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Symmetric Entrenchment: A Constitutional
and Normative Theory

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Michael B. Rappaport and John McGinnis

Abstract

In this article, we defend the traditional rule that legislative entrenchment, the practice by which a legislature insulates ordinary statutes from repeal by a subsequent legislature, is both unconstitutional and normatively undesirable. A recent essay by Professors Eric Posner and Adrian Vermeule disputes this rule against legislative entrenchment and provides the occasion for our review of the issue. First, we argue that legislative entrenchment is unconstitutional, offering the first comprehensive defense of the proposition that the original meaning of the Constitution prohibits legislative entrenchments. We show that a combination of textual, historical, and structural arguments make a very compelling case against the constitutionality of legislative entrenchment. In particular, the Framers incorporated into the Constitution the traditional Anglo-American practice against legislative entrenchment, as evidenced by early comments by James Madison - comments that have not been previously discussed in this context. Moreover, legislative entrenchment essentially would allow Congress to use majority rule to pass constitutional amendments. On the normative issue, we offer a new theory of the appropriate scope of entrenchment: the theory of symmetric entrenchment. Under our theory, there is a strong presumption that only symmetric entrenchments - entrenchments that are enacted under the same supermajority rule that is needed to repeal them - are desirable. The presumption helps to distinguish desirable entrenchments that would improve upon government decisions from undesirable ones that simply involve legislatures protecting their existing preferences against future repeal. To be desirable entrenchments must generally be symmetric, because the supermajority rule that is applied to the enactment of entrenched measures would improve the quality of these measures and therefore compensate for the additional dangers that entrenchments pose. This theory steers a middle path

between a strict majoritarian position, which would prohibit all legislative entrenchments, and a position that would allow legislative majorities to entrench measures.

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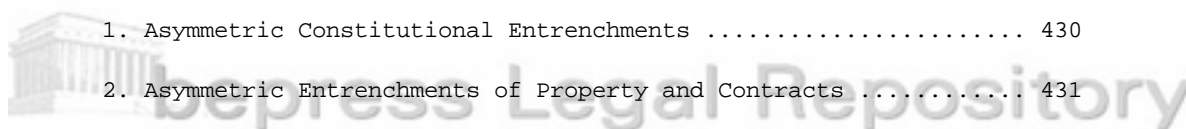
Essay

SYMMETRIC ENTRENCHMENT: A CONSTITUTIONAL AND NORMATIVE THEORY

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Our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which no provision can be made. [FN1] James Madison, speaking to the House of Representatives in 1790

Introduction

LEGISLATIVE entrenchment, the practice by which a legislature insulates ordinary statutes from repeal by a subsequent legislature, has generally been thought to be both unconstitutional and normatively undesirable. [FN2] In a recent essay, however, Professors Eric Posner and Adrian Vermeule dispute this consensus against legislative entrenchment. [FN3]

Positively, Professors Posner and Vermeule present various arguments designed to show that the text, history, and structure of the Constitution do not prohibit legislative entrenchment. [FN4] In their view, the Constitution grants to Congress the decision whether and when to employ the device of entrenching legislation against future change. [FN5]

Normatively, Posner and Vermeule maintain that entrenched legislation has distinctive value, because it can increase the predictability of law and allow government to engage in useful undertakings such as making credible commitments on which citizens can rely. [FN6] To the objection that entrenchment hamstring the authority of future generations, they respond that other kinds of legislation also constrain future majorities but are not viewed as problematic. [FN7] Legislative entrenchment, they argue, should not be subject to special restrictions. [FN8]

Although Professors Posner and Vermeule present many arguments for legislative entrenchment, they never directly discuss the radical laws and measures their approach would allow. Under their view, at a time when laissez-faire was popular, a majority in Congress could have passed legislation entrenching protections for economic liberty that could have been repealed only by a strict supermajority of a future Congress. [FN9] In fact, Posner and Vermeule would appear to permit Congress to prevent a statute from ever being legislatively repealed, which would mean the statute could only be eliminated by a constitutional amendment. For instance,

if a party favoring high progressive tax rates temporarily gained a slim majority in Congress, it could pass and entrench such rates against any future legislative modification. Indeed, a lame duck Congress could choose to entrench the rates against its immediate successors who had just won a majority on an opposing platform. Finally, although Posner and Vermeule do not address the issue, their theory would appear to allow entrenchment in other branches. For example, their view would permit a President to entrench, against future Presidents, an executive order requiring administrative agencies to employ cost-benefit analysis.

In this Essay, we will challenge Posner and Vermeule's arguments for legislative entrenchment, and we will present a new theory of entrenchment. Professors Posner and Vermeule have made an important contribution by offering creative and substantial arguments in favor of an unusual position. They have also powerfully criticized the common view that mistakenly roots the argument against legislative entrenchment in a form of majoritarianism. [\[FN10\]](#) In the end, however, we will reject both their positive and normative theses through new arguments and positions of our own.

On the issue of constitutional construction, we will offer a comprehensive defense of the proposition that the original meaning of the Constitution prohibits legislative entrenchment. We will show that a combination of textual, historical, and structural arguments makes a very compelling case against the constitutionality of legislative entrenchment. Posner and Vermeule argue that the constitutional amendment process shows that the Constitution looks favorably on such entrenchment because it expressly entrenches one provision-- the equal suffrage of states in the Senate--against constitutional change. [\[FN11\]](#) But this argument provides us with the opportunity to show that the Constitution treats constitutional entrenchments differently from legislative ones, as it allows a constitutional amendment to be entrenched against subsequent amendments, while generally prohibiting legislative entrenchment. The larger lesson here is that originalism is a methodology--sensitive to nuance--that can provide distinct answers to questions that normative considerations lump together.

