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## How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress

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# HOW TO SURVIVE A TERRORIST ATTACK: THE CONSTITUTION'S MAJORITY QUORUM REQUIREMENT AND THE CONTINUITY OF CONGRESS

JOHN BRYAN WILLIAMS\*

## ABSTRACT

*Since their realization that United Airlines Flight 93 was headed toward the U.S. Capitol on the morning of September 11, 2001, legislators and policymakers have been debating how the legislative branch would continue functioning in the aftermath of a terrorist attack that killed or incapacitated large numbers of senators or representatives. This Article reviews the current House and Senate "Continuity of Congress" plans, and argues they are both practically and constitutionally inadequate. Focusing particularly on the Constitution's majority quorum requirement in Article I, Section Five, Clause One, this Article argues that a House or Senate operating in accordance with the current rules of those two bodies after a catastrophic attack would lack the basic constitutional structure to do business. The problem would be especially intractable in the House of Representatives, because seats in that chamber can only be replenished through elections. Because the rule-making power granted to the legislative branch in Article I, Section Five, Clause Two is insufficient to fix this twenty-first century problem, this Article endorses a constitutional amendment that would establish an orderly postdisaster replenishment process.*

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## TABLE OF CONTENTS

INTRODUCTION . . . . .	1027
I. THE ROLE OF QUORUM REQUIREMENTS IN THE GOVERNANCE OF REPRESENTATIVE BODIES . . . . .	1032
II. THE ORIGINS OF THE CONSTITUTION'S MAJORITY QUORUM REQUIREMENT . . . . .	1037
<i>A. The Debate and Rejection of a Submajority         Quorum Rule . . . . .</i>	1037
<i>B. The Debate and Rejection of a         Supermajority Quorum Rule . . . . .</i>	1041
<i>C. The Majority Quorum Requirement as a Fixed         Constitutional Rule of Procedure . . . . .</i>	1046
<i>D. The Majority Quorum Requirement in the         Early Congresses . . . . .</i>	1051
III. CIVIL WAR CRISIS AND THE RUPTURE WITH EARLIER PRACTICES . . . . .	1056
<i>A. Change in the House . . . . .</i>	1057
<i>B. Change in the Senate . . . . .</i>	1059
<i>C. The Continuing Evolution of the         House Quorum Rules . . . . .</i>	1063
<i>D. The Constitutional Significance of the         New Quorum Rules . . . . .</i>	1064
IV. BALLIN AND THE OUTER LIMITS OF THE CONGRESSIONAL RULE-MAKING POWER . . . . .	1067
V. THE QUORUM REQUIREMENT AND REPRESENTATION IN THE POST-9/11 WORLD . . . . .	1074
<i>A. The Recent Congressional Response to the         Disaster Scenarios . . . . .</i>	1076
<i>B. The Current Plan Fails To Meet the Basic         Constitutional Requirements of Representation . . . . .</i>	1078
CONCLUSION . . . . .	1086

## INTRODUCTION

Since their realization that on the morning of September 11, 2001, United Airlines Flight 93 was headed toward downtown Washington, D.C., with the objective of destroying the Capitol building,<sup>1</sup> congressional leaders and outside policymakers have been asking how the federal government would have continued operating if the Flight 93 hijackers had successfully completed their mission.<sup>2</sup> Although the legislative branch has a long tradition of grappling with so-called "Continuity of Congress" issues, the near-miss of September 11th created a new sense of urgency both inside and outside Congress to develop emergency procedures that would minimize the disruption a successful attack would have on legislative branch operations.

In the course of this process, Congress has been forced to consider its own mortality and ask difficult questions: How would the legislative branch reconstitute itself if an enemy managed to kill or temporarily incapacitate a large number of senators or representatives? In the wake of a catastrophic attack, could the federal government operate temporarily without a legislative branch? Or, could Congress temporarily operate with a number of senators and representatives radically smaller than the full membership of the two chambers?<sup>3</sup>

A quick review of Congress's actions in the weeks after the 9/11 attacks illustrates the importance of an operating legislative branch in the aftermath of a national disaster. Within a week following 9/11, Congress appropriated \$40 billion to begin the recovery effort

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1. See CONTINUITY OF GOV'T COMM'N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF CONGRESS 34 (2003) [hereinafter CONTINUITY COMM'N REPORT]; Nat'l Comm'n on Terrorist Attacks Upon the United States, The 9/11 Commission Report 14 (2004).

2. See, e.g., *Symposium on Ensuring the Continuity of Government in Times of Crisis*, 53 CATH. U. L. REV. 943 (2004) (discussing the way in which "the United States Government can continue to function in the event of a catastrophic attack").

3. The size of the Senate is determined by the constitutional provision that the Senate is composed of "two Senators from each State." U.S. CONST. art. I, § 3, cl. 1. Since the reapportionment following the 1910 Census, the House of Representatives has consisted of 435 seats. 2 CONGRESSIONAL QUARTERLY, GUIDE TO CONGRESS 897 (5th ed. 1999). The current House reapportionment statutes are 2 U.S.C. §§ 2a-2c (2000).

in New York City,<sup>4</sup> and authorized the President to use force against the terrorists responsible for the attacks.<sup>5</sup> Over the next several months, Congress passed a major revision of federal criminal and intelligence laws, the USA PATRIOT Act,<sup>6</sup> and created a new federal agency for airport security, the Transportation Security Administration.<sup>7</sup>

Questions about how our government would operate in the aftermath of an attack against Congress that resulted in mass casualties have inevitably led lawmakers and other debate participants back to Article I of the U.S. Constitution, which created the legislative branch and established the basic procedural framework the House and Senate must follow in order to legitimately meet and legislate. This debate poses a very basic constitutional question: what are the essential elements of the legislative branch and its operations, without which it ceases to be able to act as a legitimate branch of the federal government?

This question is especially complicated and important for the House of Representatives, the chamber the Framers considered the "first branch" of the national legislature,<sup>8</sup> because of its role as the most purely representational part of the federal government. Whereas the Seventeenth Amendment to the Constitution provides a process through which states can temporarily fill the seats of senators killed in a terrorist attack,<sup>9</sup> the Constitution requires the House to replenish its seats through elections,<sup>10</sup> which means that chamber would need weeks or even months to replenish its membership. The difficult challenge for disaster planners seeking a workable, constitutionally sound postcatastrophe strategy is to

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4. 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220.

5. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

6. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272.

7. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

8. *E.g.*, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 196 (Max Farrand ed., rev. ed. 1966) [hereinafter *FEDERAL CONVENTION*].

9. U.S. CONST. amend. XVII. Before it was superseded by the Seventeenth Amendment, Article I, Section 3 contained a similar Senate temporary replenishment provision. U.S. CONST. art. 1, § 3, cl. 2, *amended by* U.S. CONST. amend. XVII.

10. U.S. CONST. art. I, § 2, cl. 4.

develop a plan that meets two indispensable criteria: (1) that the legislative branch be able to recover quickly and operate effectively in the aftermath of an attack, and (2) that the organic structure of the legislative branch, as spelled out in Article I of the Constitution, be preserved.

To set up the important questions this Article will explore, it is worth briefly describing what would happen to the legislative branch in the case of a mass disaster, according to the disaster plan that is in force today. If a hijacked airplane like Flight 93 struck the Capitol at a time when the House and Senate were in session and killed the majority of the members of those two chambers, several different rules and statutes would be triggered. In the Senate, the seats of the dead senators would be declared vacant and the various state processes allowing governors to name temporary Senate appointments would be engaged, as is permitted under the Seventeenth Amendment.<sup>11</sup> During the days or weeks the states would take to name temporary appointments to their vacant seats, under current Senate Rules, the Senate would consist of the smaller number of the “chosen and sworn” senators who survived the attack.<sup>12</sup> In the House, which has no constitutional power to replenish its membership through temporary appointments, the mass casualty of members would trigger an expedited election law requiring states to fill these vacancies with elected representatives within forty-nine days.<sup>13</sup> During the seven weeks necessary to conduct these special elections, the House would consist of the “chosen, sworn, and living” members who had survived the attack.<sup>14</sup>

Another version of this disaster scenario is the even more problematic “incapacitation” scenario. What would happen if a

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11. U.S. CONST. amend. XVII. Other than Alaska, Oregon, and Wisconsin, all states have adopted statutes allowing their governors to appoint temporary senators. NAT'L CONFERENCE OF STATE LEGISLATURES, STATE LAWS GOVERNING VACANCIES IN THE U.S. SENATE (2005). Senate rules allow states to present three different sets of credentials: one for senators elected to six-year terms, one for senators elected to fill out six-year terms, and one for temporary Senate appointments. STANDING RULES OF THE SENATE, S. DOC. NO. 106-15 (2000), Rule II, available at <http://rules.senate.gov/senaterules/standingrules.txt>.

12. S. DOC. NO. 106-15, Rule VI.

13. 2 U.S.C.A. § 8(b)(2) (West Supp. 2006).

14. RULES OF THE HOUSE OF REPRESENTATIVES, 109TH CONG., Rule XX, cl. 5(c) (2005) [hereinafter HOUSE RULES], available at [http://www.rules.house.gov/ruleprec/109\\_house\\_rules\\_text.htm](http://www.rules.house.gov/ruleprec/109_house_rules_text.htm).

terrorist attack did not kill a large number of legislators, but instead injured them severely enough (for example, through an anthrax attack) that they could not perform their legislative duties for a long period of time? In this case, there would not be large numbers of vacant seats, but rather large numbers of living members who could not appear in the House and Senate chambers to perform their legislative duties.<sup>15</sup> In the House, under a rule adopted at the beginning of the 109th Congress, the Speaker would have the power to determine which members were incapacitated and then the House could conduct business with the smaller “provisional” number of members the Speaker judged capable of fulfilling their duties.<sup>16</sup> The Senate currently has no plan to respond to the incapacitation scenario. As Senator John Cornyn of Texas commented in a 2003 hearing, “[i]f 50 Senators were in the hospital, unable [either] to perform their duties, or resign, they could not be replaced. The Senate could be unable to operate for up to two full election cycles—a 4-year period.”<sup>17</sup>

This Article argues that the plans described above, especially the plan for the House of Representatives, fail to provide for the continuity of Congress in a way that preserves the essential constitutional elements of the legislative branch. This Article will show that the two chambers’ disaster plans both overstep their constitutional rule-making powers and fail to observe the basic representative structure of the legislative branch that the Constitution requires. A greatly diminished House or Senate operating under their current continuity procedures would not be a valid legislative branch as the Framers established it in Article I of the Constitution. The focus of this Article will be one of the key constitutional procedural provisions the current continuity plans most obviously violate: the Article I, Section 5, Clause 1 requirement that “a Majority of each [House] shall constitute a Quorum to do Business.”<sup>18</sup>

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15. CONTINUITY COMM’N REPORT, *supra* note 1, at 11.

16. HOUSE RULES, *supra* note 14, Rule XX, cl. 5(c).

17. *Ensuring the Continuity of the United States Government: The Congress: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 2 (2003) [hereinafter *Senate Continuity Hearing*], available at <http://www.access.gpo.gov/congress/senate/pdf/108hr/96926.pdf> (statement of Sen. John Cornyn).

18. U.S. CONST. art. I, § 5, cl. 1.

After examining the role quorum requirements play in the governance of representative bodies such as the House and the Senate in Part I, the second Part of this Article examines the Framers' choice to establish a constitutionally fixed quorum requirement for the federal legislature. To ensure that a small, unrepresentative group of legislators would never be able to make decisions binding on the entire nation, the Framers decided that to do business, the House and the Senate required the presence of representatives from a majority of the whole number of seats in those two bodies. For the purpose of determining a quorum to do business, the practice of the First through Thirty-sixth Congresses was to define the whole number of seats in the House and Senate as all seats authorized by the Constitution and later statutes, whether filled or vacant at a given time.

Part III examines how, during the political stress of the Civil War period, the House and Senate violated the clear meaning and the original understanding of the Quorum Clause by redefining the House and the Senate to mean the variable number of people elected to those two bodies at any one time. It traces how, relying on the rule-making power they are given in Article I, Section 5, Clause 2, the House and the Senate have followed this variable quorum principle to the current day. Part IV examines the two bodies' extensive power to determine the rules of their proceedings, but explains why this power does not extend to altering the majority quorum rule.

Finally, Part V explains how an esoteric argument over the meaning of the Quorum Clause would become a gravely serious issue in the case of a catastrophic event that radically reduced the numbers of the two houses, either through death or incapacitation of their members. In particular, a numerically small House of Representatives would not meet the most basic requirements of the representative body created in Article I, Section 2 of the Constitution, and would thereby expose a Congress acting after a disaster to serious charges of illegitimacy.

This Article concludes that the continuity options permitted under Article I of the Constitution do not allow the House and the Senate to respond properly to a 9/11-type disaster, and should be amended to allow those two bodies to develop new procedures to



replenish quickly their numbers in the wake of a calamitous attack. Support for a constitutional amendment to fix this problem requires a simple acknowledgement that the threats that our government faces today are different from those the Framers could have contemplated in 1787. A House and Senate whose numbers are quickly replenished through an orderly, constitutionally determined process would have more legitimacy and a greater ability to act decisively than a numerically small, unrepresentative House and Senate.

### I. THE ROLE OF QUORUM REQUIREMENTS IN THE GOVERNANCE OF REPRESENTATIVE BODIES

The purpose of a quorum requirement in any corporate body, from a board of directors to a state or federal legislature, is to ensure that a certain number of members are present before a body can transact business. Quorum rules address one of the most basic questions in corporate governance: under what conditions can a governing body meet and make decisions that are binding on the entire corporate entity? A quorum requirement determines when a group is "sufficiently represented at a meeting that its members present can speak for its entire membership."<sup>19</sup> A group of members of a corporate board or a legislature smaller than the required quorum has no power to act for the corporate entity. The moment its number reaches the quorum level, however, the group has the power to make decisions and take actions that are binding on the entire body.

A modern social scientist looks at the quorum issue as a probability problem. If all members of a governing board or body are present, a condition we will call *N*, they can vote, either under a majority wins or another rule, and the probability is one hundred percent that they will reach the "correct decision," the decision that represents the board's collective position on an issue. But if one or more members are absent (*N*-1, *N*-2, etc.) from a meeting at which the board or legislative body is doing business, the probability it will reach the "correct decision" begins to drop below one hundred percent and the possibility arises that the group will reach a

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19. MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 49 (rev. ed. 2000) [hereinafter MASON'S MANUAL].

decision that is a “false negative” or a “false positive.” The purpose of a quorum requirement is to ensure that the probability the body will reach a “correct decision” will never drop below a certain level. The quorum number represents a floor, below which the probability of an incorrect decision is too high for the organization to tolerate.<sup>20</sup>

Quorum rules therefore reflect a corporate entity’s concerns about how its governing body makes decisions. On the one hand, an entity would like its decision-making body to take actions that generate wide support throughout the entity. On the other hand, the costs of assembling the entire decision-making body and then getting that body to reach unanimous or almost-unanimous decisions can sometimes be prohibitive. Quorum rules strike a balance between the costs of decision making and the desirability of taking actions that the entity will accept as legitimate.

By far the most common practice in both the legislative and corporate spheres is to allow a body to act when a majority of its members are present. To a social scientist, a majority quorum requirement ( $N/2$  rounded up when  $N$  is odd, and  $N/2 + 1$  when  $N$  is even) is simply one of many points on a decision-making probability curve.<sup>21</sup> But the majority quorum requirement has a special value because it represents the lowest point to which the quorum number can drop while preserving the principle of majority decision making. Setting the quorum requirement at  $N/2 + 1$  means that a

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20. Statisticians and behavioral psychologists have pointed out, however, that the quorum probability function is actually a “sawtoothed function,” meaning the probability of a correct answer does not increase smoothly the closer the number gets to  $N$ . Dan S. Felsenthal, *Averting the Quorum Paradox*, 36 BEHAV. SCI. 57, 60 (1991). The probability drops and climbs according to whether  $N - x$  is an odd number or an even number; for example, for a majority of eight, you need five votes, the same number you need for a majority of nine. This phenomenon leads to the counterintuitive conclusion that the probability the House of Representatives will reach a “correct decision” when 433 Members are present is higher (0.749) than when 434 members are present (0.498). *Id.*

21. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962), *reprinted in* 3 *THE COLLECTED WORKS OF JAMES M. BUCHANAN* 81-82 (1999). These authors note that

[t]he ( $N/2 + 1$ ) point seems, a priori, to represent nothing more than one among the many possible rules, and it would seem very improbable that this rule should be “ideally” chosen for more than a very limited set of collective activities.

On balance, 51 per cent of the voting population would not seem to be much preferable to 49 per cent.

