructed balance and unconstitutionally intruded on the powers of both the Senate and the President.

When the framers wanted to require a supermajority, they knew how to say so. In fact, they said so in several contexts, requiring 2/3 votes to override a presidential veto, to ratify a treaty, to convict an impeached official, to propose amendments to the Constitution, and to expel a member from either house of Congress.

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12. Id. at 944-59.
14. The Supreme Court inferred the existence of an executive privilege notwithstanding the absence of any textual reference and the explicit presence of provisions providing for legislative privileges. Id. at 703-07. Similarly, in Nixon v. Fitzgerald, 457 U.S. 731 (1982), notwithstanding no mention of presidential immunity in the Constitution, the Court inferred that the President has absolute immunity from civil damage actions for official acts.
15. Chadha, 462 U.S. at 977 (White, J., dissenting). While this statement comes from a dissenting opinion, it represents the more pragmatic analysis of separation of powers issue that the majority of the Court has adopted since the Chadha case. See, e.g., Mistretta v. United States, 488 U.S. 361, 381-82 (1989) (quoting from Chadha, 462 U.S. at 951 (1983)).

In a passage now commonplace in our cases, Justice Jackson summarized the pragmatic, flexible view of differentiated governmental power to which we are heir. ... In adopting this flexible understanding of separation of powers, we simply have recognized Madison's teaching that the greatest security against tyranny—the accumulation of excessive authority in a single Branch—lies not in a hermetic division among the Branches, but in a carefully crafted system of checked and balanced power within each Branch. ... It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the "hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power."

19. U.S. Const., Art V.
Proponents of the supermajority rule argue that the framers may have meant this list to be simply the minimal list of occasions that require supermajorities and that they intended to allow Congress to add to the list. And, on its face, that is a plausible reading. But when one considers the distorting impact adding supermajority requirements can have on the other branches, I conclude that when the framers did not specify a supermajority for passing a bill, they not only presumed that a majority would be sufficient, they in fact intended not to allow either chamber to increase the number of votes required.

Consider the potential impact such a power could have. Under the view of supporters of supermajority rules, there is no limit on the supermajority requirement. Thus, the House could require a 90% or even a 100% majority for selected topics or even for all legislation. If the House adopted such a rule, then even if most Representatives and a majority of Senators want a particular bill, the bill could not get presented to the President and could never become law. If the House can do this, it has the power unilaterally to enhance its power vis-a-vis the Senate and the President. Instead of being just one of three relatively equal players, the House, by this rule, makes itself a superplayer.

Furthermore, if the House can adopt a rule like this, obviously so can the Senate. Article I, section 5 provides: “[e]ach House may determine the Rules of its Proceedings.”21 The provision does not distinguish between the House and the Senate. The Constitution provides that “[the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other Public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States.”22 The Constitution does not specify the number of votes required for confirmation. By the logic of those supporting the House’s supermajority rule, the Senate could, by rule, declare that confirmation requires a 3/5 vote. But if the Senate were allowed to adopt such a rule, it would be able singlehandedly to upset the carefully crafted rules concerning appointment of both executive officials and judges and to unilaterally limit the power the Constitution gives to the President in the appointment process. This, I believe, would allow the Senate to aggrandize its own role and would unconstitutionally distort the balance of powers established by the Constitution.

Finally, defenders of the supermajority rule argue that it is not too restrictive because a simple majority can repeal the rule. But I see nothing in their logic that would stop the House from providing that repeal of the supermajority rule will itself require a supermajority. Some supporters of the Rule argue that the House cannot do that — that it cannot require a supermajority to repeal such a rule. They contend that standing rules of the legislature are valid only if the rules are themselves subject to repeal by a majority vote. They read this restriction into Article I, Section 5, the Rules of Proceeding Clause. Whether or not this is a correct reading of Section 5, I am not sure. But the perceived need by supermajority supporters to read a majority requirement into section 5, so that supermajority requirements must be repealable by a mere majority, supports my position. When a chamber of Congress by its rules goes beyond mere internal housekeeping and affects the relationship among the other institutional players, it aggrandizes its powers and distorts the “single, finely wrought and exhaustively considered, procedure carefully crafted by the framers and is therefore unconstitutional.

The topic for today is entitled Congress and the need for self-discipline. I agree that Congress needs self-discipline. But the discipline should come, not from gimmicky rules, but from careful deliberation and concern for the future. I am not categorically opposed to quasi-constitutional structural statutes or to Congress’ efforts to tie itself to the mast, as it attempted to do in the Gramm-Rudman-Hollings Act. Indeed, some of Congress’ past efforts, such as the Impoundment Control Act of 1974, have usefully resolved some difficult conflicts between the President and Congress. I simply urge caution so Congress avoids quick-fixes that undermine our constitutional system and/or that avoid the underlying problem in which spending is more popular

24. Id. at 503-04.
25. Id. at 504-05.
26. As I read their arguments, it seems to invalidate part of the Senate’s cloture rule — the part of the rule that provides that the supermajority requirement to suspend debate can be repealed only by 3/5 vote. Senate Manual (Rule XXII(2)).
than taxing. True self-discipline comes not by turning to quick-fix diet pills, but by pushing back from the table.

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