On the normative issue, we will offer an entirely new theory of the appropriate scope of entrenchment: the theory of symmetric entrenchment. A symmetric entrenchment occurs when an entrenching measure is enacted under the same supermajority rule that is needed to repeal it. For example, constitutional amendments ordinarily effect symmetric entrenchments, because they are enacted and can only be repealed pursuant to the same double supermajority rules contained in Article V of the Constitution.

This theory steers a middle path between a majoritarian position, which would prohibit not only legislative entrenchments but also constitutional ones, and Posner and Vermeule's view, which would allow legislative majorities to entrench measures. Under our theory, there is a strong presumption that only symmetric entrenchments should be permitted. The presumption is intended to distinguish desirable entrenchments that would improve upon government decisions from undesirable ones that simply involve legislatures protecting their existing preferences against future repeal. To be desirable, entrenchments should generally be symmetric, because the supermajority rule used to enact entrenched measures would improve the quality of these measures and would compensate for the additional dangers that entrenchments pose.

While the theory generally permits only symmetric entrenchments, this is not an absolute requirement, but a presumption that can be overcome. There are a small number of asymmetric entrenchments, such as entrenchments needed to establish property rights and, possibly, certain entrenchments necessary to form a political union, that are desirable and may override the presumption. We will also explain why it would be advantageous for a constitution to limit entrenchments to a single mechanism, like the constitutional amendment process and its fixed supermajority rules, rather than allowing Congress to pick the degree of entrenchment it desires on a case-by-case basis.

Finally, we will show that the Constitution largely, although not entirely, comports with the symmetric entrenchment theory. The Constitution prohibits the asymmetric legislative entrenchments that Professors Posner and Vermeule endorse. Moreover, the Constitution itself has comported with the symmetric entrenchment theory, in that the original Constitution and the Amendments have been enacted under essentially the same procedures that are needed to repeal them. In those limited situations where the Constitution has departed from the presumption of symmetry, it has mainly done so where the presumption may be legitimately overcome.

Part I of this Essay will present our positive constitutional theory of entrenchment. As a positive theory, it will attempt to discover the original meaning of the Constitution as to entrenchment, ignoring entirely normative arguments. We will conclude that the Constitution prohibits legislative entrenchment but does allow constitutional entrenchment--that is, the passage of constitutional amendments that cannot be amended under Article V.

Part II of the Essay will turn to normative questions. Here we will address what the ideal rules are for legislative and constitutional entrenchment. We will argue that symmetrical entrenchments tend to be desirable but that other considerations sometimes require departures from symmetry. We will then compare the normatively ideal rules to those adopted by the Constitution. We will maintain that the Constitution's rules for entrenchments are generally attractive, even though they are not entirely in accord with our normative theory.

I. The Original Understanding of Legislative and Constitutional Entrenchment

In this Part, we argue that the original meaning of the Constitution forbids legislative entrenchment. [\[FN12\]](#) First, we briefly discuss the methodology of originalism and show how the application of that methodology results in a constitutional prohibition on entrenchment. [\[FN13\]](#) Then we respond to Posner and Vermeule's arguments for interpreting the Constitution to allow legislative entrenchments.

A. The Essence of the Argument Against Legislative Entrenchment

We interpret the Constitution from an originalist perspective, ascertaining the meaning of the text as it would have been understood by a reasonable and well-informed person when it was enacted. [\[FN14\]](#) Under this approach, one first examines the meaning of the Constitution from an eighteenth-century perspective to determine whether it unambiguously resolves the question. If the language is unclear, one then looks to structure, purpose, and history to resolve that ambiguity. [\[FN15\]](#) The inferences from structure, purpose, and history are not considered separately but are weighed together to determine which eighteenth-century understanding of the language is correct. [\[FN16\]](#)

While Professors Posner and Vermeule often mix positive and normative arguments, originalists eschew an approach that would consider the values of a modern interpreter. [\[FN17\]](#) Originalism requires that we give effect to the Framers' values, as expressed in the language of the document itself. Under this approach, normative considerations are relevant only in a very limited way. In determining whether an interpretation would conform to the purposes of a provision, one may consider the normative effects of that interpretation, but only if they are of the kind that the Framers' generation would have embraced. By contrast, normative effects reflecting modern sensibilities that would be alien to the Framers are not relevant to an originalist interpretation.

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In our view, this methodology strongly indicates that legislative entrenchment is unconstitutional. The constitutional text provides, "All legislative Powers herein granted shall be vested in a Congress of the United States." [\[FN18\]](#) Thus, the question is whether the term "legislative power" encompasses the authority to pass entrenched legislation. [\[FN19\]](#) It is our argument that "legislative power" is ambiguous: While it could mean the power to pass legislation, including statutes that entrench, it might also mean the power to enact only ordinary, nonentrenched legislation. [\[FN20\]](#) This ambiguity, however, is clearly resolved by inferences from structure and history that indicate that the Framers' use of "legislative power" excluded the authority to entrench.