*Id.* at 82.

majority of the members of the governing body will have to be present before it can conduct business, which provides a guarantee to the broader entity that a minority group is not making decisions for the majority. As Luther Cushing, the famous nineteenth century parliamentary expert, explained it, quorum requirements “prevent matters from being concluded in a hasty manner, or agreed to by so small a number of the members, as not to command a due and proper respect.”<sup>22</sup>

The parliamentary principle that a majority empowers a body to take actions binding on the whole entity is one practical application of a basic principle of liberal Western political thought—that governments formed through the consent of the people can take actions with the consent of a majority. The most famous statement of this principle is Locke’s discussion of majority rule in Chapter VIII of the *Second Treatise on Government*. When men have consented to form a community and a “body politic,” Locke argues, they also consent to be governed by a majority of that body.<sup>23</sup> The heart of this argument is the very practical observation that if a community cannot move “whither the greater force carries it,” it cannot effectively act as one body and will quickly dissolve.<sup>24</sup> As support for this argument, Locke cited the practice of legislative assemblies:

[W]e see that in assemblies, empowered to act by positive laws, where no number is set by that positive law which empowers them, the act of the majority passes for the act of the whole, and of course determines; as having, by the law of nature and reason, the power of the whole.<sup>25</sup>

Locke argued that a society would collapse under its own weight if it required the consent of each member to take action: it is logistically difficult to get every member of a body in one place at the same time; and even if you could get every member of the body together

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22. LUTHER S. CUSHING, RULES OF PROCEEDING AND DEBATE IN DELIBERATIVE ASSEMBLIES 27 (5th ed. 1899).

23. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 142 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

24. *Id.*

25. *Id.*

in the same room, their “variety of opinions” and “contrariety of interests” would make it impossible to reach a unanimous decision.<sup>26</sup> Although later political theorists have expressed concern about the rights of the minority members in Locke’s community who must submit to the “greater force” of the majority, majoritarian decision making strikes a compromise between social utility and individual consent, and remains a workable and equitable solution to a basic problem of representative government.<sup>27</sup>

Whereas the traditional rule, as well as the rule in all modern state corporation statutes, is that a majority of directors constitutes a quorum for an official meeting, modern corporation laws allow entities to set quorum requirements that are higher or lower than a majority.<sup>28</sup> The current U.S. model corporation law allows entities to have quorum requirements as low as one-third of board membership, and allows supermajority requirements as high as one hundred percent of board membership.<sup>29</sup> In modern U.S. legislative procedure, majority quorum requirements are the general rule, although a few states require the presence of two-thirds of their members to constitute a quorum.<sup>30</sup>

A supermajority requirement, such as a two-thirds quorum rule or a two-thirds voting rule, shows that the entity puts a priority on high levels of participation and agreement in its decision making, even if it increases the costs of the process and the possibility that the process could deadlock. In the corporate context, for example, the comments to the Model Business Code note that higher-than-majority vote or quorum requirements are most commonly used in closely held corporations, “where a greater degree of participation is thought appropriate or where a minority participant in the venture seeks to obtain a veto power over corporate

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26. *Id.* at 143.

27. See Douglas W. Rae, *The Limits of Consensual Decision*, 69 AM. POL. SCI. REV. 1270 (1975), for a discussion of how recalcitrant minorities, private actions, and other factors undermine arguments that consensual decision making can be more socially efficient than majority decision making.

28. 2 MODEL BUS. CORP. ACT ANN. § 8.24 (3d ed. & historical background Supp. 2005).

29. *See id.*

30. *See* MASON’S MANUAL OF LEGISLATIVE PROCEDURE, *supra* note 19, § 500. The states with supermajority quorum requirements are Indiana, Oregon, Tennessee, and Texas. NAT’L CONF. OF STATE LEGISLATURES, QUORUM REQUIREMENTS (2003).

action.”<sup>31</sup> Lower-than-majority quorum requirements, on the other hand, reflect a corporate entity’s concern for the efficiency of the decision-making process and less concern about thorough participation in that process. The comments to the Model Business Code note that Delaware and other states permit quorum numbers as low as one-third because they appear to provide “useful flexibility primarily for publicly held corporations with large boards of directors.”<sup>32</sup>

In the legislative setting a supermajority quorum requirement means that participation in the decision-making process will be higher, but it also provides minorities a tool they do not have under a majority quorum rule: the power to block majority action by simply not showing up. The power of a large, cohesive minority to “bust the quorum” means that a minority group has an option other than staying in a chamber and fighting the majority’s legislative proposals through debate and amendment. It has the additional option of blocking legislation by depriving the chamber of its ability to conduct business. In May 2003, for example, a group of fifty-three Texas Democratic state representatives known as the “Killer Ds,” who opposed a Republican redistricting bill, seceded from the 150-seat chamber and thereby deprived the Texas House of the two-thirds quorum the state’s constitution requires for the chamber to do business.<sup>33</sup> An earlier quorum-busting episode in Texas history reflected intraparty rather than interparty tensions. In 1979, a group of twelve Democratic state senators, known as the “Killer Bees,” seceded from the thirty-three-seat house to deprive it of the two-thirds quorum necessary to consider a Democratic proposal to change primary dates in a way that would have assisted the 1980 presidential candidacy of former Texas Governor John Connally.<sup>34</sup>

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31. 2 MODEL BUS. CORP. ACT ANN. § 8.24 official cmt.

32. *Id.* § 8.24 historical background.

33. TEX. CONST. art. 3, § 10 (“Two-thirds of each House shall constitute a quorum to do business, but a smaller number may adjourn from day to day, and compel the attendance of absent members, in such manner and under such penalties as each House may provide.”). In order to prevent the House Speaker from compelling them to return to the House chamber, these quorum-busting legislators escaped to Ardmore, Oklahoma, outside the jurisdiction of Texas authorities. R.G. Ratcliffe et al., *Wanted: AWOL Democrats; Some Rebel Lawmakers Surface in Oklahoma*, HOUSTON CHRON., May 13, 2003, at A1.

34. Dennis A. Williams & Lea Donosky, *The Bees that Had Texas in a Buzz*, NEWSWEEK, June 4, 1979, at 29.

## II. THE ORIGINS OF THE CONSTITUTION'S MAJORITY QUORUM REQUIREMENT

The basic advantages and disadvantages of different quorum and voting requirements were just as apparent to eighteenth century politicians as they are to their twenty-first century counterparts. Many members of the Constitutional Convention of 1787 were experienced legislators with practical knowledge of the effects of different quorum rules on representative assemblies' decision-making process. The debate conducted on the quorum requirement, which ultimately resulted in Article I, Section 5, Clause 1, reflected their legislative experiences and considered opinion about where the federal legislature's quorum requirements should fall in the continuum between high and low representative participation. The conclusion of this debate was that, in order to ensure the representative nature of the two legislative chambers, the House and the Senate should be structured on a majoritarian principle.

### *A. The Debate and Rejection of a Submajority Quorum Rule*

The question of where to set the quorum requirement in the new federal legislature was not the most contentious issue of the 1787 Constitutional Convention. But it is clear from the record of debates that the Convention considered several alternatives to the majority quorum requirement ultimately included in Article I, Section 5, Clause 1. When the Committee on Details reported back to the Convention on August 6th with a draft based on the Convention's earlier debates, it included a section in Article VI establishing that a majority of members of each House constituted a quorum to do business.<sup>35</sup> The Convention had not debated the issue before this time, so it appears that the members of the Committee on Detail, as they did in other sections, took this language from contemporary

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35. 2 FEDERAL CONVENTION, *supra* note 8, at 180 (1911). The text of this section read: "In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day." *Id.*

state constitutions.<sup>36</sup> Working its way through the Committee's draft, the Convention arrived at this section on August 10th.

One of the central themes of the debate over the quorum requirement concerned the logistical difficulties and delays contemporary legislatures had in assembling a majority of their members. Many delegates feared that a high quorum requirement in a national legislature would be an insurmountable obstacle to the efficient conduct of business. While House and Senate members from centrally located states could reach the meeting place within a few days, members from states farther north and south sometimes needed weeks to reach the seat of government.<sup>37</sup> Nathaniel Gorham, who came from the one state, Massachusetts, with a numerically fixed, submajority quorum requirement,<sup>38</sup> argued that, if the Congress needed a majority to act, "great delay might happen in business."<sup>39</sup> Part of his argument was that the logistical problems would just grow more acute over time as the population and geographical extent of the United States grew and the number of representatives needed to constitute a majority quorum continued to grow.<sup>40</sup> Another Massachusetts delegate, Rufus King, argued that

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36. By the time of the 1787 Convention, the legislative bodies of the thirteen states generally operated under majority quorum requirements. ROBERT LUCE, *LEGISLATIVE PROCEDURE* 27-29 (Da Capo Press 1972) (1922). During debate on the presidential veto on August 15, Nathaniel Gorham of Massachusetts expressed his feeling that "a majority [was] as large a quorum as was necessary. It was the quorum almost every where fixt in the U. States." 2 *FEDERAL CONVENTION*, *supra* note 8, at 300. Several years earlier, Thomas Jefferson had noted that the Virginia assembly followed the *lex majoris partis*, which was "founded in common law as well as common right. It is the natural law of every assembly of men, whose numbers are not fixed by any other law." THOMAS JEFFERSON, *Notes on the State of Virginia*, in *WRITINGS* 251 (Merrill D. Peterson ed., 1984) (1781-82).

37. For example, at the opening of the Constitutional Convention on May 14, 1787, only two complete state delegations, from Virginia and Pennsylvania, were present. CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 101-02 (Fred B. Rothman & Co. 1993) (1928). The Convention was only able to convene for business eleven days later, on May 25th, when the seventh state delegation, from New Jersey, arrived in Philadelphia. *Id.* at 120.

38. The Massachusetts Constitution of 1780 set a quorum of sixteen for the state senate and a quorum of sixty for the state house of representatives. 5 *SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS* 99, 100 (William F. Swindler ed., 1975). In the Massachusetts General Court of 1787-88, there were thirty-six elected senators and 272 elected representatives, which meant the numerical quorum requirements for both houses were below a majority. During an 1862 debate in the United States Senate on the quorum requirement, Massachusetts Senator Charles Sumner alluded to this Massachusetts "exception." *CONG. GLOBE*, 37th Cong., 2d Sess. 3193 (1862).

39. 2 *FEDERAL CONVENTION*, *supra* note 8, at 251.

40. *Id.*

the "future increase of members would render a majority of the whole extremely cumbersome."<sup>41</sup>

The proponents of a lower quorum requirement made another argument: that a majority quorum requirement might be high enough to encourage members of Congress to engage in quorum-busting maneuvers (what they called "secessions"). Their argument was that if a house had once reached a majority to do business, but many members were still absent, a minority group large enough to deprive the house of a majority could hold the Congress hostage by threatening secession.<sup>42</sup> Gouverneur Morris of Pennsylvania invoked the ominous scenario that "if a few can break up a quorum, they may seize a moment when a particular [part] of the Continent may be in need of immediate aid, to extort, by threatening a secession, some unjust & selfish measure."<sup>43</sup> John Mercer of Maryland agreed that a majority quorum requirement was high enough to tempt representatives to secede, and pointed out that the English Houses of Parliament had set their quorum requirements at numbers significantly below a majority. Mercer "was for leaving it to the Legislature to fix the Quorum, as in Great Britain, where the requisite number is small & no inconveniency has been experienced."<sup>44</sup>

In response to these concerns over the high potential costs of a majority requirement, several delegates proposed setting a baseline quorum number in the Constitution, but then giving the houses discretion to later adjust the quorum number through legislation.

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41. *Id.* at 253.

42. This scenario describes what actually happened in the Thirty-seventh Congress when eleven southern states did not send legislators to Washington. *See infra* Part III.

43. 2 FEDERAL CONVENTION, *supra* note 8, at 252 (alteration in original).

44. *Id.* at 251. Story noted that the current quorum to do business in the English House of Commons (a body of almost six hundred members) was forty-five. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 296 (Carolina Academic Press 1987) (1833). In a debate over the quorum requirement in the Thirty-eighth Congress, Senator Reverdy Johnson pointed to the low quorum requirements in Parliament to show that small quorum numbers presented "no great inconvenience" to that body's ability to do business. CONG. GLOBE, 38th Cong., 1st Sess. 2086 (1864). English parliamentary practice still has extremely low quorum requirements. In the House of Lords, which had a full membership of 710 in 1976, a quorum was present if only three Lords were in attendance. ERSKINE MAY'S TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT 292 (19th ed. 1976). In the case of votes, thirty Lords had to be present. *Id.* A quorum in the House of Commons was forty members, in a body whose full membership was 659. *Id.* at 301.



Rufus King proposed setting the quorum number at thirty-three for the House and fourteen for the Senate, majorities of the two chambers as they were being created in the proposed Constitution, and then allowing future Congresses to increase those numbers.<sup>45</sup> In other words, the Constitution would set a quorum number that would be a majority in the First Congress, but would be less than a majority in future Congresses as the chambers grew in size. This proposal fixed a minimum numerical quorum requirement, but it left future Congresses with the discretion to adjust, or not adjust, that number in accordance with future circumstances. For example, if the House of Representatives grew to a ninety-eight-member chamber and experienced the logistical problems some delegates were predicting, the House might choose to keep the quorum number at thirty-three, which would be a one-third quorum requirement.<sup>46</sup>

The majority of delegates, however, favored a constitutionally fixed majority quorum requirement, arguing that, in spite of the higher costs it imposed on the decision-making process, it provided Americans a guarantee that a small group of unrepresentative people could not take actions binding the whole country.<sup>47</sup> In what appears to have been a lengthy floor statement, George Mason of Virginia argued that in a country so large and diverse as the United States, it "would be dangerous to the distant parts to allow a small number of members ... to make laws," because members from the central states could get to the Congress more easily and pass laws without waiting for those members who had to travel greater distances.<sup>48</sup> Leaving the power to determine the quorum requirement in the hands of the legislature itself also invited mischief by allowing a small group of legislators the power to lower the quorum

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45. 2 FEDERAL CONVENTION, *supra* note 8, at 252-53. The text of King's amendment provided that

not less than 33 members of the House of representatives, nor less that 14 members of the Senate, shall constitute a quorum to do business; a smaller number in either House may adjourn from day to day, but the number necessary to form such quorum may be encreased by an act of the Legislature on the addition of members in either branch.

*Id.* at 245.

46. As Daniel Carroll of Maryland noted, this amendment provided "no security agst. a continuance of the quorums at 33 & 14. when they ought to be increased." *Id.* at 253.

47. *Id.* at 251-52.

48. *Id.*

and rule the country by "Juncto."<sup>49</sup> On the secession issue, Mason related that his own experience in the Virginia assembly was that the threat of secession sometimes forced legislators to reach agreements out of apprehension of losing a quorum to do business.<sup>50</sup> Oliver Ellsworth of Connecticut supported the majority quorum requirement and opposed King's proposal, saying "[i]t would be a pleasing ground of confidence to the people that no law or burden could be imposed on them, by a few men."<sup>51</sup> Addressing the fear of quorum-busting, Ellsworth pointed out that "[t]he inconveniency of secessions may be guarded agst by giving to each House an authority to require the attendance of absent members."<sup>52</sup>

The Convention demonstrated its opposition to dropping the quorum requirement to less than a majority of the body by voting down King's amendment by a vote of nine to two<sup>53</sup> and adopting the majority quorum requirement by voice vote, after Randolph and Madison added language giving the houses the power to compel members to attend sessions when a quorum was lacking.<sup>54</sup> This section became Article I, Section 5, Clause 1 of the Constitution, as the Committee on Style reported it on September 12, 1787.<sup>55</sup>

### *B. The Debate and Rejection of a Supermajority Quorum Rule*

The Constitution's authors expressed their support for a majority requirement in another way as well: by opposing supermajority requirements in all but a few special cases.<sup>56</sup> During the Constitutional Convention and the ratification conventions, some delegates objected that a simple majority requirement was not high enough to protect American citizens from bad or hasty legislation. During

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49. *Id.* at 252. In the later eighteenth century, the term "Juncto," or "Junto," had a precise political meaning. It referred to a small group within a legislature that managed to wrest control of the administration of the state's government from the royally appointed executive. It was a term often used in combination with the similarly derisive term "faction." See RALPH VOLNEY HARLOW, *THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825*, at 49-60 (1917).

50. 2 *FEDERAL CONVENTION*, *supra* note 8, at 251-52.

51. *Id.* at 253.

52. *Id.*

53. *Id.*

54. *Id.* at 253-54.

55. *Id.* at 592.