At the time of the framing, informed persons would have understood one meaning of "legislative power" as excluding the authority to entrench. Terms like "legislative power," which refer to the powers exercised by institutional entities, are often comprehended by reference to prior exercises of that authority. [\[FN21\]](#) Where there is a consistent understanding of the authority of such entities, that understanding can become part of the meaning of the term referring to the entity. [\[FN22\]](#)

When the Constitution was enacted, Anglo-American legislatures, such as the English Parliament as well as colonial and state legislatures, did not generally, if ever, entrench. [\[FN23\]](#) Moreover, this practice was not accidental but was justified by the view that legislatures did not possess this authority. Blackstone, whose Commentaries were the best known to the Framers' generation and were frequently referenced at the Constitutional Convention, [\[FN24\]](#) offered this rationale for legislative entrenchment's impropriety:

Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been if it's [sic] ordinances could bind a subsequent parliament. [\[FN25\]](#) Therefore, the traditional understanding was that the power to entrench would provide excessive and unequal authority to prior legislatures. While the Framers did replace Blackstone's idea that the legislature was sovereign with a conception of popular sovereignty, which explicitly stated that the legislature could not even entrench natural rights, they did nothing to displace the distinct idea that all legislatures were equal. [\[FN26\]](#) The equality of succeeding legislatures fits comfortably with American principles of republican government and popular sovereignty. The combination of the practice of legislatures refusing to entrench and the public rationale for this refusal would have been especially likely to inform the Framers' understanding of what "legislative power" meant. [\[FN27\]](#)

Thus, one meaning of the term "legislative power" would have denied the legislature the authority to entrench. If we assume that "legislative power" could also have been understood as providing entrenchment authority, the term would be ambiguous, and then we must determine which of the two meanings was employed. In our view, history and structure unequivocally resolve the question in favor of the antientrenchment interpretation.

While we have employed historical evidence to demonstrate that one meaning of legislative power excluded the authority to entrench, this evidence actually shows more. It reveals that the antientrenchment meaning was the preferred understanding of the term. Determining whether the Framers employed a particular sense of a word depends in part on how common this usage was. [\[FN28\]](#) Unusual meanings are less likely to have been employed than more common usages. Thus, the traditional and consistent understanding of "legislative power" suggests that the term excluded the legislative authority to entrench. [\[FN29\]](#)

The strongest support for resolving the ambiguity so as to exclude the power to entrench, however, derives from the structure of the Constitution. The Framers established an extremely strict constitutional amendment process that requires two-thirds of Congress to propose an amendment and then three-quarters of the states

to ratify one. [\[FN30\]](#) Legislative entrenchment, however, would allow Congress to pass a statute that could not be repealed by subsequent Congresses and therefore would operate as a type of quasi-constitutional law. It is extremely unlikely that the Framers would have allowed Congress to pass a measure that so resembles a constitutional amendment through such a lenient procedure, when they established such a strict procedure for constitutional amendments. In short, the distinction between constitutional and ordinary legislation is fundamental in our system, and entrenchment flouts that distinction.

Thus, history and structure make a strong case for concluding that the legislature does not have the power to entrench. Interestingly, either type of evidence by itself would present a much weaker argument. While the historical evidence shows that the antientrenchment interpretation of legislation was in common usage, skeptics might still conclude that the language was ambiguous and the argument therefore inconclusive. While the structural evidence provides a compelling reason for finding no power to entrench, it does not by itself supply a way of reading the text to further this purpose. Structure and history together, however, supply mutually reinforcing evidence that powerfully supports the antientrenchment interpretation. History supplies the textual road to the antientrenchment principle, and structure provides the strongest reason for taking that road. [\[FN31\]](#)

Despite the strength of this argument, Posner and Vermeule attack it at every turn. They contend that the legislative power should not be construed to incorporate the traditional antientrenchment understanding, [\[FN32\]](#) that history does not show a pattern militating against entrenchment, [\[FN33\]](#) and that legislative entrenchment would be consistent with the constitutional structure. [\[FN34\]](#) We respond to each of these contentions in turn.

B. The Constitutional Text and Legislative Entrenchment

Professors Posner and Vermeule make several arguments to show that the text of the Constitution does not support interpreting legislative power in accord with its traditional limitation against entrenchment. First, they contrast the clauses vesting legislative power with those vesting executive and judicial power. While Congress is vested with "[a]ll legislative Powers herein granted," the President and the federal judiciary are given executive power or judicial power without limitation. [\[FN35\]](#) Posner and Vermeule claim that this qualification requires that legislative power be defined expressly by grants and limitations in the Constitution rather than through undefined norms. [\[FN36\]](#)

This argument is mistaken. The term "herein granted" merely modifies "legislative power," but does not change its meaning. Thus, the Framers' understanding of "legislative power" as prohibiting entrenchment is not affected by the "herein granted" language. The purpose of the phrase "herein granted" is to indicate that no legislative subjects in addition to those listed in the Constitution may be implied. [\[FN37\]](#) It does not speak to what constitutes legislative power and thus what limitations are implicit in that concept. The "herein granted" language means that Congress cannot, for example, legislate as to intrastate commerce. But even laws that regulate interstate commerce must constitute legislative power and therefore must conform to the requirements of such power. [\[FN38\]](#)

Even if one did conclude that the "herein granted" language referred not merely to legislative subjects but also to the implicit requirements of "legislative power," Posner and Vermeule's argument would still not follow. The "herein granted" language is intended to prevent one from interpreting the Constitution to provide Congress with additional powers. Posner and Vermeule's goal, however, is not to prevent an additional power from being read in, but to prevent an implicit limitation on Congress's power from being recognized. Posner

and Vermeule, then, are attempting to read the constitutional language conferring "all legislative powers herein granted" as if it read "all legislative powers without implicit limitation." Clearly, the text can bear no such interpretation.

Posner and Vermeule also present a second argument for concluding that the constitutional text does not incorporate the traditional prohibition on entrenchment. Because the Constitution expressly prohibits certain types of laws that violate common law maxims, such as ex post facto laws, [\[FN39\]](#) they argue that the Framers did not intend to incorporate other common law maxims, such as the common law maxim against entrenchment, which were not specifically mentioned in the text. [\[FN40\]](#) This type of argument employs the traditional canon of construction of *expressio unius est exclusio alterius*, which means the expression of one thing (the ban on ex post facto laws) indicates the exclusion of another (no prohibition on entrenchment).

While we agree that the *expressio unius* canon was accepted by the Framers' generation, it is essential that, like other guides to statutory interpretation, the canon be employed appropriately. As Alexander Hamilton stated in *The Federalist* No. 83, proper uses of this canon need to be distinguished from improper uses to avoid misconstruing the Constitution. [\[FN41\]](#) In the present case, that the Constitution specifically prohibits ex post facto laws and bills of attainder, but not entrenchment, does not mean that the "legislative power" should not be read to include a prohibition on entrenchment. Given the brevity of the Constitution, it is simply not possible for the Framers to have included all the prohibitions that were implicitly within general terms such as "legislative power." As Chief Justice Marshall famously stated, "we must never forget that it is a constitution we are expounding," not a code. [\[FN42\]](#)

The real question is whether it would have made sense for the Framers to have specifically prohibited ex post facto laws but to have left the prohibition of entrenchments to the general language of "legislative power." There are at least three reasons why this would have made sense.

First, the propriety of ex post facto laws was a more visible and disputed question in England and America than the question of entrenched legislation. [\[FN43\]](#) It would make sense for the Framers to have addressed a question that often arose rather than one that seldom did.

Given the visibility of this issue, ex post facto laws were more controversial than entrenchment. One can imagine what opponents of the Constitution would have said if it were left to construction as to whether the federal government was permitted to punish without prior notice.

Third, the prohibition of ex post facto laws was less clearly implied by the "legislative power" than the prohibition on entrenchment. The prohibition on entrenchment contained in the vesting of legislative power was based on a strong inference from the constitutional amendment process as well as long-standing Anglo-American practice. By contrast, whether or not the prohibition on ex post facto laws had been regularly followed, the case for finding these prohibitions in the legislative power was not supported by a structural argument even remotely as strong as the one buttressing the prohibition on entrenchment. [\[FN44\]](#) Thus, to communicate their positions clearly, it would have been far more necessary for the Framers to have spelled out the prohibition on ex post facto laws than the prohibition on entrenchment. [\[FN45\]](#)

C. The Historical Evidence Against Legislative Entrenchment

Professors Posner and Vermeule also attempt to rebut the historical basis for suggesting that the antientrenchment principle is part of the meaning of "legislative power." First, they argue that British history

contains exceptions to the antientrenchment principle. [\[FN46\]](#) Even if British history did include a few examples of entrenchments, however, such minor divergences would not necessarily imply that the Framers' understanding tracked the exceptions rather than the overall practice, particularly when the practice was backed by a justifying theory. A few exceptions, especially if they were not well known, would have been unlikely to modify an understanding formed by a general practice. After all, people were more likely to read Blackstone in order to gain an understanding of legal principles than to canvass the course of English history. Moreover, anyone of legal sophistication understands that rules are flouted and that the legal world should be viewed in terms of regularities, making due allowance for exceptions. Thus, for instance, Professor A.V. Dicey embraces the antientrenchment principle as the norm and explains away the few exceptions. [\[FN47\]](#) Posner and Vermeule have not explained why this would not have been the view of the well-informed lawyer at the time of the framing.

In any event, Posner and Vermeule are only able to provide one purported example of entrenchment from the time before the framing: the Act of Union between Scotland and England of 1706. [\[FN48\]](#) This Act does not constitute a genuine example of legislative entrenchment for several different reasons. First, despite its name, this enactment was not legislation but, rather, an international treaty between Scotland and England. It was signed by the commissioners representing the two independent states of Scotland and England, which happened to have the same sovereign. [\[FN49\]](#) Under our Constitution, the power to make treaties is an executive power that is shared between the President and the Senate, [\[FN50\]](#) and, therefore, historical examples of entrenched treaties shed no light on whether Congress may entrench legislation.

In addition, this treaty may not have been entrenched in the sense that Posner and Vermeule suggest. It may have been an agreement that purported to be entrenched under international law, but that does not mean that it would be binding and enforceable under domestic law. As a matter of international theory, it makes sense that the provisions of this merger between two states could be entrenched [\[FN51\]](#) because a treaty can be changed only if both parties agree, and here the treaty extinguished the parties. [\[FN52\]](#) But the international law implications of the treaty may be distinct from the domestic law effects, and it is possible that a subsequent enactment could have legally violated the treaty under British law. Thus, this example would not suggest that entrenchment would be available in a dualist system like ours where the international and domestic law implications of a treaty are separate.

Actually, it is surprising that Posner and Vermeule cannot cite more examples of legislation that flouts the antientrenchment principle, because self-aggrandizing legislators might be expected to try periodically to bend rules to perpetuate their power. Posner and Vermeule's historical evidence of pre-framing entrenchment is so weak that they bear witness to the strength of the historical antientrenchment principle that informs the meaning of "legislative power."