56. See *infra* notes 70-77 and accompanying text.

debate over presidential veto power on August 15, 1787, Daniel Carroll of Maryland argued that the majority quorum requirement made it more important to have a strong executive negative power, because as few as seventeen representatives and eight Senators could take advantage of the majority quorum requirement and pass "improper laws."<sup>57</sup> The argument that the small size of the two houses, combined with the majority quorum requirement, empowered unrepresentative small groups to impose unfair laws on the people, featured prominently in Anti-Federalist criticisms of the Constitution. During the New York Convention, for example, the Anti-Federalist Melancton Smith used the small numbers needed to pass legislation to explain his belief that the proposed federal legislature would not "wear the complexion of a democratic branch."<sup>58</sup> He explained:

The whole number, in both houses, amounts to ninety-one; of these forty-six make a quorum; and twenty-four of those, being secured, may carry any point. Can the liberties of three millions of people be securely trusted in the hands of twenty-four men? Is it prudent to commit to so small a number the decision of the great questions which will come before them? Reason revolts at the idea.<sup>59</sup>

The response to these so-called "attenuated democracy" criticisms—that a simple majority quorum requirement would not be enough to protect citizens against bad laws—was that supermajority requirements actually had the effect of empowering a different kind of "junco," a small group of dissidents who could stymie a majority by depriving the house of a quorum. Madison and Hamilton both dedicated time to defending the size of the national legislature and to criticizing supermajority quorum requirements in the *Federalist*

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57. 2 FEDERAL CONVENTION, *supra* note 8, at 300.

58. 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 249 (photo. reprint 1987) (Jonathan Elliot ed., 2d ed. 1888) [hereinafter STATE CONVENTIONS].

59. *Id.* The widespread concern over the size of the federal legislature prompted the First Congress to ratify a constitutional amendment guaranteeing that the size of the houses would increase with the population. This original First Amendment to the Bill of Rights, however, fell short by one state for ratification. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1137-43 (1991).

*Papers*. In *Federalist No. 58*, Madison conceded that a supermajority quorum requirement might serve as “an additional shield to some particular interests, and another obstacle generally to hasty and partial measures.”<sup>60</sup> But he argued that the disadvantages of a two-thirds rule were greater than the advantages: if Congress required a two-thirds majority to do business, one-third of the Congress could effectively stymie the will of the other two-thirds through “the baneful practice of secessions,” by depriving the legislature of its ability to do business.<sup>61</sup> A simple majority requirement, Madison argued, encourages a minority to stay in the chamber and work to improve legislation. It diminishes a minority’s ability to extort concessions from the majority to pass the majority’s legislation.<sup>62</sup>

In *Federalist No. 22*, Hamilton bitterly attacked the legislative supermajority rules created by the Articles of Confederation. Having experienced such supermajority requirements first-hand as a New York representative in the Continental Congress, Hamilton wrote: “To give a minority a negative [i.e., veto] upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number.”<sup>63</sup> Making this same point in a different way during the New York ratifying convention, Hamilton argued that under a majoritarian scheme, “corruption must embrace a majority,” while under a supermajoritarian system, corruption’s “poison, administered to a single man, may render the efforts of a majority totally vain.”<sup>64</sup>

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60. THE FEDERALIST NO. 58, at 286 (James Madison) (Terence Ball ed., 2003).

61. *Id.* at 286-87.

62. *Id.* at 286. In a letter to Edward Everett in 1830, Madison opposed the so-called “Nullification Doctrine” (usually associated with Senator John Calhoun), which provided that a state could declare a federal law unconstitutional unless three-fourths of the states overrode this finding. Madison wrote: “But to establish a positive and permanent rule giving such a power, to such a minority, over such a majority, would overturn the first principle of free government, and in practice necessarily overturn the government itself.” JAMES MADISON, *Opposition to Nullification*, in THE COMPLETE MADISON: HIS BASIC WRITINGS 158 (Saul Padover ed., 1953).

63. THE FEDERALIST NO. 22, at 101 (Alexander Hamilton) (Terence Ball ed., 2003) (alteration in original).

64. 2 STATE CONVENTIONS, *supra* note 58, at 264. Madison employed this “a minority is easier to corrupt” argument during a late August debate in the Convention over Charles Pinckney’s proposal, offered on behalf of the southern states, that all laws regulating international commerce require two-thirds votes to pass. Madison observed “that the power of foreign nations to obstruct our retaliating measures on them by a corrupt influence would

When writing the *Federalist Papers*, Madison and Hamilton would have had a quorum-busting episode fresh in their minds: the legislative secession that had occurred in the Pennsylvania Assembly about a month after the close of the Constitutional Convention, an event that threatened to derail the ratification process. On September 28, 1787, by a vote of forty-three to nineteen, the Assembly passed a resolution calling for a state convention to consider the proposed Constitution.<sup>65</sup> When the Speaker tried to reconvene the house later in the day to pass legislation providing for the election of delegates to the Convention, he found a quorum was lacking because a group of western members who opposed the new Constitution had refused to return to the chamber. Because the full membership of the Assembly was sixty-eight and the state's constitution had a two-thirds quorum requirement, the present forty-four members were two short of a quorum to do business.<sup>66</sup> The members present in the chamber were outraged and expressed their regret that "our Journals are again to be stained by recording the conduct of an unmanly minority."<sup>67</sup> The next morning, a mob went to Major Boyd's Tavern and "forcibly dragged" two of the absent legislators, James M'Calmont and Jacob Miley, "through the streets of Philadelphia to the State House, and there detained [them] by force, and in the presence of the majority, who had, the day before, voted for the first of the proposed resolutions, treated [them] with the most insulting language."<sup>68</sup> With these two, forty-six members were present in the chamber; the Assembly had a quorum to do business, and it quickly passed the resolution.<sup>69</sup>

As this review of the historical evidence makes clear, the authors of the Constitution created a legislative branch that generally operated on a "bare majority" principle: when a majority of each house's members were present, a simple majority vote was enough to pass legislation.<sup>70</sup> As Justice Story remarked in his commentary,

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also be less if a majority shd be made competent than if 2/3 of each House shd. be required to legislative acts in this case." 2 FEDERAL CONVENTION, *supra* note 8, at 452.

65. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 94 (Merrill Jensen ed., 1976).

66. *Id.* at 95-96 & nn.1-2.

67. *Id.* at 98.

68. *Id.* at 114.

69. *Id.* at 103-10.

70. One scholar has explained the relationship between the bare majority requirement

the Constitution departs from “the general rule, of the right of a majority to govern,” in only a few, special cases.<sup>71</sup> The eight instances in which the Constitution requires supermajorities in the legislative process were carefully considered exceptions to the rule. The two-thirds vote requirement to expel members,<sup>72</sup> for example, came from the feeling that legislators had the right to protect their personal reputations from ephemeral partisan battles. Madison offered the amendment requiring this two-thirds vote because “the right of expulsion ... was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused.”<sup>73</sup> As discussed above, the two-thirds vote to override a presidential veto<sup>74</sup> was the conclusion of a long structural debate over the roles of the legislative and executive branches in the lawmaking process and the concern that a simple legislative majority might pass “improper laws.”<sup>75</sup> While the Framers decided that the executive should not have an “absolute negative” over congressional acts, they also thought Congress should have to demonstrate a higher degree of support for legislation the President

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to pass legislation and a majority quorum requirement:

In general, where the underlying voting rule is enactment by simple majority, there will be strong pressure to adopt a majority quorum requirement as well. If a minority cannot defeat an enactment on the merits, the intuition runs, why should the same minority be able to block an enactment by absenting themselves and thereby breaking the quorum?

Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 403 (2004).

71. 3 STORY, *supra* note 44, at 324. The fact that the Framers envisioned the House and Senate as majoritarian bodies does not prohibit those two bodies from adopting rules requiring supermajorities in certain cases, such as the Senate cloture rule or a House rule requiring a three-fifths vote to increase federal income tax rates, because such rules can be reversed by a simple majority of those bodies. See *Skaggs v. Carle*, 110 F.3d 831, 834-35 (D.C. Cir. 1997) (holding that members of the House do not have standing to bring suit against the House on the theory that a three-fifths voting requirement dilutes their vote because this three-fifths requirement can be repealed by a simple majority vote). See generally John O. McGinnis & Michael B. Rappaport, Essay, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995) (discussing with approval the three-fifths tax increase rule).

72. U.S. CONST. art. I, § 5, cl. 2.

73. 2 FEDERAL CONVENTION, *supra* note 8, at 254.

74. U.S. CONST. art. I, § 7. The Article I, Section 7, requirement for a two-thirds vote to override a presidential veto means two-thirds of the body empowered to act because a quorum is present, not two-thirds of the body's entire membership. *Mo. Pac. Ry. Co. v. Kansas*, 248 U.S. 276, 284-85 (1919).

75. See *supra* Part II.B.

opposed.<sup>76</sup> As James Wilson explained this provision during the Pennsylvania ratifying convention, if the President, who represents the “whole Union” of the United States, rejects a bill the Congress presents to him, then the Congress should have to meet a higher burden to enact the bill into law.<sup>77</sup>

*C. The Majority Quorum Requirement as a Fixed Constitutional Rule of Procedure*

The Constitutional Convention considered several different quorum rules, debating in some detail how the different schemes would affect the representative bodies they sought to create. Working in an era when the concept of “representative democracy” was much more controversial than it is today,<sup>78</sup> and anticipating that critics would focus on the small size of the two chambers, the Convention’s decision about where to set the quorum requirement was politically important.

Accordingly, the convention rejected the English Parliament model of a numerically small quorum, which would reduce the costs of doing business, but would not provide what they thought was an adequate representational guarantee. Under the English model, Story wrote, “the concerns of the nation might be decided by a very small number of the members of each body.”<sup>79</sup> The Constitution’s majority quorum requirement, on the other hand, “has secured the public from any hazard of passing laws by surprise, or against the

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76. As Hamilton explained it, the presidential qualified negative “establishes a salutary check upon the legislative body calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.” *THE FEDERALIST* NO. 73, at 358 (Alexander Hamilton) (Terence Ball ed., 2003).

77. 2 *STATE CONVENTIONS*, *supra* note 58, at 448. Wilson also pointed out that Article I, Section 7 contained the further procedural guarantee that votes to override presidential vetoes be recorded in the House and Senate journals. This public disclosure requirement would serve as a restraint on the legislative branch because people would know exactly which legislators to blame for a bad law. *Id.*

78. ROBERT A. DAHL, *ON DEMOCRACY* 103-05 (1998).

79. 3 *STORY*, *supra* note 44, at 296. As Vermeule, repeating the observation of Jeremy Bentham, points out, a constraint on minoritarian legislative action is the fact that a majority in the legislature can simply repeal or amend that action. It is not a perfect restraint, however, because there might be limitations on reconsideration and because the minoritarian action becomes the new status quo point, therefore becoming harder to alter. Vermeule, *supra* note 70, at 405-06.

deliberate opinion of a majority of the representative body.”<sup>80</sup> The majority quorum requirement was an important procedural assurance that fewer than a majority of representatives or senators, who could represent only one region or narrow interest of the American people, could not make decisions binding the whole nation.<sup>81</sup> While conceding that a supermajority quorum requirement would set a higher representational standard than a majority quorum, the Convention delegates rejected a supermajority quorum requirement after considering its higher costs and its potential to empower quorum busters.<sup>82</sup>

The Convention not only decided that the legislative branch should operate under a majoritarian regime; it also decided that this principle was so important that it should be included among the few fixed procedural rules in Article I of the Constitution. Because they felt a majority quorum requirement was a fundamental feature of the legislative branch, the Framers made it an organic, unalterable element of legislative procedure.<sup>83</sup> After considering several alternatives, the Framers decided that future Congresses should not have the ability to alter the quorum requirements because they would have a strong motivation to do so in favor of their party or faction.<sup>84</sup> Once Congress was created and legislators began to meet and pass laws, they would be tempted to alter quorum requirements to advance their short-term political goals. The Framers felt they were in a better position to develop a rule guaranteeing the basic

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80. 3 STORY, *supra* note 44, at 296. A prominent early commentator on the Constitution, St. George Tucker, described the majority quorum clause as

a provision of no small importance, since otherwise it is possible that the concerns of the nation might be decided by a very small portion of its representatives; if as has been done in other assemblies, the quorum were left to the decision of the body itself. In England, where there are near six hundred members in the house of commons, the number of 45 constitutes a quorum to do business. Is it possible that the nation can be represented by that number, whilst the elections stand upon their present footing?

2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA, ed. app. at 201-03 (Lawbook Exch. 1996) (1803).

81. See *supra* Part II.A.

82. See *supra* Part II.B.

83. Vermeule, *supra* note 70, at 366.

84. See *supra* notes 47-55 and accompanying text.



democratic operations of the two houses than the people who would operate within the system the Framers were creating.<sup>85</sup>

In his influential *Notes on the State of Virginia*, written during the Revolutionary War, Thomas Jefferson described a situation that he thought illustrated why it was a bad idea to give legislatures the power to alter their quorum requirements. Jefferson explained that under normal circumstances, the Virginia assembly operated under a majority quorum requirement, but had recently lowered its quorum number to forty members in the face of the “present dangerous invasion.”<sup>86</sup> He thought his legislators’ actions set a precedent that could be abused in the future. He explained:

They have been moved to this by the fear of not being able to collect a house. But this danger could not authorize them to call that a house which was none: and if they may fix it at one number, they may at another, till it loses its fundamental character of being a representative body.... From forty it may be reduced to four, and from four to one: from a house to a committee, from a committee to a chairman or speaker, and thus an oligarchy or monarchy be substituted under forms supposed to be regular.<sup>87</sup>

It is important to note that August 10, the day the Convention took up the quorum issue, was also the day it conducted an extensive debate on a fundamental, congressional structural issue that also produced a constitutionally fixed provision: the qualifications of members of Congress.<sup>88</sup> While the Committee of Detail draft contained sections setting out the qualifications of representatives and senators, it also contained a section—Article VI, Section 2—stating that the Congress “shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.”<sup>89</sup> This

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85. Vermeule, *supra* note 70, at 371.

86. JEFFERSON, *supra* note 36, at 251.

87. *Id.* In *Federalist No. 48*, Madison cited a long passage from the same chapter of Jefferson’s *Notes* explaining how the legislative branch in the Virginia government had encroached on the judicial and executive branches of the government. *THE FEDERALIST NO. 48*, at 242-43 (James Madison) (Terence Ball ed., 2003).

88. *Powell v. McCormack*, 395 U.S. 486, 533-36 (1969).

89. 2 *FEDERAL CONVENTION*, *supra* note 8, at 179.

section provoked a debate not only on the subject of property qualifications, but also a more general discussion on whether the legislature should have the ability to add to the basic three qualifications of age, citizenship, and residence.

One of the most interesting features of this debate was that delegates on opposite sides of the property qualification issue agreed that giving Congress the power to create property qualifications could produce undesirable outcomes. Charles Pinckney of South Carolina, a supporter of property qualifications, pointed out that if the first Congress was elected without property qualifications, then it would set property qualifications at the level most advantageous to itself.<sup>90</sup> If the first Congress “should happen to consist of rich men they might fix such ... qualifications as may be too favorable to the rich; if of poor men, an opposite extreme might be run into.”<sup>91</sup> Pinckney proposed establishing property qualifications in the Constitution to avoid this problem.<sup>92</sup>

Madison’s famous speech against this section comprehensively laid out the question of constitutionalizing rules versus leaving them up to future Congresses. The qualifications of electors and elected, Madison said, were “fundamental articles in a Republican Govt. and ought to be fixed by the Constitution.”<sup>93</sup> Giving legislators the power to alter the qualifications of people who could hold office gave them an incentive to devise rules that would favor their faction and exclude their opponents. Madison’s even more basic structural opposition to the section was that it would create a conflict of interest between a legislator and his constituents.<sup>94</sup> Rather than represent their constituents, legislators would devise qualification rules to entrench themselves in their offices and work for their own private interests; in this way they would “subvert the Constitution” and turn the country into an aristocracy or an oligarchy.<sup>95</sup> By voting to strip this section out of the Committee draft, the Convention reached the same conclusion it reached later that day on the quorum requirement: it fixed representatives’ qualifications in the

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90. *Id.* at 248.

91. *Id.*

92. *Id.* at 248-49.

93. *Id.* at 249-50.

94. *Id.* at 250.

95. *Id.* at 249-50.

Constitution rather than allow the federal legislature to modify qualifications as it saw fit.<sup>96</sup>

This debate over the qualifications clause is well known because it played a major role in the Supreme Court's opinion in *Powell v. McCormack*,<sup>97</sup> in which the Court ruled that the House of Representatives unconstitutionally blocked Representative Adam Clayton Powell from taking his seat in the Ninetieth Congress.<sup>98</sup> The people of the Eighteenth Congressional District of New York had reelected Powell in spite of the fact that a House subcommittee had determined that Powell had misused official funds.<sup>99</sup> But when the House refused to swear him in as a member of the Ninetieth Congress, the Court found the House had exceeded its power because "the Constitution leaves the House without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."<sup>100</sup>

*Powell's* extensive historical analysis of the qualifications debate during and after the Constitutional Convention<sup>101</sup> shows that Madison's and other delegates' strong feelings on this subject came from a well-known battle in the English Parliament over the expulsion and conviction of an elected member, John Wilkes, for attacking the English Crown's peace agreement with France.<sup>102</sup> Both the intent of the Framers and the "basic principles of our democratic system" convinced the Court that Congress did not have the "discretionary power" to deny a duly-elected member such as Representative Powell a seat in Congress.<sup>103</sup> In other words, the Court concluded in *Powell*, Congress has no power to alter rules that the Framers intended to be fixed and unalterable. While the Constitution gave the two legislative houses almost unlimited power to "determine the Rules of its Proceedings,"<sup>104</sup> it carefully created a

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96. See *supra* note 90 and accompanying text.

97. 395 U.S. 486 (1969).

98. *Id.* at 547-48.

99. *Id.* at 490.

100. *Id.* at 522.

101. "As this elaborate summary reveals, our historical analysis in *Powell* was both detailed and persuasive. We thus conclude ... that history shows that, with respect to Congress, the Framers intended the Constitution to establish fixed qualifications." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 792-93 (1995).

102. *Powell*, 395 U.S. at 527-31.

103. *Id.* at 548.

104. U.S. CONST. art. I, § 5, cl. 2; see *infra* Part IV.

small number of constitutionally fixed rules that would remain beyond the reach of future Congresses.

*D. The Majority Quorum Requirement in the Early Congresses*

The First Congress's records from early 1789 allow us to see how the Framers serving in that Congress treated the majority quorum rule they had debated and drafted in the summer of 1787. It is a well-settled principle that the way the First Congress applied constitutional provisions "is contemporaneous and weighty evidence of its true meaning."<sup>105</sup> As Chief Justice Taft explained in *Myers v. United States*,<sup>106</sup> courts owe special deference to the constitutional constructions of the First Congress, because that legislature contained "a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification."<sup>107</sup> It is a widely accepted rule, Taft explained, that "a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions."<sup>108</sup>

The opening of the First Session of the House of Representatives and Senate shows that the First Congress interpreted the Constitution's majority quorum requirement to mean that to do business, the houses needed the attendance of a majority of representatives from the whole number of seats created in the Constitution, a total of sixty-five House seats and twenty-six Senate seats.<sup>109</sup> In other words, for the purposes of determining the presence of a quorum, the Framers defined the "House" and the "Senate" according to their total number of authorized seats. Because Rhode Island and North Carolina had not yet ratified the Constitution in March 1789, the number of apportioned seats in the House was fifty-nine, a majority of which was thirty members.<sup>110</sup> On March 4, 1789, the first day of

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105. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)).

106. 272 U.S. 52 (1926).

107. *Id.* at 174.

108. *Id.* at 175.

109. U.S. CONST. art. 1, § 2, cl. 3 (House); U.S. CONST. art. 1, § 3, cl. 1 (Senate).

110. JOURNAL OF THE HOUSE OF REPRESENTATIVES, 1st Cong., 1st Sess. 3 (1826).

the Congress, only thirteen members appeared in New York.<sup>111</sup> The House Journal noted: "But a quorum of the whole number not being present, the House adjourned until to-morrow morning eleven o'clock."<sup>112</sup> Over the next several weeks, the journal dutifully recorded the new members who appeared in the chamber, noting that the House continued to adjourn for lack of a quorum.<sup>113</sup> On Saturday, March 14th, the House Journal records that three new members from Virginia, James Madison,<sup>114</sup> John Page, and Richard Bland Lee, "appeared and took their seats," but that the House adjourned for lack of a quorum.<sup>115</sup> Finally, on April 1, 1789, Representatives James Schureman from New Jersey and Thomas Scott from Pennsylvania appeared, bringing the total to thirty members, and finally, the journal noted that "a quorum, consisting of a majority of the whole number," was present.<sup>116</sup> The House then proceeded to elect a Speaker, Frederick Augustus Muhlenberg of Pennsylvania, who took the chair to preside over the House.<sup>117</sup>

In the Senate, the record is even clearer that the senators thought a quorum required the presence of senators representing a majority of the seats authorized by the Constitution. Because Rhode Island and North Carolina had not yet ratified the Constitution, there were twenty-two seats in the Senate on opening day of the First Congress.<sup>118</sup> There were only twenty *elected* senators, however,

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111. *Id.*

112. *Id.*

113. *Id.* at 4.

114. As Chief Justice Taft wrote in *Myers*, the First Congress was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instrument.

*Myers v. United States*, 272 U.S. 52, 174-75 (1926).

115. JOURNAL OF THE HOUSE OF REPRESENTATIVES, 1st Cong., 1st Sess. 4 (1826). On March 25, 1789, Representative Fisher Ames wrote in a letter: "[W]e have twenty-six representatives; and as thirty are necessary to make a quorum, we are still in a state of inaction. This is a very mortifying situation.... I am inclined to believe that the languor of the Old Confederation ... is transfused into the members of the new Congress." This letter is quoted in ROBERT V. REMINI, *THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES* 12 (2006).

116. JOURNAL OF THE HOUSE OF REPRESENTATIVES, 1st Cong., 1st Sess. 6 (1826).

117. REMINI, *supra* note 115, at 15.

118. 1 JOURNAL OF THE FIRST SESSION OF THE SENATE 5 (1789) [hereinafter *SENATE JOURNAL*].

because New York would not elect its senators until July 15, 1789.<sup>119</sup> On March 4, only eight senators appeared in New York City, six of whom had been Constitutional Convention delegates—John Langdon of New Hampshire, Caleb Strong of Massachusetts, William Johnson and Oliver Ellsworth of Connecticut, Robert Morris of Pennsylvania, and William Few of Georgia.<sup>120</sup> On March 11, these senators sent a letter to the twelve elected senators who had not yet arrived, urging them to come to New York, “[i]t being of the utmost importance that a quorum sufficient to proceed to business be assembled as soon as possible.”<sup>121</sup> A week later, they wrote their absent colleagues again, urgently requesting their “immediate attendance” so they would not disappoint the “anxious expectations” of the public.<sup>122</sup> Throughout the month, these senators would meet, then adjourn because a quorum was not present, even after March 28, the day the eleventh senator, Jonathan Elmer of New Jersey, appeared in New York.<sup>123</sup> The Senate only organized on April 6, the day the twelfth senator, Richard Henry Lee from Virginia, appeared; as the record notes, a quorum, “the whole number of Senators of the United States,” was present.<sup>124</sup>

This Senate record makes it clear that although the senators were eager to organize and proceed to business,<sup>125</sup> they thought that a quorum consisted of a majority of the total number of Senate seats, or twelve out of the total twenty-two seats, not the total number of elected senators, eleven out of the twenty elected seats.<sup>126</sup> If the senators in attendance, many of whom had helped draft and

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119. The newly elected senators from New York, Rufus King and Philip Schuyler, appeared in the Senate on July 25 and July 27, respectively, were sworn in, and took their seats. *Id.* at 69, 70.

120. 1 SENATE JOURNAL, *supra* note 118, at 5.

121. *Id.*

122. *Id.* at 6. As Vermeule points out, the First Congress was suffering from what he calls an “infinite regress” problem experienced by legislatures forming for the first time. Vermeule, *supra* note 70, at 368. The Constitution had created a mechanism to compel the attendance of members when a quorum was lacking, but that power could not be invoked until a quorum appeared. *Id.* at 368-69. In other words, the two houses were completely at the mercy of their colleagues to appear in sufficient numbers to do business. *Id.*

123. SENATE JOURNAL, *supra* note 118, at 7.

124. *Id.*

125. The Senate’s first order of business was to conduct a joint meeting with the House to count and certify the ballots electing George Washington as president and John Adams as vice president. *Id.*

126. *See supra* note 120.

approve the new Constitution under which they were operating, had viewed the quorum provision as requiring a majority of elected senators, they would have declared a majority present on March 28 and organized on that date.

The principle that quorums in the House and Senate consisted of a majority of the whole number of authorized seats appears to have been consistently observed in the pre-Civil War period. During a debate over the meaning of the Quorum Clause in the Thirty-seventh Congress on July 9, 1862, the President pro tempore of the Senate, Solomon Foot of Vermont, placed in the record a long memorandum asserting that "the House or the Senate, as bodies, are composed or constituted of the whole number of members to which the several States may or shall be entitled to have in those bodies respectively."<sup>127</sup> To prove that this principle was the "general practice" of the previous thirty-six Congresses,<sup>128</sup> Foot submitted to the record a list of numerous precedents demonstrating that the early Congresses based their quorum numbers on the majority of the whole number of seats, rather than on the number of actual members occupying those seats.<sup>129</sup>

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127. CONG. GLOBE, 37th Cong., 2d Sess. 3191-92 (1862).

128. *Id.* Foot added testimony as evidence of the practice of previous Congresses:

The Chair will further state, as a member of the body, and in his right as a Senator, that some ten or eleven years ago this very question was debated at length, and with great ability, by many of the oldest and ablest members of the body, by Mr. Clay, by Mr. Berrien, by Mr. Underwood, by Mr. Badger, and others, and it was decided by an emphatic vote that it required a majority of the whole number entitled to seats in the body to constitute a quorum. The Chair would follow that emphatic decision of the body since the present occupant of the Chair has been a member of it.

*Id.* at 3022. Writing in 1916, former Representative and House historian De Alva Stanwood Alexander wrote:

The important question is, therefore, what constitutes a majority? Speaker Clay held that it was one more than one half of all possible members. Thus, if an apportionment provided for a total of 400 members, 201 constituted a quorum. This ruling remained unquestioned until the Civil War deprived the House of many members.

DE ALVA STANWOOD ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 155 (1916).

129. CONG. GLOBE, 37th Cong., 2d Sess. 3191-92 (1862). Foot's memo was comprehensive and honest enough to include instances from the Seventh and Tenth Congresses in which the House appeared to have used not the whole number of seats, but the whole number of "qualified" seats, to determine a quorum. *Id.* at 3191. Foot characterized these episodes as "very few and detached exceptions, which should have no consideration or value in view of general practice." *Id.*

In his famous *Lex Parliamentaria Americana*, published in 1856, parliamentarian Luther Stearns Cushing wrote that the House and Senate were assemblies whose numbers were fixed by the Constitution, and therefore their quorums were determined according to “the number of which such assembly may consist and not the number of which it does in fact consist, at the time in question.”<sup>130</sup> Summarizing the quorum rules in the House and Senate, Cushing wrote:

Thus, in the senate of the United States, to which by the constitution each State in the Union may elect two members, and which may consequently consist of two members from each State, the quorum is a majority of that number, whether the States have all exercised their constitutional right or not. So, in the second branch of congress, in which, by the constitution, the whole number of representatives of which the house may consist is fixed by the last apportionment, increased by the number of members to which newly admitted States may be entitled, the quorum is a majority of the whole number, including the number to which such new States may be entitled, whether they have elected members or not, and making no deductions on account of vacant districts.<sup>131</sup>

One of the precedents Cushing cited came from House proceedings on June 5, 1848, the day a representative from the newly admitted State of Wisconsin appeared on the House floor.<sup>132</sup> The two new Wisconsin seats increased the number of seats in the House from 228 to 230, although three seats were vacant at the time.<sup>133</sup> After only 114 members voted on a motion to recommit a bill to the Judiciary Committee, Representative George Jones of Tennessee made a point of order that a quorum was not present.<sup>134</sup> After a discussion in which the Clerk of the House maintained that 114 was a quorum of the current number of 227 members, the Speaker,

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130. LUTHER STEARNS CUSHING, *ELEMENTS OF THE LAW AND PRACTICE OF LEGISLATIVE ASSEMBLIES IN THE UNITED STATES OF AMERICA* 100 (9th ed. 1874).

131. *Id.* (footnotes omitted). This passage was cited by Senator Charles Manderson of Nebraska during an 1893 debate on the quorum requirement. 25 CONG. REC. 2395 (1893).

132. CONG. GLOBE, 30th Cong., 1st Sess. 821 (1848).

133. *Id.*

134. *Id.*



Robert C. Winthrop of Massachusetts, ruled that a quorum would be 116, "not less than a majority of the whole number of members of which the House is composed," including the two new Wisconsin seats.<sup>135</sup>

### III. CIVIL WAR CRISIS AND THE RUPTURE WITH EARLIER PRACTICE

The early Congresses clearly understood the Constitution's quorum requirement to mean that a majority to do business in the House and Senate meant a majority of legislators from all of the extant seats in each chamber. In the mathematical terms some observers have employed to discuss legislative quorums, the denominators the First Congress used to determine the presence of a quorum were sixty-five for the House and twenty-six for the Senate.<sup>136</sup> The denominators the Second through Thirty-sixth Congresses used for this calculation were always, for the House, the legally apportioned number of seats and, for the Senate, twice the number of states currently admitted to the Union.

As a precedent, this consistent practice of the early Congresses carries decisive weight when interpreting the meaning of Article I, Section 5, Clause 1. But aside from the constitutional argument, it makes sense as a matter of policy. The majoritarian guarantee that the Framers deliberately built into the legislative structure would be undermined if members of the House and Senate had the ability to change the denominator to a number lower than the "whole number of members to which the several States may or shall be entitled."<sup>137</sup> The Framers quite intentionally fixed the majority quorum requirement in the Constitution to insulate it from the manipulations of future Congresses. As this Part will demonstrate, however, the Civil War Congresses dramatically broke with this principle and later Congresses have followed their example.

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135. JOURNAL OF THE HOUSE OF REPRESENTATIVES, 30th Cong., 1st Sess. 876 (June 8, 1848).

136. See *supra* Part II.D.

137. CONG. GLOBE, 37th Cong., 2d Sess. 3191 (1862).

*A. Change in the House*

Congress's reading of the quorum requirement abruptly changed during the Civil War years, when state secessions placed great strains on the operations of the House and the Senate. After eleven states seceded from the Union in late 1860 and early 1861 and did not send representatives or senators to the Thirty-seventh Congress,<sup>138</sup> the two chambers found it difficult to muster a majority of the full number of those bodies if they included the seats to which the seceding states were entitled. For example, while the full, apportioned number of seats in the House of Representatives in the Thirty-seventh Congress was 238,<sup>139</sup> the First Session of that Congress had 183 elected members.<sup>140</sup> A quorum based on the full number of apportioned seats would have been 120 seats, or sixty-six percent of the elected members, while a majority of the *elected* Representatives would have been ninety-two.<sup>141</sup> In other words, a quorum based on the majority of all apportioned House seats would have actually required a two-thirds supermajority of elected representatives.

The Republican leaders of the Thirty-seventh Congress were stuck. For obvious political reasons, the House and Senate could not reduce the total number of apportioned seats; that would have been tantamount to admitting that the eleven southern states had the power to secede and were no longer part of the Union. But they were having very practical problems assembling groups large enough to meet the constitutional quorum requirement as it had been consistently applied in the First through Thirty-sixth Congresses.<sup>142</sup>

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138. See STEPHEN G. CHRISTIANSON, *FACTS ABOUT CONGRESS* 154 (1996).

139. After the Seventh Census in 1850, the apportioned number of seats was 234, to which was added Minnesota (2 seats) in 1858, Oregon (1 seat) in 1859, and Kansas (1 seat) in 1861. U.S. GOVT. PRINTING OFFICE, *CONG. DIRECTORY*, 108th Cong. 543 (2003). The eleven seceding states were apportioned fifty-nine of these seats, although a few representatives from these states appeared for the Thirty-seventh Congress. CHRISTIANSON, *supra* note 138, at 154.

140. *CONG. GLOBE*, 37th Cong., 1st Sess. 210 (1861). A later scholar has concluded that the Thirty-seventh Congress "eventually consisted of 181 seats." LEONARD P. CURRY, *BLUEPRINT FOR MODERN AMERICA: NONMILITARY LEGISLATION OF THE FIRST CIVIL WAR CONGRESS* 34 (1968).

141. *CONG. GLOBE*, 37th Cong., 1st Sess. 210 (1861).

142. Scholars have noted that because they held only forty-four seats in the Thirty-seventh Congress, House Democrats were completely powerless and had high rates of absenteeism, which would have only exacerbated House leaders' concerns about establishing a quorum. See

A few months earlier, Lincoln had concisely explained the broader political dilemma to his aide, John Hay. The central question raised by the secession crisis, he said, was "whether in a free government the minority have the right to break up the government whenever they choose."<sup>143</sup> The ad hoc solution congressional leaders developed in the Civil War years was to change the definition of the House and the Senate from all the seats to which the states were entitled to the total number of members elected to the House and Senate. In other words, the "House" and "Senate" were no longer defined as chambers with a statutorily fixed number of seats, but rather as chambers made up of a constantly fluctuating number of representatives.