Posner and Vermeule also note that it is "remarkably hard" to find express statements where the Framers specifically approved the antientrenchment principle. [\[FN53\]](#) In fact, as discussed at length below, we found clear statements of this sort in a famous statute passed by the Virginia legislature one year before the framing of the Constitution and in a statement by the father of the Constitution, James Madison, made in Congress one year after the Constitution took effect. In general, however, prior to the establishment of the Constitution, there would have been little reason to expect the Founders' debates to mention this principle, given that the new Constitution would presumably follow the traditional antientrenchment view. By contrast, had anyone believed that the proposed Constitution would depart from the traditional view, significant public debate about it would have been likely to have arisen, especially from the Antifederalists, who were concerned about the ability of a temporary oligarchy to seize control of the government and resist challenges from the people. [\[FN54\]](#) Thus, if silence from the debates in this area suggests anything, [\[FN55\]](#) it suggests that the traditional

view was accepted. [\[FN56\]](#)

Posner and Vermeule note that James Madison divided "political acts into three categories: (1) constitutions; (2) laws irrevocable at the will of the legislature; and (3) ordinary laws that are not irrevocable." [\[FN57\]](#) Although Posner and Vermeule seize upon the second category for support, Madison's remarks actually suggest that legislative entrenchment was not generally permitted (which is confirmed by his statements elsewhere, as we discuss below). In the remarks cited by Posner and Vermeule, [\[FN58\]](#) Madison is responding in a private letter to Thomas Jefferson's claim that entrenchment should never be permitted--a claim summarized in his famous declaration that "[t]he earth belongs always to the living generation." [\[FN59\]](#) Jefferson argues that "[t]he Constitution and the laws of their predecessors are extinguished then, in their natural course, with those whose will gave them being." [\[FN60\]](#) Madison disagrees with this proposition of political philosophy and instead divides enactments into three categories. [\[FN61\]](#) He agrees with Jefferson that each legislature must have the power of revision on laws "involving no such irrevocable quality." [\[FN62\]](#) By contrast, he argues that constitutions can be entrenched. [\[FN63\]](#) His second category includes kinds of "irrevocable" legislation. [\[FN64\]](#) The only example that Madison provides of this category is debt legislation, which he claims is "in the nature of things" irrevocable because of the relation that "one generation bears to another." [\[FN65\]](#)

Madison thus appears to agree as a general matter that statutes, unlike constitutional provisions, are not entrenched against majoritarian change. That is, after all, his major concession to Jefferson. His acknowledgment of an additional category of irrevocable statutes is perfectly consistent with a constitutional order like ours that permits entrenchment in limited circumstances specified by the Constitution itself. For example, the Takings Clause makes it impossible for the legislature to revoke property rights once granted by legislation. [\[FN66\]](#) Moreover, the conventional view of the Contracts Clause holds that government debt--Madison's example of an irrevocable statute--cannot be abrogated. [\[FN67\]](#)

In any event, it must be recognized that neither Jefferson nor Madison was purporting to state positive law. Instead, both were discussing political philosophy, which is an uncertain measure of constitutional meaning. [\[FN68\]](#) When Madison did speak in terms of positive law, his actions and remarks, both directly before and after the framing of the Constitution, show that he embraced the antientrenchment principle. Moreover, his acceptance of the principle was very visible; it was embodied in a famous statute [\[FN69\]](#) as well as in an uncontradicted statement made on the floor of the House of Representatives. [\[FN70\]](#) The combination of these events strongly suggests that the antientrenchment principle was widely accepted among the Framers' generation.

Madison introduced the Virginia Statute for Religious Freedom. [\[FN71\]](#) After outlining the famous principles of religious freedom for which the statute is best known, the statute continued:

And though we know this assembly elected by the people for ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right. [\[FN72\]](#) This provision not only confirms that the antientrenchment principle was part of the common understanding of legislative power at the time of the framing but also shows that the rationales for entrenchment were precisely those that we suggest flow from an original understanding of the Constitution. First, the statute makes an express reference to an assembly "elected . . . for ordinary purposes," presumably to distinguish it from more extraordinary assemblies authorized to enact constitutional provisions. [\[FN73\]](#) This accords with our structural argument that the possibility of entrenching through extraordinary procedures, like

our own Constitution's amendment process, undercuts the claim that the ordinary legislature can entrench legislation. Second, the statute refers to the legislative equality rationale for the antientrenchment principle, showing that the traditional rationale noted by Blackstone had traveled to the United States. [FN74] More generally, the authors of the Virginia statute refused to make even those principles guaranteed by natural law irrevocable. [FN75] Thus, this provision demonstrates that, in the absence of constitutional authorization for particular kinds of legislative entrenchment, the antientrenchment principle was so strong that it trumped all other considerations, including the kinds of considerations that Posner and Vermeule adduce for legislative entrenchment.

In 1790, a few months after his exchange with Jefferson, Madison supported a bill to establish a temporary capital for ten years at Philadelphia and then to move the capital to the new city of Washington. [FN76] In response to fears that advocates of Philadelphia would succeed in the future in making its temporary status permanent, Madison said:

But what more can we do than pass a law for the purpose [of making Washington the future capital]? It is not in our power to guard against a repeal. Our acts are not like those of the Medes and Persians, unalterable. A repeal is a thing against which no provision can be made. If that is an objection, it holds good against any law that can be passed. [FN77] Finally, Posner and Vermeule offer the senatorial filibuster as an example of entrenchment. [FN78] Under present Senate rules, Senators cannot be stopped from engaging in debate through cloture unless sixty percent of the Senators agree. [FN79] By itself, this cloture rule would not entrench if a simple majority of the Senate could waive or repeal the rule. But under Senate rules, proposals to change the cloture rule can be filibustered and cloture of these filibusters requires two-thirds of the Senate. [FN80] Thus, these cloture rules would, if followed, prevent a majority from changing the cloture rule because they could not force a vote on the rule.