During the Special War Session called in the summer of 1861, the problem came to a head in the House of Representatives during a procedural vote on a joint resolution creating a board to oversee the United States Naval Academy.<sup>144</sup> The motion to second the previous question prevailed on a vote of fifty-two to forty-one, a total number of votes well below 120.<sup>145</sup> After the vote result was announced, Representative Clement Vallandigham, a so-called "Peace Democrat" from Ohio, made a point of order that a quorum had not voted.<sup>146</sup> The Speaker of the House, Galusha Grow of Pennsylvania, then had the Clerk read Article 1, Section 5, Clause 1 of the Constitution, followed by Article 1, Section 2, stating that "[t]he House of Representatives shall be composed of members chosen every second year by the people of the several States."<sup>147</sup> From these provisions, Grow reasoned that in the Thirty-seventh Congress, the House consisted of 183 "chosen" members and that a quorum of the House was therefore ninety-two members, a majority of which would be forty-seven.<sup>148</sup> As the House Journal recorded, "[t]he

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JOEL H. SILBEY, *A RESPECTABLE MINORITY: THE DEMOCRATIC PARTY IN THE CIVIL WAR ERA, 1860-1868*, at 50-51 (1977).

143. *INSIDE LINCOLN'S WHITE HOUSE: THE COMPLETE CIVIL WAR DIARY OF JOHN HAY* 20 (Michael Burlingame & John R. Turner Ettlinger eds., 1997).

144. See *CONG. GLOBE*, 37th Cong., 1st Sess. 210.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* There does not appear to be an empirical study of how often the Civil War House actually acted with fewer than 120 representatives after it adopted this rule change. The Reconstruction Congresses faced an analogous issue during the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. See generally John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001) (discussing the ratification process

Speaker decided that, inasmuch as ninety-two members constituted a majority of the members *chosen*, a quorum had voted.<sup>149</sup> The Speaker's ruling was not challenged and business continued.

### *B. Change in the Senate*

While the House changed its long-standing interpretation of the Quorum Clause with little debate in the course of a mundane procedural vote, the Civil War Era Senate altered its interpretation of the quorum rule only after several votes, and a long, spirited debate extending over several years. In the Senate of the Thirty-seventh Congress, twenty-four of the thirty-four states had sent senators, which meant that of the fifty-one elected senators, thirty-five senators, or almost seventy percent, had to be present to conduct business.<sup>150</sup>

During the Second Session of this Congress in 1862, Republican Senator John Sherman of Ohio introduced a resolution stating "[t]hat a majority of the Senators duly elected and entitled to seats in this body is a constitutional quorum."<sup>151</sup> After being unfavorably reported from the Senate Judiciary Committee, Sherman brought his resolution up on the Senate floor for debate in late June and early July of 1862.<sup>152</sup> Sherman and other supporters of the rule change openly admitted the reason for the proposal was that the number of senators present and able to conduct business was

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of the Thirteenth, Fourteenth, and Fifteenth Amendments). The difficult question at that time was, under the Article V ratification process, should the post-War southern governments be counted for the purposes of determining when three-fourths of the states had ratified these amendments? While some congressional leaders argued that the southern states were "conquered provinces" and should not be included in the denominator, others argued they should be included in the denominator only after they had formed new post-rebellion governments. *Id.* at 390-93. The solution adopted was to include the rebel states for the purposes of calculating three-fourths state ratification. *Id.* at 398. At the same time, Congress also made it clear to the rebel states that it would recognize their new governments on the condition that they ratify these constitutional amendments. *Id.* at 406.

149. JOURNAL OF THE HOUSE OF REPRESENTATIVES, 37th Cong., 1st Sess. 117 (1861).

150. Included in the total number of elected senators are the single senator from Tennessee (future president Andrew Johnson) and the two senators from nonsecessionist Virginia (current day West Virginia), who were of dubious legal status. CHRISTIANSON, *supra* note 138, at 154.

151. CONG. GLOBE, 37th Cong., 2d Sess. 3021 (1862).

152. *Id.*

perilously close to thirty-five senators.<sup>153</sup> Sherman stated that “[t]he condition of the Senate is such that I am satisfied any casualty would prevent us doing business under the present practice.”<sup>154</sup> He observed that there were only thirty-seven senators “accessible” in Washington and that “two or three are sick, several have gone away, and others desire to go.”<sup>155</sup> Under the current circumstances, he was very concerned that a small group of senators, even from a small state like Delaware or Rhode Island, could take advantage of this situation, depart the Senate and deprive the chamber of its ability to do business.<sup>156</sup> Acquiescing in the principle that a quorum is thirty-five senators, he argued, would mean “[a] very small minority of the people of the United States might break up the Government.”<sup>157</sup> Citing the 1861 House ruling, he argued that changing the quorum requirement was constitutionally defensible and was also justified “on the simple ground of absolute necessity.”<sup>158</sup>

On the constitutionality of the change, Sherman acknowledged it had been the practice since the First Congress that the secretary of the Senate “always fixes the number of the quorum at the commencement of the session, taking the whole number who could be possibly elected, and taking the majority of that number; and that has been acted upon rather by consent, by silence, as the quorum.”<sup>159</sup> But, he argued, it was an arbitrary rule and must now be changed to address the new circumstances. It was a workable rule in a Senate where all states sent senators and there were a few vacancies at one time, but now must be changed. “In my judgment,” Sherman continued, “if you recognize the doctrine that it requires a majority of all who might constitute the Senate, two from each state, to make a quorum, you will break up the Senate, as you certainly would have broken up the House of Representatives.”<sup>160</sup>

To further explain his reading of the Quorum Clause, Sherman took up the provision in Article I, Section 5, Clause 1 allowing a number of senators smaller than a quorum to “adjourn from day to

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 3190.

157. *Id.* at 3022.

158. *Id.*

159. *Id.* at 3190.

160. *Id.* at 3022.

day” and to “compel the attendance of the absent members in such a manner and under such penalties as each House may provide.”<sup>161</sup> The intent of this provision was to give members present in a house the power to bring absent members back to the chamber in order to make a quorum to conduct business. But the current problem, Sherman argued, is not absent members, but nonexistent members. He asked: “Can we compel the attendance of men who are not elected? Many of those States have no Senators. They have not been elected. They have failed to elect them for reasons that we know very well. How can we who are here, compel their attendance?”<sup>162</sup> After a long debate, during which the acting President pro tempore of the Senate, Solomon Foot of Vermont, inserted a detailed analysis of quorum practices in the House and Senate from the First Congress to the Thirty-sixth,<sup>163</sup> the Senate voted to table Sherman’s resolution by a vote of nineteen to eighteen.<sup>164</sup>

Two years later, during the First Session of the Thirty-eighth Congress, Sherman brought up his resolution again and the Senate again engaged in a long, passionate debate on the meaning of the Quorum Clause.<sup>165</sup> It is obvious from the records that in this period, the Senate was having a difficult time mustering a quorum based on the whole number of Senate seats. Senator Reverdy Johnson of Maryland supported the rule change, arguing there was a fundamental difference between an absent member, the type addressed in the constitutional quorum provision, and the vacant seats created by states not willing to send senators.<sup>166</sup> Speaking specifically to the first southern state that had seceded, Johnson asked what harm proceeding with a lower quorum would do the people of South Carolina: “What injustice is to be done them? Who keeps South Carolina from electing her Senators?”<sup>167</sup>

Leading the debate against the rule change was Senator John Davis of Kentucky, who cited the Constitutional Convention debates, Senate tradition, and the importance of certainty in the

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161. *Id.* at 3190 (quoting U.S. CONST. art. I, § 5, cl. 1).

162. *Id.* at 3022.

163. *See supra* notes 127-29 and accompanying text.

164. CONG. GLOBE, 37th Cong., 2d Sess. 3194 (1862).

165. CONG. GLOBE, 38th Cong., 1st Sess. 2085 (1864).

166. *Id.*

167. *Id.*

legislative process to argue that the constitutional quorum provisions required the attendance of senators from a majority of all possible Senate seats.<sup>168</sup> After reviewing the Constitutional Convention debates from August 10, 1789, Davis concluded:

The reasonable presumption is that the Convention did not intend that a *cabal* of both or either House of Congress should ever exercise so much of the legislative powers of the Government; and therefore required the quorum of both to do business to be a majority of the *whole number* of its members. It intended further that it should be certainly known at all times and beyond doubt or contingency what the quorum of each successive Senate and House was; so that less than that quorum might not from inadvertence or ignorance upon any question of the number of the members of either House undertake at any time to transact business.<sup>169</sup>

Unlike the quorum debate two years earlier, the Senate voted for the rule change by a margin of twenty-six to eleven, which in its final form, resolved “[t]hat a quorum of the Senate consists of a majority of the Senators duly chosen.”<sup>170</sup> Four years later, apparently to block senators chosen by the illegally reconstructed governments of several southern states,<sup>171</sup> the Senate modified this rule to read that a quorum consists of a majority of the senators “duly chosen and sworn.”<sup>172</sup> That modification is currently codified in the first paragraph of Senate Rule VI.<sup>173</sup>

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168. *Id.* at 2082-83.

169. *Id.* at 2083.

170. *Id.* at 2087.

171. IV ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 2892 (1907).

172. CONG. GLOBE, 40th Cong., 2d Sess. 1628 (1868); *see also* ALEXANDER, *supra* note 128, at 155 (discussing the purpose of the language “duly chosen and sworn”).

173. STANDING RULES OF THE SENATE, S. DOC. NO., 106-15 (2000); FLOYD M. RIDDICK & ALAN S. FRUMIN, RIDDICK'S SENATE PROCEDURE 1039 (1992). The Senate debated this question again in 1893, during a contentious all-night debate on silver legislation. In the course of the debate, Senator Edward Wolcott of Colorado made a point of order that a quorum was not present when forty-three senators answered the quorum call. The Senate at that time consisted of eighty-eight seats (a majority of which was forty-five), but the Senate's “duly chosen and sworn” rule set the quorum number instead at forty-three since three of the seats were currently vacant. After the vice president (Adlai Stevenson of Illinois) ruled that forty-three senators satisfied the quorum requirement, Senator Wolcott appealed the ruling of the chair. His appeal lost by a vote of thirty-eight to five. 25 CONG. REC. 2396 (1893).

*C. The Continuing Evolution of the House Quorum Rules*

Speaker Grow's 1861 ruling that, for the purposes of determining a quorum, the House of Representatives consisted of all "chosen" members, was observed until 1890. During a dispute over a contested election in the famously fractious Fifty-first Congress, Republican Speaker Joseph Reed interpreted Grow's "those chosen" to mean those members "chosen and living" so the House could conduct business during a Democratic walkout.<sup>174</sup> Fifteen years later, on a day he was several members short of his quorum number of 193, Speaker Joseph Cannon reexamined the Civil War Era debates in the House and Senate and the later precedents.<sup>175</sup> He issued a new ruling that "after the House is once organized a quorum consists of a majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House."<sup>176</sup> This new formulation allowed him to remove from his denominator two members who had been elected but not yet sworn in, and one member who had resigned, and thereby determine that the 191 members present on the House floor were a quorum.<sup>177</sup> This so-called "Joe Cannon Precedent of 1906" continues to be the rule in the modern House of Representatives and became part of the standing House Rules in the 109th Congress.<sup>178</sup>

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174. The "chosen" standard resulted in a quorum of 166 members (the total number of apportioned seats in that Congress was 330), while the "chosen and living" standard required a quorum of only 164 since four members had died. 21 CONG. REC. 10234-35 (1890). Republican representative, and future president, William McKinley of Ohio accused the Democratic floor leader Charles Crisp of Georgia of holding 100 members off the floor to halt business. *Id.* at 10234. Other Republicans insulted these Democratic members by calling them "secessionists." *Id.* at 10234-36. The day before this exchange, Democratic representative C. Buckley Kilgore of Texas literally kicked down a door to the House chamber to escape a quorum call ordered by Speaker Reed, which earned him the nickname "Kicking Buck Kilgore." WILLIAM A. ROBINSON, THOMAS B. REED: PARLIAMENTARIAN 248 (1930). Although Speaker Reed did not change the precedent during a lengthy debate on September 19, 1890, six months later he inserted a statement declaring that the proper interpretation of the 1861 "those chosen" Speaker Grow precedent was members who were both elected and living. 22 CONG. REC. 3815 (1891). As noted in Part IV of this Article, the *Ballin* decision was the result of another Democratic walkout during a different contested election fight in the closely divided Fifty-first Congress.

175. 40 CONG. REC. 5354 (1906).

176. *Id.*

177. *Id.*

178. HOUSE RULES, *supra* note 14, Rule XX, cl. 5(c)(7)(B).



In the 108th Congress, as part of its effort to address post-9/11 “continuity” issues, the House adopted a standing rule formalizing the practice that had developed since Speaker Grow’s 1861 ruling in which the Speaker periodically adjusts the “whole number of the House” to reflect “the death, resignation, expulsion, disqualification, or removal of a Member.”<sup>179</sup> This adjustment to the denominator has the effect of lowering the number of members needed to make a quorum. For example, when Representative Christopher Cox resigned his seat to head the Securities and Exchange Commission on September 2, 2005, the Speaker pro tempore announced to the House that he had lowered the “whole number of the House” to 433.<sup>180</sup> Immediately after Representative John Campbell, who was elected in a special election to replace Cox in California’s 48th District, was sworn in on December 7, 2005, the Speaker announced he had increased the “whole number of the House” back up to 434.<sup>181</sup>

#### *D. The Constitutional Significance of the New Quorum Rules*

Earlier sections of this Article demonstrated that the intention of the Framers—as it can be discerned from their deliberations, from the practices of the early Congresses, and from the text of the Constitution itself—was that a quorum was to be based on the House and Senate as institutions, rather than on the fluctuating numbers of people serving in them at any given moment.<sup>182</sup> This Part has shown that during the constitutional and political crisis of the Civil War Era, Congress switched from an institutional definition of the House and Senate to a personal one. This new definition of the House and Senate, which is the standard both chambers use in their current practices, was based on the number of people actually occupying seats in those two bodies, usually a number slightly lower than the number of all possible seats. Although the legislators who made this fundamental change in

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179. RULES OF THE HOUSE OF REPRESENTATIVES, 108TH CONG. (2003) Rule XX, cl. 5(c), recodified as Rule XX, cl. 5(d) in the rules of the 109th Congress, with additional language clarifying that the swearing in of a new representative also allows the Speaker to adjust the number of the whole House. HOUSE RULES, *supra* note 14, Rule XX, cl. 5(d).

180. 151 CONG. REC. H7616 (daily ed. Sept. 2, 2005).

181. *Id.* at H11187 (daily ed. Dec. 7, 2005).

182. *See supra* Part II.

practice said they were forced to do so by “absolute necessity,” their reading of Article I, Section 5, Clause 1 was incorrect and later Congresses have incorrectly followed it.<sup>183</sup>

During the Civil War and Reconstruction periods, the United States government was under severe stress and took actions that in hindsight appear to be extraconstitutional. Before he convened the Special Session of 1861, President Lincoln increased the size of the army without authorization, spent money that was not appropriated by the Congress, and suspended the right of habeas corpus.<sup>184</sup> As one later scholar of the era observed, “the Civil War stands out as an eccentric period, a time when constitutional restraints did not fully operate and when the ‘rule of law’ largely broke down.”<sup>185</sup> A significant part of *Powell*, for example, was its finding that, during the Reconstruction period, the House unconstitutionally rejected otherwise qualified members of Congress from former states of the Confederacy on the basis that they had given “aid and comfort” to the enemy.<sup>186</sup> As reviewed earlier in this Part,<sup>187</sup> the 1868 Senate rule change, from “chosen” to “chosen and sworn,” appears to be part of an effort to avoid seating otherwise qualified senators.

In an analogous case reexamining a statute dating from the Reconstruction period,<sup>188</sup> the Supreme Court held that, during the

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183. Looking back on the Senate debates that led to the quorum rule change in 1864, Senator Charles Manderson of Nebraska argued in 1893 that prior to the Civil War, the Quorum Clause had always been interpreted to require a majority from all seats in the Senate. He said:

This language is exceedingly plain, and it is supported by all the early decisions ... in the two Houses of Congress. It continued as the measure of the quorum until the rule which has been read was adopted, after considerable debate, on the 4th day of May, 1864. The circumstances of that time are recalled by the mere mention of the date. Both Houses of Congress were under great stress. Certain states had seceded from the Union; they were without representation in either House of Congress; and it was under the stress of the great necessity that the constitutional provision should receive strain that this rule was adopted.

25 CONG. REC. 2395 (1893). Manderson conceded that since that time, the Senate had consistently applied the “duly chosen and sworn” rule, but also pointed out that “if the rule of the Senate as read is in contravention of the constitutional provision, then, of course, it falls to the ground.” *Id.*

184. JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 514 (rev. ed. 1964).

185. *Id.* at 521.

186. *Powell v. McCormack*, 395 U.S. 486, 544 (1969).