To argue that the filibuster is evidence of the original meaning of the Constitution, one would need to show that early Congresses approved of it. [FN81] More recent actions lack a proximate connection to the Framers' milieu and therefore there is little reason to believe that these actions reflect the Framers' understanding of the world. It is therefore significant that early Congresses did not have any clear procedural rules that denied a majority the power to pass a rule curtailing debate. [FN82] While members in early Congresses sometimes engaged in debate for purposes of delay, [FN83] there are no indications that a majority wanted to change the rules permitting such debate or that a majority was prevented from doing so. At that time, unlimited debate did not operate to block legislation in the way that it can now. Long speeches by Senators in a body with a limited agenda could, at most, delay consideration of legislation, and they could only do so at considerable personal costs to the Senators. By contrast, in today's Senate, the crowded agenda allows Senators to prevent consideration of a bill merely by announcing a filibuster and withstanding a cloture vote. [FN84] Thus, it is by no means clear that early legislative houses were subjected to an entrenched filibuster rule.

Although more recent legislative practice provides little evidence of the original meaning, even that practice does not clearly endorse entrenchment of the filibuster rule. While it is true and important that the Senate has adopted a formal cloture rule that applies to attempts to change these rules, [FN85] members have challenged the entrenchment of the filibuster. [FN86] The legal analyses of the rule by Presidents of the Senate have consistently disapproved of entrenchment, and these analyses have sometimes been endorsed by the Senate as a whole. [FN87]

D. The Inconsistency of Legislative Entrenchment with Constitutional Structure

1. Intrusions on the Constitutional Amendment Process

Professors Posner and Vermeule also argue that a legislative power to entrench is not inconsistent with the constitutional amendment process established in Article V, [\[FN88\]](#) but this argument is hard to make. With the power to entrench, Congress could pass laws that a future Congress could never repeal. These laws would therefore function as constitutional amendments because, like constitutional provisions, they could only be changed by constitutional amendment.

Posner and Vermeule respond, however, that entrenched legislation is not a perfect substitute for a constitutional amendment. [\[FN89\]](#) The power to entrench legislation would not allow Congress to pass entrenched laws that would violate the Constitution, such as an entrenched law that abridges freedom of speech. [\[FN90\]](#) Only constitutional amendments could repeal or override existing constitutional provisions.

Posner and Vermeule's argument is interesting but ultimately unpersuasive, as it seizes on a small distinction that does not negate the substantial similarity between constitutional amendments and entrenching legislation. That entrenching legislation must conform to constitutional provisions does not change the fact that such legislation allows Congress to exercise an enormous portion of the power to pass constitutional amendments. While constitutional restrictions are important, the Constitution leaves most matters to the discretion of Congress and therefore would give Congress an immense range of matters to entrench.

The legislative power that Congress could exercise with the entrenchment power and the laws it could pass that would be constitutional would simply be enormous. A few examples are instructive. Congress could pass permanent laws that could: eliminate the estate tax; establish a generous minimum wage that was indexed to inflation; prohibit all progressive taxation; authorize sizeable welfare payments equal to some percentage of the median income; limit federal spending to a fixed percentage of Gross Domestic Product ("GDP"); or prohibit the federal government from violating liberty of contract or taking actions that would impair the value of property rights. There would be no need to pass the Balanced Budget Amendment, as entrenched legislation would have precisely the same effect.

No one has ever seriously considered that such laws could be passed, and for good reason. It would have been extremely anomalous for the Framers to have established a double supermajoritarian process for passing constitutional amendments and then to allow Congress to bypass it in a wide range of cases where its actions would have exactly the same effect. Posner and Vermeule's argument seems weakest at this point. Their approach here is more like the contrivance of a tax loophole than an exposition of the Constitution. [\[FN91\]](#)

Allowing entrenchment through the ordinary lawmaking provisions rather than through the strict supermajoritarian process for constitutional amendments would also ignore the virtues that the Framers recognized in the supermajoritarian process. The Framers recognized that the lenient provisions for lawmaking would be undesirable for entrenched rules, because ordinary legislation could sometimes be temporarily afflicted by pernicious influences that would result in undesirable laws. [\[FN92\]](#) If such laws were enacted, republican governments could at least repeal these laws once the influences had subsided. But if undesirable legislation could be entrenched, such legislation would be difficult, if not impossible, to repeal. Therefore, to prevent evanescent majorities from enacting undesirable laws, the Framers established a double supermajoritarian process for enacting amendments that was both long and difficult to satisfy. [\[FN93\]](#)

2. Inferences from Constitutional Entrenchments

Professors Posner and Vermeule also argue that the Constitution supports entrenchment because the

Constitution itself entrenches one provision against change: Article V provides that no constitutional amendment may deprive a state, without its consent, of its equal voting rights in the Senate. [\[FN94\]](#) But this provision is not an example of legislative entrenchment, in which a statute is insulated from future legislative modification. Rather, it is an example of an asymmetric constitutional entrenchment, in which a constitutional provision is insulated from change by future constitutional amendments. [\[FN95\]](#)

Legislative entrenchments and asymmetric constitutional entrenchments are distinct matters. That Article V constitutionally entrenches a few provisions does not mean that the Constitution permits legislative entrenchment. Indeed, we believe there are strong arguments for concluding that the Constitution treats legislative entrenchment and asymmetric constitutional entrenchment differently. In our view, Article V not only constitutionally entrenches the equal state suffrage provision against future constitutional amendments, but it may also allow the passage of constitutional amendments that would absolutely insulate their provisions against future constitutional amendment. [\[FN96\]](#) Not only is this interpretation of Article V consistent with a prohibition on legislative entrenchment, but it also flows from some of the same considerations that support the ban on legislative entrenchment.