187. See *supra* notes 170-73 and accompanying text.

188. *Myers v. United States*, 272 U.S. 52 (1926).

furious battle over President Andrew Johnson's attempt to remove Secretary of War Edwin Stanton, the Fortieth Congress had unconstitutionally passed the Tenure of Office Act and other laws attempting to restrict the President's ability to dismiss executive branch officials.<sup>189</sup> After examining the Article II grant of executive power to the President, which included a review of how the First Congress treated the President's right to dismiss officials, Chief Justice Taft concluded that the consistent practices of the early Congresses trumped the actions of a single Congress acting in the heat of the Reconstruction controversy:

The extremes to which the majority in both Houses carried legislative measures in that matter are now recognized by all who calmly review the history of that episode in our Government, leading to articles of impeachment against President Johnson, and his acquittal. Without animadverting on the character of the measures taken, we are certainly justified in saying that they should not be given the weight affecting proper constitutional construction to be accorded to that reached by the First Congress of the United States during a political calm and acquiesced in by the whole Government for three-quarters of a century ....<sup>190</sup>

Reserving judgment about whether changing the quorum requirement was an absolutely necessary step to allow the legislative branch to continue operating during the Civil War, it was clearly a break with the practice of the First through Thirty-sixth Congresses and with the intentions of the Framers of the Constitution. Supporters of the change admitted at the time that their construction of the constitutional quorum provision did not accord with that of the First Congress, a construction that had then been "acquiesced in by the whole Government for three-quarters of a century."<sup>191</sup> Their argument boiled down to the contention that there was more

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189. *Id.* at 163-64.

190. *Id.* at 175-76; see also *Raines v. Byrd*, 521 U.S. 811, 826-28 (1997) (discussing the historical background of the *Myers* decision).

191. *Myers*, 272 U.S. at 176. A useful contrast to this rupture in practice is the continuous congressional assertion of the power (implied in its legislative power) to conduct oversight on the executive branch. The fact that the early Congresses asserted this power and later Congresses followed them without disruption carries decisive weight in a court's assessment of this power. See *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

than one proper way to read the constitutional quorum provision and that the houses were within their powers to choose a different construction than that which the First through Thirty-sixth Congresses had chosen.

This Article has already argued that the novel construction of the majority quorum requirement legislators devised during the Civil War was incorrect. The next Part will examine the congressional rule-making power and show that it does not give the House and Senate the power to reinterpret constitutionally fixed procedural rules. In other words, the actions of the Thirty-Seventh through 109th Congresses to break with the original construction of the Article I, Section 5, Clause 1 quorum requirement are unconstitutional, and the two chambers' long acquiescence in the practice of defining the houses in terms of their elected members does nothing to justify them. As the *Powell* Court pointed out, a series of congressional precedents has little or no value when those precedents do not comply with the Constitution: "That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."<sup>192</sup>

#### IV. BALLIN AND THE OUTER LIMITS OF THE CONGRESSIONAL RULE-MAKING POWER

As the Civil War Congresses struggled to function when the southern states were not electing members, the crux of the question legislators faced was whether their constitutional rule-making power covered their novel interpretation of the Quorum Clause. Policymakers face the same question today as they think about how Congress would function in the aftermath of an attack that radically diminished the size of Congress: How far can Congress exercise its rule-making powers before it bumps up against constitutionally established procedural provisions that it lacks the power to change? While some scholars and legislators argue for broad "flexibility" in where the line should be drawn,<sup>193</sup> the answer this Article offers is

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192. See *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969).

193. As Professor Walter Dellinger has expressed this idea, "the Constitution is flexible enough to permit a number of different formulas for determining a quorum—and the fact that Congress is empowered by the rulemaking clause to adopt a relatively strict version of the rule does not mean that it is prohibited from adopting a looser version." *Continuity of*

that the Civil War Era legislators, and the legislators who have followed their interpretation of the Quorum Clause, went too far; they altered a constitutional procedural rule that the Framers clearly intended to be fixed once and for all in the Constitution. The practice of defining the House and Senate in terms of the elected members of those two bodies is not consistent with Article I, Section 5, Clause 1 of the Constitution. A closer examination of the Congressional rule-making power will help clarify this point.

Article I, Section 5, Clause 2 of the Constitution gives both the House and the Senate the power to “determine the Rules of its Proceedings.”<sup>194</sup> It was not a controversial principle at the time of the Constitutional Convention that each chamber should have the ability to adopt rules binding on its members. As Justice Story wrote, “[t]he humblest assembly of men is understood to possess this power; and it would be absurd to deprive the councils of the nation of a like authority.”<sup>195</sup> Over the two centuries since that time, each chamber has developed complex standing rules and precedents to govern its proceedings. Under normal circumstances, in light of the Constitution’s clear textual commitment to the Congress of power to govern its own affairs and out of deference to a coordinate branch of government, the judicial branch carefully refrains from interpreting or ruling on the houses’ procedures.<sup>196</sup> As the Supreme Court noted in *Christoffel v. United States*, “[c]ongressional practice in the transaction of ordinary legislative business is of course none of our

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*Congress: An Examination of the Existing Quorum Requirement and the Mass Incapacitation of Members: Hearing Before the H. Comm. on Rules*, 108th Cong. 34 (2004) [hereinafter *House Continuity Hearing*], available at <http://www.rules.house.gov/jccos/95-383.pdf> (statement of Prof. Walter Dellinger). Another policy justification for such flexibility is an argument similar to the one used during the Civil War Congresses: if a small “rump Congress” cannot act in the aftermath of an attack, then the attackers have won. See Howard M. Wasserman, *Continuity of Congress: A Play in Three Stages*, 53 CATH. U. L. REV. 949, 963 (2004). According to another theory, the source of a rump Congress’s power to act would come from both its rule-making power and from its Article I, Section 4 power to regulate the “Times, Places, and Manner” of congressional elections. Paul Taylor, *Alternatives to a Constitutional Amendment: How Congress May Provide for the Quick, Temporary Filling of House Member Seats in Emergencies by Statute*, 10 J.L. & POL’Y 373, 378-80 (2002).

194. U.S. CONST. art. I, § 5, cl. 2.

195. 3 STORY, *supra* note 44, at 298.

196. *Yellin v. United States*, 374 U.S. 109, 143 (1963) (White, J., dissenting) (“The role that the courts play in adjudicating questions involving the rules of either house must of necessity be a limited one, for the manner in which a house or committee of Congress chooses to run its business ordinarily raises no justiciable controversy.”).

concern.”<sup>197</sup> Even when congressional proceedings affect the rights of people who are not members of Congress, courts must give great weight to the chambers’ interpretations of their own rules.<sup>198</sup> In certain extraordinary cases, however, courts have heard cases in which the exercise of the congressional rule-making power bumps up against other constitutional principles. In *Christoffel*, for example, the United States Supreme Court heard a case in which congressional committee procedure played a key role in a criminal indictment.<sup>199</sup> In a more recent case, courts heard a constitutional challenge to a House of Representatives rule granting limited voting rights to delegates from U.S. territories.<sup>200</sup>

The case in which the Supreme Court made its most extensive analysis of the nature and limitations of the congressional rule-making power was the case of *United States v. Ballin*,<sup>201</sup> a late nineteenth-century case that coincidentally involved the constitutional quorum requirement. The origin of this case was a quorum-busting technique, sometimes called a “filibuster,” that both parties used in that era to halt business in the House.<sup>202</sup> Under the House rules at that time, the Speaker established the presence of a quorum through counting the voting members. In an era of a closely divided House, members of a “factional minority” could refuse to vote on certain measures, which forced the majority party to produce all of its members or else fail to establish a quorum to do business. The issue came to a head after the 1888 elections, when Republicans won the majority for the first time in fourteen years. The new Speaker of the Fifty-first Congress, Thomas B. Reed of Maine, found himself in the position of having 166 Republican members, the exact

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197. 338 U.S. 84, 88 (1949).

198. *United States v. Smith*, 286 U.S. 6, 33 (1932); see *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1168 (D.C. Cir. 1983) (dismissing suit by House members over committee assignment rules out of “prudential and separation-of-powers concerns,” even though the suit was a justiciable controversy).

199. *Christoffel*, 338 U.S. at 88.

200. *Michel v. Anderson*, 14 F.3d 623, 632 (D.C. Cir. 1994).

201. 144 U.S. 1 (1892).

202. The use of this tactic in the House of Representatives appears to go back as far as the 1830s. SARAH H. BINDER, *MINORITY RIGHTS, MAJORITY RULE: PARTISANSHIP AND THE DEVELOPMENT OF CONGRESS* 31 (1997). According to Alexander, John Quincy Adams was the first representative who refused to answer a call to vote on a motion. ALEXANDER, *supra* note 128, at 158.

number needed to satisfy the quorum requirement.<sup>203</sup> Democrats could halt business in the House by simply refusing to vote and requiring the Republicans to establish a quorum with their members alone. On January 29, 1890, Democrats halted business on a contested election case by remaining silent to defeat the quorum requirement.<sup>204</sup> Speaker Reed retaliated by announcing the names of members "present and refusing to vote," thus establishing that a majority of the House was present and the House was thereby able to conduct business.<sup>205</sup> Speaker Reed's famous interpretation of the quorum rule became "Rule XV" in the Fifty-first Congress, the constitutionality of which became the central issue in *Ballin*.<sup>206</sup>

*Ballin's* factual basis was a tariff law the House passed later in 1890 under Speaker Reed's new quorum-counting rule.<sup>207</sup> The plaintiff in the case was a New York merchant who had imported worsted wool fabrics subject to that law. It had passed by the House by a vote of 138 to none, with the Speaker noting, in accordance with the new Rule XV, that 74 members were in the chamber but not voting, which brought the total number of lawmakers present to 212, a figure well above the 166 members needed to make a quorum.<sup>208</sup> The merchant challenged the tariff as illegal, arguing that it had not legitimately passed the House because a quorum had not been present to do business.<sup>209</sup> The Circuit Court in the Southern District of New York held that the tariff had not been properly passed and the United States appealed to the Supreme Court.<sup>210</sup>

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203. Joseph G. Cannon, *Dramatic Scenes in My Career in Congress. II - When Reed Counted a Quorum*, 140 HARPER'S MAG. 433, 434 (1920).

204. *Id.*

205. 21 CONG. REC. 949-51 (1890).

206. This provision is currently codified at HOUSE RULES, *supra* note 14, Rule XX, cl. 4(b). Speaker Reed's ruling occurred in a period before the House had adopted rules for the Fifty-first Congress and was therefore operating under "general parliamentary law." The House only adopted its rules package (the famous "Reed's Rules") a few weeks later, on February 14, 1890. ROBINSON, *supra* note 174, at 231.

207. *United States v. Ballin*, 144 U.S. 1, 3 (1892).

208. *Id.* at 3-4. As was discussed *supra* Part III.C, later in that same year, Speaker Reed created a new "chosen and living" quorum standard in response to another Democratic walkout during a contested election fight.

209. *Ballin*, 144 U.S. at 3.

210. *Id.* at 2-3.

In an opinion authored by Chief Justice Brewer, the Supreme Court reversed the lower court and ruled that Speaker Reed's rule change was a valid exercise of the House's rule-making power.<sup>211</sup> Key to the Court's analysis was its distinction between the constitutional requirement for a quorum to do business and the House's power, deriving from its rule-making power, to adopt any reasonable method it desired that would be "reasonably certain" to determine whether a quorum was present.<sup>212</sup> Just because there might be a better way to count a quorum, or because the House had used a different counting method for a long period of time, did not mean the House lacked the power to adopt a different counting method. The Court wrote:

It is no objection to the validity of a rule that a different one has been prescribed and in force for a length of time. The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house ... absolute and beyond the challenge of any other body or tribunal.<sup>213</sup>

The Court therefore found that Rule XV was valid and that the record of House proceedings showed that under Speaker Reed's new method of counting, 212 members were present when the tariff bill was passed, which was a number well above the 166 members required to constitute a quorum.<sup>214</sup> The House clearly had a majority to do business, the measure received a sufficient number of votes to pass, and it then passed the Senate and received a presidential signature; therefore, the statute was valid.

Despite some claims to the contrary,<sup>215</sup> the facts of the case did not require the Supreme Court to interpret the meaning of the majority quorum requirement of the Constitution. The Court simply found that 212 Members present were indisputably a majority of the House and that this number amply satisfied the Constitution's

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211. *Id.* at 9.

212. *Id.* at 6.

213. *Id.* at 5.

214. *Id.* at 4 ("All that the Constitution requires is the presence of a majority, and when that majority are present the power of the house arises.").

215. See, e.g., *House Continuity Hearing*, *supra* note 193, at 15 (statement of Charles Johnson, Parliamentarian, U.S. House of Representatives).



requirement that a majority be present to conduct business.<sup>216</sup> The Court examined contemporary common law, for both corporate boards and legislative assemblies, and decided that it was an almost universally accepted and noncontroversial principle that, once a majority of a body was present, the body may take official actions.<sup>217</sup>

In its important discussion of the House rule-making power, the *Ballin* decision also located the point at which the exercise of the House rule-making power would be restrained by other constitutional provisions:

The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.<sup>218</sup>

This passage lays out a relatively straightforward approach to interpreting the congressional rule-making power and its relationship to other constitutional procedural rules. Congress's constitutional powers to make rules are constrained by other constitutional provisions that explicitly limit them. As the extensive review of the debate in the Constitutional Convention showed, the Framers gave a great deal of thought to the procedural rules that should be constitutionalized and those that should be left to later Congresses to change as they would see fit.<sup>219</sup> While the Constitution gives Congress extensive rule-making powers, it also contains a certain number of other provisions that "directly regulate the internal decisionmaking procedures of Congress."<sup>220</sup> *Ballin* makes it clear that the rule-making power is limited by these fixed procedures.

The Supreme Court used this same reasoning in *Powell* to decide that although the House and the Senate had exclusive power to

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216. *Ballin*, 144 U.S. at 4.

217. *Id.* at 7-8.

218. *Id.* at 5. For the view that *Ballin* and later cases improperly extended judicial review over Congress's exclusive rule-making powers, see generally Gregory Frederick Van Tatenhove, Comment, *A Question of Power: Judicial Review of Congressional Rules of Procedure*, 76 KY. L.J. 597 (1987-88).

219. See *supra* Part II.C.

220. Vermeule, *supra* note 70, at 361.

determine whether a person had satisfied the constitutional qualifications to serve in those houses, the Constitution prohibited them from adding any new qualifications.<sup>221</sup> Adding qualifications to the three listed in Article I, Section 2 exceeded the Constitution's grant to the legislative branch of the power to judge the qualifications of its members.<sup>222</sup> In other words, the House's power to judge elections in Article I, Section 5, Clause 1 bumped up against, and was limited by, the Constitution's precise definition of qualifications in Article I, Section 2. Explaining this principle in *Nixon v. United States*, Chief Justice Rehnquist wrote: "The decision as to whether a Member satisfied these qualifications *was* placed with the House, but the decision as to what these qualifications consisted of was not."<sup>223</sup>

The ability of the House and the Senate to determine their own rules of procedure, as restrained by constitutionally fixed requirements—such as the right of a member to call for the yeas and nays, with the affirmation of one-fifth of those present,<sup>224</sup> or the requirement that a quorum be present to do business—demands a similar exercise in constitutional interpretation. While the Constitution gave the houses ample room to adopt and develop their own rules of procedure, it prohibits them from adopting a rule, for example, that would increase the affirmation requirement for the yeas and nays.<sup>225</sup> Likewise, it prohibits them from conducting business with a number smaller than a majority.<sup>226</sup> Careful review of the Constitutional Convention debates and the practice of the early Congresses makes it clear that, for the purposes of the constitutional quorum requirement, "majority" means representatives from a majority of the legally authorized seats in the House and the Senate. The two houses have no power to alter this requirement.

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221. *Powell v. McCormack*, 395 U.S. 486, 519-22 (1969).

222. *Id.*

223. 506 U.S. 224, 237 (1993).

224. U.S. CONST. art. I, § 5, cl. 3.

225. *Id.*

226. *Id.*

## V. THE QUORUM REQUIREMENT AND REPRESENTATION IN THE POST-9/11 WORLD

The earlier sections of this Article have demonstrated that the current quorum rules in the Senate and the House of Representatives, which originated in a moment of extreme constitutional stress during the Civil War, materially altered a constitutional provision that the Framers intended to be unalterable. Under normal conditions in the modern Congress, however, the debate over whether to define the House and Senate in terms of the number of their seats or the members serving in them is purely theoretical. While the two chambers regularly adjust their membership numbers according to the “chosen and sworn” and the “chosen, sworn, and living” standards to determine a quorum, the modern House and Senate operate with almost full chambers. In other words, the modern House always operates with a number significantly higher than 218, and the Senate significantly higher than fifty-one seats, which moots any real-world argument that their rules conflict with the constitutional requirement of a majority to conduct business.

In early 2005, for example, the Republican leadership of the House decided to bring the House back into session on a Sunday evening for a dramatic late-night debate on legislation related to the controversial Terri Schiavo case.<sup>227</sup> Although the House had adjourned for a scheduled Easter recess that Thursday and the House leadership gave members less than two days’ notice that it was going back into session, a number well in excess of 218 (at least 261) representatives returned to Washington on short notice to vote on this legislation.<sup>228</sup>

While the drastically lower costs and greater speed of transportation mean that the modern House and Senate never struggle to establish quorums the way legislatures in the eighteenth century did, the Framers had similar expectations that under normal conditions, Congress would work with numbers comfortably above the majority quorum requirement. In response to criticisms in the

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227. 151 CONG. REC. H1728 (daily ed. Mar. 20, 2005).

228. *Id.*

New York ratifying convention over the small size of the legislature, Hamilton responded that out of the self-interest of the states, there was not "a shadow of probability that the number of acting members, in the general legislature, will be ever reduced to a bare quorum."<sup>229</sup> Proportional representation in the House, he argued, gave the larger states a strong incentive to fill all of their apportioned seats and make sure those representatives appeared for the legislative session.<sup>230</sup>

Where the modern quorum rules would run into very serious problems, however, is in the case of a terrorist attack or other calamitous event that reduced the number of living senators to fewer than fifty-one or the number of representatives to fewer than 218. Under these scenarios, which were described at the beginning of this Article, the legislative rules and the constitutional requirements of Article I, Section 5, Clause 1 would no longer peacefully coexist: they would directly conflict. This Part will show that a House or Senate operating with fewer members than the Constitution requires would not meet the basic representative requirements Article I established for the legislative branch.

Though the arguments made in this Part apply equally to a Senate operating with a greatly diminished number, this Part will focus on the House. As was outlined at the beginning of this Article, the Senate might briefly find itself with a diminished number, but it would be able to take immediate steps to replenish itself through the process authorized by the Seventeenth Amendment, which allows state legislatures to empower their governors to name temporary senators.<sup>231</sup> On the other hand, because the House was intended to be the most directly representational branch of the government and because the House can replenish its seats only through elections,<sup>232</sup> the problems it would face in the aftermath of a calamity would be more serious, for both logistical and constitutional reasons.

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229. 2 STATE CONVENTIONS, *supra* note 58, at 263.

230. *Id.*

231. U.S. CONST. amend. XVII; *see supra* note 9.

232. *See supra* note 10.

*A. The Recent Congressional Response to the Disaster Scenarios*

As was briefly reviewed at the beginning of this Article, under the current House rules and the current House leaders' interpretation of them, if a large number of representatives died in an attack, the Speaker would mechanically reduce the House quorum number to a number below 218.<sup>233</sup> Representative David Dreier, the current Chairman of the House Rules Committee, explained this process in the following way:

Under another longstanding House precedent, which we codified in clause 5(c) of rule XX, the Speaker is empowered to adjust the whole number of the House, and thus its quorum, upon the death or resignation of Members. Thus, if a catastrophe occurs and 225 Members of the House were found dead, the whole number of the House would be reduced to 210. The Speaker under the rules would announce that fact to the House. The number required for quorum would then, of course, be 106. The House could proceed on that basis to conduct its business.<sup>234</sup>

Under the current interpretation of the House rules explained by Chairman Dreier, the quorum to do business in the House is 218 members if all 435 apportioned seats are filled. If terrorists manage to kill 225 of those members, however, the number of "chose, sworn, and living" members would decrease to 210. The Speaker, using his power derived from the Article I, Section 5, Clause 2 rule-making power, would simply lower the number of the "whole House" to 210 and the House would continue to be properly constituted and able to conduct business if 106, a majority of its members, are present. In the plan, Dreier and other House leaders imagine, the House would operate with this lowered quorum until the deceased members are replaced, through elections held under a special forty-nine-day expedited elections law.<sup>235</sup> As newly elected members appeared to take their seats, the Speaker would then adjust the number of the whole House.

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233. See *supra* notes 13-14, 179-80 and accompanying text.

234. *House Continuity Hearing*, *supra* note 193, at 3-4 (statement of Rep. Dreier, Chairman, House Comm. on Rules).

235. 2 U.S.C.A. § 8(b)(2) (West Supp. 2006).

The House of Representatives recently exercised its rule-making power to elaborate further on the power to lower its quorum when it adopted a new rule addressing the issue of mass member incapacitation at the beginning of the 109th Congress.<sup>236</sup> As discussed at the beginning of this Article, this rule attempts to address the scenario where terrorists managed to successfully injure, but not kill, a large number of members of Congress.<sup>237</sup> Under standing House rules, these incapacitated members would still be “chosen, sworn, and living,” but would not be able to perform their duties in the House chamber.<sup>238</sup> If 218 members were incapacitated, there would be an insufficient number of members to make a quorum and the House would not be able to conduct business.

Under this new incapacitation rule,<sup>239</sup> in the aftermath of a calamity, the House would first use the power it has under clause 5 of Rule XX to assemble a quorum through compelling the attendance of absent members.<sup>240</sup> Under this provision, fifteen members may vote to send the sergeant-at-arms out to arrest those members able to attend, and to otherwise account for absent members.<sup>241</sup> When this process is exhausted, and a quorum has not yet appeared, the House would go through a special seventy-two-hour quorum call.<sup>242</sup> During this period, the Speaker and other House officers would be working to determine the nature and extent of the crisis.<sup>243</sup> At the end of this three-day quorum call, the Speaker could then present to the House an unappealable “catastrophic quorum failure report” concluding that a calamity has taken place, a large number of members are incapacitated, and that, as a consequence, the House is unable to assemble a majority of its whole number to do business.<sup>244</sup> After another twenty-four-hour quorum call, the quorum number would be automatically adjusted downward to a

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236. See *supra* note 16 and accompanying text.

237. See *supra* note 15 and accompanying text.

238. HOUSE RULES, *supra* note 14, Rule XX, cl. 5(c).

239. *Id.*

240. The authority for this rule comes from the provision in Article 1, Section 5, Clause 1, which allows a smaller number of members to compel the attendance of absent members when a quorum is not present. U.S. CONST. art. I, § 5, cl. 1. See *supra* Part II.A for a discussion of the origin of this provision.

241. HOUSE RULES, *supra* note 14, Rule XX, cl. 5(a), (b).

242. *Id.* cl. 5(c)(3).

243. *Id.*

244. *Id.* cl. 5(c)(4).

new “provisional” quorum number.<sup>245</sup> This provisional number would be determined by excluding the members who have died and those members whom the report deems incapacitated, unaccounted for, or otherwise incapable of attending.<sup>246</sup> With this new, smaller provisional quorum, the House would then be able to conduct any business it can currently conduct with a quorum of the whole number of the House.

*B. The Current Plan Fails To Meet the Basic Constitutional Requirements of Representation*

In spite of the good intentions of those who wrote them, these rules would lead to an unconstitutional result and produce political uncertainty in an already perilous moment for the government. As this Article has argued, a fair and careful reading of Article I, Section 5, Clause 1 and the history surrounding its genesis and application in the early Congresses must conclude that a House and Senate operating with small numbers would not be empowered to legislate. But as the rest of this Section will explain, these rules also have another problem; they would create a legislative body that does not meet the basic structural requirements established in Article 1.

For the purposes of argument, suppose that on a day in late October during the 109th Congress, when the House and Senate were in session and present in their respective chambers casting votes, terrorists successfully attacked the Capitol building and killed or incapacitated all persons present in or near the building at that time. On that day, however, the entire Massachusetts congressional delegation was not in Washington, but in Boston celebrating a World Series victory by their beloved Boston Red Sox. Under the current House continuity schemes, the ten Democratic representatives from Massachusetts would constitute the “whole number of the House,” either through the “chosen, sworn, and living” principle in the case of death, or through the “provisional number of the House” procedure in the case of incapacitation.<sup>247</sup> At this point, and

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245. *Id.* cl. 5(c)(1), (7).

246. *Id.* cl. 5(c)(4).

247. *See id.* cl. (5)(c)(7).

probably for weeks afterward, six of these ten surviving representatives would be able to do business, including electing a Speaker and passing legislation. In addition, under the current law of presidential succession, the colleague they elect as Speaker would stand in line to become president if the president and vice president had perished in the attack.<sup>248</sup>

In any common sense usage of the word, these ten congressmen could not be considered “representative” of the United States. They were elected by only the citizens of one of the fifty states, they are all white males, and they all belong to the political party that held the lesser number of seats in the House before the attacks. Except under House rules, it would be absurd to assert that a legislative body composed of these ten men is “representative” of the United States in any meaningful way. In an uncanny way, this group would resemble the “junctos,” or small groups of unrepresentative elected officials that the Framers wanted to avoid when they adopted the majority quorum rule.<sup>249</sup> In other words, mechanically following the mathematical process of denominator adjustment set out in the current House rules would lead to an absurd, unrepresentative result.<sup>250</sup>

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248. 3 U.S.C. § 19 (2000); see also John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993 (2004) (discussing the Presidential Succession Act).

249. See *supra* note 49 and accompanying text.

250. In an 1890 debate on the quorum issue, Representative Joseph Bonaparte Cheadle of Indiana provided the following quorum hypothetical, which could be dubbed the “Reality Show” hypothetical:

It has been held by some that a majority of the members chosen to the House, who are alive, shall constitute a quorum for the transaction of business; or, in other words, that a majority of the Representatives from those districts that have representation on this floor shall constitute a quorum of the House, within the meaning of the law, for the purpose of transacting the public business.

But let us suppose a case that might arise. Suppose that a majority of any House shall see proper to turn out one member, or a number of members, say ten members; can it be held that that act would reduce the number of members requisite under the Constitution to make a quorum to transact business by half the number of members so unseated? If this could be held to be a correct principle the size of the House might be reduced indefinitely.

21 CONG. REC. 10236 (1890). The facts of this hypothetical require one correction: as *Powell* clarified, the number of members required to turn out members is two-thirds of the chamber, see *Powell v. McCormack*, 395 U.S. 486, 506-12 (1969), so the number of members thrown out of the body at any one time could never exceed one-third of the members left in the body.



The proposition that a small group of surviving congressmen could be considered a sufficient number to conduct business on behalf of a 435-seat legislative body is also wrong in a more formal, constitutional sense. A "House" consisting of the surviving ten Bay State members would be lacking several of the basic structural features Article I, Section 2 requires of the legislative branch.

First of all, this House would not represent the "people," as that term is used in Article I, Section 2. One of the most basic features of the House of Representatives, as created in that section, is that it consists of members the American people have delegated to represent them in their national government.<sup>251</sup> More than any other part of the federal government, the House of Representatives derives its power from what Madison termed the "great body of the people."<sup>252</sup> Essential to a republican government, Madison wrote, is "that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it."<sup>253</sup> Crucial to what the Framers termed the "republican" nature of the House was its proportionality, the fact that more representatives would come from the larger states than from the smaller ones, and that "no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress."<sup>254</sup> Paraphrasing Madison in *Federalist No. 54*, Justice Story wrote that the Convention chose representation based on the number of people in the states because "it had a natural and universal connexion with the rights and liberties of the whole people."<sup>255</sup>

The subject of a long, passionate debate in the Constitutional Convention, this principle was ultimately embodied in Article I, Section 2 requiring that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union."<sup>256</sup> The same section apportioned sixty-five House seats for the First Congress and created a mechanism, the decennial census and reapportionment process, that would allow the composi-

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251. See U.S. CONST. art. 1, § 2, cl. 1.

252. THE FEDERALIST NO. 39, at 183 (James Madison) (Terence Ball ed., 2003).

253. *Id.* at 182.

254. *Wesberry v. Sanders*, 376 U.S. 1, 10 (1964).

255. 3 STORY, *supra* note 44, at 239.

256. U.S. CONST. art. I, § 2, cl. 3. The second section of the Fourteenth Amendment changed this operative language to read, "Representatives shall be apportioned among the several States according to their respective numbers ...." *Id.* amend. XIV, § 2.

tion of the House to track that of the growing country.<sup>257</sup> The Convention showed its commitment to proportional representation by rejecting a proposal offered by Elbridge Gerry of Massachusetts to block new western states from ever having more seats than the original thirteen states.<sup>258</sup> This proportionality mechanism guaranteed that the House of Representatives would always accurately reflect the varying populations of the states, or in James Wilson's famous phrase, that the House "ought to be the most exact transcript of the whole Society."<sup>259</sup> In another memorable image, Wilson explained that because he supported raising the federal pyramid to "a considerable altitude," he "wished to give it as broad a basis as possible" through a legislative body derived immediately from the people,<sup>260</sup> "the legitimate source of all authority."<sup>261</sup>

Another essential part of the so-called "Madisonian" conception of representation was its extensive nature.<sup>262</sup> Madison famously argued, both during the Convention and in *Federalist No. 10*, that one of the strengths of the proposed republican government was that it would encompass a broad array of "Sects, Factions, & interests," and therefore any one group would find it difficult to build enough strength to oppress its rivals.<sup>263</sup> "Extend[ing] the sphere" and establishing a system where representatives answered to larger, more heterogeneous groups of people, would help avoid the

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257. *Id.* art. I, § 2, cl. 3.

258. 2 FEDERAL CONVENTION, *supra* note 8, at 2-3.

259. 1 *id.* at 132. A decade earlier, John Adams had explained this idea of proportional representation:

In a large society, inhabiting an extensive country, it is impossible that the whole should assemble, to make laws: The first necessary step then, is, to depute power from the many, to a few of the most wise and good....

The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. That it may be the interest of this Assembly to do strict justice at all times, it should be an equal representation, or in other words equal interest among the people should have equal interest in it.

JOHN ADAMS, *Thoughts on Government*, in 4 PAPERS OF JOHN ADAMS 87-88 (Robert J. Taylor ed., 1979) (1776).

260. 1 FEDERAL CONVENTION, *supra* note 8, at 49.

261. *Id.* at 132.

262. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 10-17 (1956).

263. 1 FEDERAL CONVENTION, *supra* note 8, at 135; *see* THE FEDERALIST NO. 10, at 45 (James Madison) (Terence Ball ed., 2003).

"faction combinations" characteristic of the smaller democracies Madison had studied and found lacking.<sup>264</sup> One of the fundamental features of the legislative branch, and in particular the popularly elected House, was its heterogeneity and its coextensiveness with the changing boundaries of the nation. As noted in Part II, one of the major objections to the proposed constitution was that it excessively attenuated representation so that each House member represented too many people to truly reflect and sympathize with their views.<sup>265</sup> Madison and Hamilton fought this "attenuated representation" critique in many ways, most famously in Numbers 55 to 58 of the *Federalist Papers*. In these essays, Madison argued that sixty-five-member apportionment, which would be regularly augmented and adjusted through reapportionment, was a sufficient number "*for the purposes of safety, of local information, and of diffusive sympathy, with the whole society.*"<sup>266</sup>

What emerges from this discussion is a clear constitutional principle that, among other things, representation in the House of Representatives requires a sum of legislators sufficiently numerous and diverse to proportionally reflect the interests of the "great body of the people."<sup>267</sup> Article I, Section 2 lays out a basic standard, one representative for every 30,000 people, and a periodic reapportioning process for the House to follow over time to maintain this principle.<sup>268</sup> As was also discussed in Part II of this Article, the Article I, Section 5, Clause 1 majority quorum requirement was one of the procedural safeguards the Framers included to prevent a small, unrepresentative minority of House members from conducting business on behalf of the entire body.<sup>269</sup> This majority quorum requirement would help assure the people that their representative

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264. THE FEDERALIST NO. 10, at 45 (James Madison) (Terence Ball ed., 2003). During the Convention, Madison observed:

The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in case they shd. have such an interest, they may not be apt to unite in the pursuit of it.

1 FEDERAL CONVENTION, *supra* note 8, at 136.

265. See *supra* notes 58-62 and accompanying text.

266. THE FEDERALIST NO. 58, at 286 (James Madison) (Terence Ball ed., 2003).

267. THE FEDERALIST NO. 39, at 183 (James Madison) (Terence Ball ed., 2003).

268. U.S. CONST. art. I, § 2, cl. 3.

269. See *supra* notes 47-55 and accompanying text.

body could not operate if its numbers were so low that it lost its “diffusive sympathy” with the people of the various states.<sup>270</sup> A rule allowing such a minority to conduct business directly contradicts this majoritarian, representative principle: “There are limitations to the House’s rule-making power, and Art. I, § 2 is such a limit.”<sup>271</sup> In light of this principle, a House consisting of ten representatives from Massachusetts would obviously not be a constitutionally “representative” body in the First Congress, much less the 109th Congress.