The main considerations that support a bar on legislative entrenchment-- history and structure--suggest that asymmetric constitutional entrenchment is constitutional. [\[FN97\]](#) First, the Constitution itself contains an asymmetric constitutional entrenchment. The Constitution was passed under a rule that allowed all its provisions, including the equal state suffrage provision, to be enacted if they received the approval of nine of the thirteen states. [\[FN98\]](#) The equal suffrage provision may be repealed, however, only if all states consent, creating a substantial asymmetry. [\[FN99\]](#)

Some people may argue that the equal state suffrage provision of Article V is not an asymmetric entrenchment, because the Constitution applied only to those states that consented to it and therefore was adopted under a type of unanimity rule. [\[FN100\]](#) Thus, the rule requiring unanimous consent to deprive all states of their equal voting rights in the Senate would be symmetric with the rule providing for the adoption of the Constitution. But this argument is mistaken. To determine whether the rule for amending the constitution is symmetric with the rule for adopting it, one must look to the number of states which were required to approve the constitution as a proportion of the number which were offered it. Thus, under the original Constitution, nine states were needed to approve the document out of the thirteen that were offered it. [\[FN101\]](#) Under an ordinary constitutional amendment, thirty-eight states must ratify the amendment out of the existing fifty, [\[FN102\]](#) and hence there is a rough symmetry with the nine-thirteenths proportion. To change the equal voting rights of the states, however, all of the existing fifty states would need to approve, which would constitute an asymmetric entrenchment of a provision that was enacted under a rule that required only nine of the thirteen states to approve.

The argument that the unanimity requirement for changing the equal state suffrage provision is symmetric with the nine-thirteenths supermajority rule for establishing the Constitution is based on the idea that one must consider the number of states who agree to the document as a proportion of the number who are governed by the Constitution. Under this approach, the proportion in both situations needs to be unanimous. But that proportion is not the relevant one, [\[FN103\]](#) because it does not indicate the overall support for an enactment. [\[FN104\]](#) For example, suppose that the original Constitution had chosen to allow the approval of three states to establish that Constitution among those agreeing (instead of the rule adopted in Article VII which required that nine states approve). That constitution might have secured very little support--a mere three of thirteen states--yet under the mistaken argument above the support of these three states would be symmetric with a requirement that all fifty states in the union today would be needed to modify the equal state suffrage provision. That interpretation of symmetry is clearly misconceived. Under the proper interpretation of

symmetry, the requirement that all states must consent to changing the equal state suffrage provision is an asymmetric entrenchment.

Because the Framers wrote an asymmetric entrenchment into Article V of the Constitution, it is extremely hard to argue that they were implicitly prohibiting such entrenchments under the same provision. Also, while the meaning of "legislative power" was informed by the traditional practice against legislative entrenchments, there was no similar practice concerning constitutional amendments, in part because England did not have a written constitution. Thus, one cannot infer that the Framers would have assumed that asymmetric constitutional entrenchment was impermissible. Finally, although legislative entrenchment conflicts with the constitutional structure by improperly substituting for the constitutional amendment process, the entrenchment of constitutional provisions does not intrude upon or substitute for any other process. There is no other constitutional mechanism, governed by even stricter supermajority rules, that could be used to entrench constitutional provisions. [\[FN105\]](#) Thus, structure and history indicate that legislative entrenchment is prohibited, but suggest that asymmetric constitutional entrenchment is permitted.

Although there are strong originalist arguments in favor of asymmetric constitutional entrenchment, we generally oppose both legislative and asymmetric constitutional entrenchments on normative grounds, because both constitute asymmetric entrenchments. [\[FN106\]](#) Nonetheless, an originalist approach to interpreting the Constitution requires that we ignore our normative concerns and focus exclusively on the Constitution that was actually adopted. Although one always regrets departures from normative ideals, interpreting the Constitution to permit asymmetric constitutional entrenchment but not legislative entrenchment at least has the virtue of showing that we are not mistaking our principles for the Constitution.

E. Conceptual Disagreements

As our discussion of the difference between normative and positive principles suggests, we appear to have a larger conceptual disagreement with Professors Posner and Vermeule on what constitutes originalism. We differ with Posner and Vermeule in two respects. Some of their arguments are originalist, but these involve faulty inferences or mistaken factual claims. Some of their other arguments are not, however, originalist arguments at all.

For instance, Posner and Vermeule argue that the equality of legislatures rationale for the antientrenchment principle is defective because a rule that allows each legislature to entrench would also respect the equality of legislatures. [\[FN107\]](#) Even if Posner and Vermeule were correct that the traditional understanding of legislative equality was mistaken, this would say nothing about whether the traditional view was generally accepted. We cannot project our own normative visions onto the Framers if we want to understand what they meant. If Posner and Vermeule's understanding of legislative equality was not shared by anyone in the Framers' generation, then it is irrelevant to a proper construction of the Constitution. [\[FN108\]](#)

Posner and Vermeule also argue that there is an incongruity between opposing legislative entrenchment and endorsing stare decisis. [\[FN109\]](#) While these two doctrines do treat legislative and judicial decisions differently, the question is how the Framers' Constitution should be interpreted, not whether this differential treatment satisfies an abstract notion of consistency. History and structure, again, provide strong reasons for concluding that the Framers approved of this differential treatment. Historically, legislatures were governed by different rules than were the courts. Just as Blackstone states that legislatures cannot entrench, he also indicates that prior judicial decisions are entitled to precedential weight. [\[FN110\]](#) Structurally, while legislative entrenchment would intrude upon the constitutional amendment process, precedent does not intrude upon any

other constitutional process and appears to keep the judiciary from exercising policymaking power that is more appropriate to a legislature. [\[FN111\]](#)

II. In Defense of Symmetric Entrenchment

In this Part, we respond to the normative arguments of Professors Posner and Vermeule that majoritarian entrenchment is desirable by articulating and defending a theory of symmetric entrenchment. In the first Part, we argued that the United States Constitution forbids legislative entrenchments and permits constitutional entrenchments. In this second Part, we offer a theory that outlines which entrenchments an ideal constitution would permit. We compare those ideal entrenchments with the entrenchments contained in our own Constitution. Our theory of entrenchment neither endorses all types of entrenchments, as Posner and Vermeule appear to do, nor opposes all types, as strict majoritarians do. [\[FN112\]](#) Instead, it adopts a middle path that attempts to distinguish beneficial entrenchments from harmful ones.