Supporters of lower quorum requirements might concede that rules allowing the House to operate with a number smaller than 218 would temporarily violate this collective notion of representation, but they point out that the current rules at least preserve the important constitutional principle of direct election of House members.<sup>272</sup> They argue that while small quorums might attenuate the House’s collective representation of the people, they at least preserve the important principle that every individual who has ever served in the House of Representatives has been elected by the people.<sup>273</sup> In other words, the fact that the ten remaining Massachusetts congressmen posited in the example above were directly elected by their constituents would give their deliberations adequate weight and credibility to overcome the fact that they represented less than two percent of the apportioned seats of that legislative body.

Advocates of this position correctly argue that direct election by the people is an important organic element of the House of Representatives. The Framers clearly viewed the first branch of the legislature as the most directly democratic part of the federal government, the branch “elected immediately by the great body of the people.”<sup>274</sup> As Madison explained it, while the Senate and the other branches would represent “successive filtrations” of the people’s will, the House instead would rest on the “solid foundation

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270. See THE FEDERALIST NO. 58, at 324 (James Madison) (Terence Ball ed., 2003).

271. *Michel v. Anderson*, 14 F.3d 623, 627 (D.C. Cir. 1994).

272. U.S. CONST. art. 1, § 2, cl. 1; see H.R. REP. NO. 108-404, pt. 2, at 3 (2004).

273. See Vic Snyder, *Ornstein Is Wrong: House Members Should Never Be Appointed*, ROLL CALL, Nov. 19, 2001.

274. THE FEDERALIST NO. 39, at 183 (James Madison) (Terence Ball ed., 2003).

of the people themselves.”<sup>275</sup> Frequent elections in the House of Representatives ensured that the members of that chamber “should have an immediate dependence on, [and] an intimate sympathy with the people,”<sup>276</sup> and maintained in the elected representatives’ minds the “habitual recollection of their dependence on the people.”<sup>277</sup>

Where advocates of this popular election argument overreach, however, is when they suggest that popular election is such a predominating principle of congressional representation that it can cure the absence of the other structural elements required by Article I, Section 2. They seem to be arguing that if the first element of Madison’s maxim, that the representatives are “elected,” is satisfied, then the second part, that they represent the “great body of the people,” is merely optional. The problem with this reading is that Article I, Section 2 lays out the basic structural requirements for the House of Representatives—frequency of elections, qualifications, census, and apportionment—in definitive, nonoptional terms. The fact that a House satisfies the requirement that it be composed of “Members chosen every second Year”<sup>278</sup> does not then dispense with the requirements that those members shall have the proper qualifications and shall proportionally represent the people of the various states.<sup>279</sup> A fair reading of Article I, Section 2 would be that a legitimate House of Representatives requires all three of these elements.

While it appears to be true that the House has never seated any man or woman who was not elected,<sup>280</sup> supporters of the direct election principle probably overstate their argument when they elevate it to the level of an inviolable democratic principle. As discussed at the beginning of this Article, the Senate can replenish itself through temporary appointments,<sup>281</sup> but Article I, Section 2 provides for vacant House seats to be filled through elections.<sup>282</sup> While this direct election principle assuredly reflects the Framers’

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275. 1 FEDERAL CONVENTION, *supra* note 8, at 50.

276. THE FEDERALIST NO. 52, at 256 (James Madison) (Terence Ball ed., 2003).

277. THE FEDERALIST NO. 57, at 279 (James Madison) (Terence Ball ed., 2003).

278. U.S. CONST. art. I, § 2, cl. 1.

279. *Id.* cl. 3.

280. H.R. REP. NO. 109-404, pt. 2 at 3 (2004).

281. *See supra* note 9.

282. U.S. CONST. art. 1, § 2, cl. 4.

keen interest in maintaining direct representation of the people in the House, it also reflects their very practical judgment that vacancies in a larger legislative body with frequent elections were not likely to endanger that body's ability to do business.<sup>283</sup> The Senate presented a different situation than the House, Edmund Randolph explained during the Convention, because vacancies in a smaller body on a six-year election cycle could create "inconvenient chasms," during which the Senate might be unable to act.<sup>284</sup> Randolph argued that the Senate Temporary Appointment Clause was necessary because that chamber would "have more power & consist of a smaller number than the other House, [and] vacancies there w[ould] be of more consequence."<sup>285</sup> As Senator Cornyn pointed out, continuity problems in the Senate could cause "inconvenient chasms" that lasted much longer than two years.<sup>286</sup>

In other words, the evidence available from the proceedings of the Constitutional Convention suggests that the Framers were not concerned about House replenishment because they assumed that the larger size of the House and its more frequent elections were sufficient to address periodic vacancies. They obviously could not have foreseen a scenario in which enemies of the United States killed enough House members at one time to make it impossible to muster a constitutional quorum.

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283. See 2 FEDERAL CONVENTION, *supra* note 8, at 231. James Wilson argued that the Senate temporary replacement clause removed decision making "too far from the people," but his amendment to remove the language failed by a vote of one to eight. *Id.*

284. *Id.*

285. *Id.* In his famous manual of parliamentary practice, Thomas Jefferson stated that the importance of the legislative privilege from arrest was that it protected the representative rights of the people. He explained: "When a Representative is withdrawn from his seat by summons, the 40,000 people whom he represents lose their voice in debate and vote, as they do on his voluntary absence; when a Senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does on his voluntary absence. The enormous disparity of evil admits no comparison." THOMAS JEFFERSON, JEFFERSON'S MANUAL OF PARLIAMENTARY PRACTICE § 290, in CONSTITUTION, JEFFERSON'S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, 109TH CONG. 131 (2005), available at [http://www.gpoaccess.gov/hrm/browse\\_109.html](http://www.gpoaccess.gov/hrm/browse_109.html). It is also worth observing that the structural differences between the House and Senate were reduced when the Seventeenth Amendment (ratified in 1913) instituted popular elections for Senate seats. U.S. CONST. amend. XVII; see also Wasserman, *supra* note 193, at 974-75 (noting that the Seventeenth Amendment "instilled the same method of selection for both houses").

286. *Senate Continuity Hearing*, *supra* note 17.

## CONCLUSION

If policymakers accept this Article's argument that a House operating with small numbers in the aftermath of a catastrophic attack would lack the basic constitutional structure to do business, and if they further accept the argument that the congressional rule-making power is insufficient to remedy such a situation, what options are left? Some observers have suggested that in such a disaster scenario, the legislative branch would have an inherent, *ex necessitate* superconstitutional power to take any necessary step to preserve itself.<sup>287</sup> In the case of a calamity, Professor Walter Dellinger recently testified, the constitutional importance of having a functioning Congress would trump all concerns about its structure.<sup>288</sup> In other words, a small, unrepresentative Congress would be better than no Congress at all.<sup>289</sup> Relying on several inapposite passages of the *Federalist Papers* discussing the federal government's inherent power to preserve itself,<sup>290</sup> Dellinger, Rules Committee Chairman Dreier, and other observers argue that maintaining a functioning legislative branch would justify these drastic steps.<sup>291</sup>

The Civil War Congresses essentially took the same "ends-justify-the-means" approach to the crisis they faced when the southern states failed to send senators and representatives to Washington in 1861. As Part III of this Article showed, the Civil War Congresses

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287. See *House Continuity Hearing*, *supra* note 193, at 32-35 (statement of Prof. Walter Dellinger).

288. *Id.*

289. *Id.* at 34-35.

290. Specifically, a passage from *Federalist No. 23*, in which Hamilton refers to the "variety of national exigencies" that require a federal government with the plenary power to raise armies and otherwise provide for the common defense (Hamilton was the leading advocate for the then-controversial idea of a standing army), THE FEDERALIST NO. 23, at 107 (Alexander Hamilton) (Terence Ball ed., 2003), and a passage from *Federalist No. 59*, in which Hamilton is defending the "*Times, Places and Manner*" election provision in Article I, Section 4, a provision addressing the federal government's relationship with state governments, THE FEDERALIST NO. 59, at 287 (Alexander Hamilton) (Terence Ball ed., 2003). In both of these passages, Hamilton is defending grants of power to the national government that were controversial during the ratification debates. They do not suggest that the national government has an additional open-ended power to preserve or defend itself, even when the exercise of such a power clearly violates other constitutional provisions.

291. *House Continuity Hearing*, *supra* note 193, at 4-5 (statement of David Dreier, Chairman, H. Comm. on Rules); *id.* at 32-35 (statement of Prof. Walter Dellinger).

took the radical step of altering the constitutionally fixed majority quorum rule to continue operations.<sup>292</sup> Based on the language of the majority quorum rule in Article I, Section 5, Clause 1, the debate over quorum rules in the Constitutional Convention, and consistent practice in the First through Thirty-sixth Congresses, the quorum provision requires the presence of a majority of members from the House or the Senate—as those two chambers are defined by the Constitution and later statutes—before those chambers can do business. During the Civil War crisis, the two chambers changed this fixed, institution-based definition of the quorum to a variable, member-based definition that viewed the House and Senate in terms of the members occupying seats at any particular moment.<sup>293</sup>

The purpose of this Article has been to show that Congress does not have an extraordinary rule-making power it can invoke when it faces existential crises. Congress can only exercise its rule-making powers within the boundaries that the Constitution carefully draws around them. This Article has shown that the congressional rule-making power does not extend to altering constitutionally fixed rules of procedure such as the majority quorum requirement. Furthermore, Congress can only act as a legislative body if and when it possesses the essential structural features Article I requires. A Congress that is not a representative body cannot make itself one by invoking some kind of special crisis authority. The danger of war, Jefferson argued in his *Notes on the State of Virginia*, did not authorize legislators “to call that a house which was none.”<sup>294</sup>

While the Thirty-seventh and Thirty-eighth Congresses managed to survive the Civil War crisis, their improvised, extraconstitutional solution to the quorum problem should not be a model for twenty-first century disaster planning. Overextending the congressional

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292. CONG. GLOBE, 37th Cong., 2d Sess. 3191-92 (1862); CONG. GLOBE, 37th Cong., 1st Sess. 210 (1861).

293. See *supra* Part III.

294. JEFFERSON, *supra* note 36, at 251. See *supra* Part II.C for further explanation of this passage; see also *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 649-50 (1952) (Jackson, J., concurring) (“The appeal, however, that we declare the existence of inherent powers *ex necessitate* to meet an emergency asks us to do what many think would be wise, although it is something the forefathers omitted. They knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation.”).



rule-making power to allow an unrepresentatively small House and Senate to meet and do business does not solve the problem; in fact, it creates new problems. For example, would the American public view the actions of a small, unrepresentative Congress as legitimate, especially if those actions involved the most solemn congressional powers such as declaring war or selecting a Speaker who stands in line to become president?<sup>295</sup> And even if the general public accepted such decisions as legitimate, would they survive the scrutiny of the federal courts? An individual claiming injury from a law approved by such a Congress would likely have standing in a federal court to challenge the legitimacy of the law.<sup>296</sup> However these questions were resolved in a real disaster, they would create a number of uncertainties at a moment when a "smooth, orderly, lawful, ethical, and uncontroversial transition of power" would be of the utmost importance.<sup>297</sup>

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295. See 150 CONG. REC. H7415 (daily ed. Sept. 22, 2004) (statement of Rep. Martin Frost).

296. See *supra* notes 207-09 and accompanying text. Unlike a member of Congress challenging the constitutionality of these rules before a calamity, who would lack the necessary elements of a judicially cognizable injury, under *Raines v. Byrd*, 521 U.S. 811 (1997), a plaintiff injured by a law passed by a numerically small Congress, such as a businessman injured in a way similar to the plaintiff in the *Ballin* case, would certainly be able to show a particularized, concrete personal injury sufficient to meet the Article III standing requirement. See *United States v. Ballin*, 144 U.S. 1 (1892). Professor Dellinger has suggested that, after a calamity, federal courts might invoke the political question doctrine to refuse to hear such injury claims because judicial decisions on these claims would constitute "multifarious pronouncements by various departments on one question" in the time of a national emergency. *House Continuity Hearing*, *supra* note 193, at 37-38 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962), and *Nixon v. United States*, 506 U.S. 224, 252 (1993)). The problem with this argument is that a federal court is the only appropriate department to determine the constitutionality of a statute. *INS v. Chadha*, 462 U.S. 919, 941-42 (1983) ("No policy underlying the political question doctrine suggests that the Congress or the Executive, or both acting in concert and in compliance with Art. I, can decide the constitutionality of a statute; that is a decision for the courts."); see also *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1880) ("[I]t is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution ...."). And unlike the facts of the *Nixon* case, where the impeachment process is clearly committed to a "coordinate political department," the injury case contemplated here would require an interpretation of the relation of a constitutional clause committing a power to a coordinate political department (the rule-making power) to another clause limiting that power. *Nixon*, 506 U.S. at 240 (White, J., concurring).

297. Akil Reed Amar & Vikram David Amar, Essay, *Is the Presidential Succession Law Constitutional?*, 48 STAN. L. REV. 113, 136 (1995).

The best way to avoid these uncertainties is to develop a continuity plan at the constitutional level. A patchwork of statutes, rules, and legislative practices cannot provide the authoritative guidance our government would need to cope with the aftermath of a disaster. As the former congressional leaders and scholars composing the Continuity of Government Commission concluded in their 2003 report, a constitutional fix to this problem "is the only solution that adequately addresses the problem of filling mass vacancies in Congress quickly after a catastrophic attack."<sup>298</sup>

Although it is not the goal of this Article to propose one constitutional amendment as the definitive solution to how the legislative branch would survive a terrorist attack, it is worth noting that both the Continuity Commission and other policymakers have put forward a number of different ideas.<sup>299</sup> The simplest approach would be to model a new amendment on the Seventeenth Amendment and authorize states to appoint temporary replacements for House members who die or are incapacitated in a mass casualty situation.<sup>300</sup> Out of concern that these appointments not disturb the partisan balance in Congress and represent the policy preferences of the elected representatives they replace, a number of constitutional amendment proposals would allow current members to name their own temporary successors before or at the time of their election.<sup>301</sup> While some policymakers prefer a short, concise amendment that establishes a basic framework for temporary replacements and then empowers Congress to work out the details through statute,<sup>302</sup> Norman Ornstein of the American Enterprise Institute has proposed a lengthy amendment detailing the process through which an emergency is declared and executive authorities

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298. CONTINUITY COMM'N REPORT, *supra* note 1, at 16; *see also* Shayna M. Bloom, In Case of Emergency: The Need for a Constitutional Amendment to Provide for Mass Vacancies in the House of Representatives (Jan. 2004) (unpublished comment, on file with author).

299. *See* CONTINUITY COMM'N REPORT, *supra* note 1, app. VI; Wasserman, *supra* note 193, at 967-73.

300. CONTINUITY COMM'N REPORT, *supra* note 1, at 44-46, 51. In the 1950s, the Senate passed several such amendment proposals, but the House refused to take them up. *Id.* at 17; *see* Avi Klein, *Death Wish*, WASH. MONTHLY, Nov. 2006, at 19.

301. H.R.J. Res. 83, 108th Cong. (2005); H.R.J. Res. 92, 108th Cong. (2004). This proposal, offered by Representative Brian Baird of Washington, failed in the House on a vote of 63-353 on June 2, 2004. 150 CONG. REC. H3681 (2004).

302. H.R.J. Res. 90, 108th Cong. (2004); S.J. Res. 23, 108th Cong. (2003); CONTINUITY COMM'N REPORT, *supra* note 1, at 51.

in each state select temporary replacements for their House and Senate seats.<sup>303</sup>

Resolving to address this problem through constitutional amendment simply requires policymakers to acknowledge that the mechanics of the legislative branch the Framers created in 1787 need to be adjusted to the realities of the twenty-first century. Article I dealt with the vacancy and replenishment problems its eighteenth-century authors could foresee. They cannot be blamed for failing to foresee that two centuries later, America's enemies might be capable of simultaneously killing or incapacitating large numbers of federal legislators. Although some members of Congress are squeamish about amending the Constitution, they should recall that on several occasions in our history, Congress and the States have amended the Constitution to resolve problems of constitutional mechanics. After the controversial presidential election of 1800, Congress and the States ratified the Twelfth Amendment to clarify the presidential selection process. They ratified the Twentieth Amendment in the 1930s to move up the presidential inauguration date to January 20, to clarify presidential succession, and to shorten postelection "lame duck" sessions of Congress. In the wake of the Kennedy assassination, they ratified the Twenty-fifth Amendment to clarify the rules of presidential succession and address the issue of temporary presidential incapacity. As their predecessors did in these three instances, today's lawmakers should forthrightly acknowledge that the constitutional mechanics of congressional continuity need to be updated. Congress should fix these shortcomings while they are still theoretical questions in a disaster planning exercise, rather than wait until they are exposed by actual catastrophes.

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303. CONTINUITY COMM'N REPORT, *supra* note 1, at 49-50.