We argue that the best way to identify desirable entrenchments is to require that they be symmetric. Symmetric entrenchments are those that employ the same voting rule to govern the enactment of the entrenched measure as would be required to repeal it. An example of a symmetric entrenchment is the Eighteenth Amendment to the Constitution, which established prohibition. [\[FN113\]](#) Like all constitutional amendments, the Eighteenth Amendment was entrenched, in that it could only be repealed by satisfying the two strict supermajority rules necessary to amend the Constitution. Yet, the entrenchment was symmetric, since the Eighteenth Amendment was enacted through the exact same procedures that were needed to repeal it. [\[FN114\]](#) By contrast, Posner and Vermeule endorse asymmetric entrenchments, in which Congress could use the ordinary processes for passing legislation to entrench provisions that could be repealed only through stricter procedures. [\[FN115\]](#)

A requirement of symmetric entrenchment helps to distinguish between desirable and undesirable entrenchments. Entrenchments can improve democratic legislation in a variety of ways, including establishing constitutional provisions that structure government decisionmaking and protect fundamental rights. Entrenchments, however, can also be harmful. In particular, an incumbent legislature could use them simply to embed their preferences into the law so that future generations could not easily change the rules, even if circumstances, knowledge, or public values evolved.

A symmetry requirement helps to avoid these harmful entrenchments. We argue that measures enacted under a supermajority rule are of higher quality than those enacted under majority rule. A symmetry requirement will therefore increase the quality of legislation that is entrenched in rough proportion to the extent that it is entrenched. The more entrenched a provision is, the more likely that it will be beneficial.

Although we believe that Posner and Vermeule's failure to recognize the importance of symmetry is the fatal flaw in their arguments, we do not claim that symmetry is the only relevant normative consideration. We recognize that asymmetric entrenchments may in some cases be desirable and that beneficial institutions for entrenchment depend on more than symmetry. But even taking these matters into account, the central normative consideration governing entrenchment, in our view, is the presumption of symmetry.

We then use the theory of symmetric entrenchment to examine and critique Posner and Vermeule's claims in favor of asymmetric, majoritarian entrenchment. We believe that Posner and Vermeule's argument in favor of majoritarian entrenchment is puzzling, since the failures of majority rule that they believe help justify entrenchments would afflict majoritarian entrenchment as well. We also show that their criticisms of the

arguments against legislative entrenchment for being underinclusive are beside the mark.

A. The Theory of Supermajority Rules

While majority rule has great merits as a decisionmaking procedure, on many occasions it is plagued by serious defects that result in the passage of undesirable legislation. Supermajority rules can sometimes operate to address these defects and produce better legislation than would majority rule. The potential benefits of supermajority rules, however, must be balanced against their administrative, substitution, and decisionmaking costs. [\[FN116\]](#) Thus, a supermajority rule will be preferable to majority rule when the benefits it produces in terms of improved legislation outweigh these costs. [\[FN117\]](#)

In analyzing whether supermajority rules are preferable to majority rule, we employ an economic approach for both expositional and substantive reasons. [\[FN118\]](#) Under this approach, a supermajority rule would produce better legislation than majority rule if the laws generated by the supermajority rule produce more total net benefits than the laws generated by majority rule.

1. Improved Legislation

Assessing whether a supermajority rule would produce better legislation than would majority rule requires a comparison of the laws that are generated by each of these voting rules. While both voting rules would generate many of the same laws, it is the laws that would be passed by only one of the voting rules that determines the superior rule. These laws fall into two groups. First, certain laws would pass under majority rule, but would be blocked by a supermajority rule, because they can only obtain the support of a mere majority of the legislature. Second, other laws would be enacted under a supermajority rule, but not under majority rule. If a supermajority rule would prevent the passage of a law, the legislature might decide to make it more desirable in order to secure supermajority support. A supermajority rule would produce better legislation, then, if the laws that pass only under the supermajority rule generate greater total net benefits than laws that can secure only a mere majority.

This comparison of the laws passed by majority and supermajority rules is greatly aided by an important generalization concerning the quality of legislation produced by different voting rules. In general, laws that pass under strict supermajority rules are of higher quality than those that pass under more lenient supermajority rules or majority rule. By "high-quality," we mean something quite specific: High-quality laws are those that produce large net benefits per dollar incurred. Thus, laws passed under a supermajority rule are likely to produce greater net benefits per dollar than laws passed under majority rule.

The reason for this result is straightforward: The greater the political support that a law can secure, the greater the net benefit per dollar that the law is likely to produce. Legislative support for a law is likely to be strongly correlated with the quality of the law, because large net benefits are an important source of political support for legislation, and other sources of such support are also likely to produce net benefits. [\[FN119\]](#)

That supermajority rules generate higher quality laws, however, does not mean that supermajority rules always produce better legislation. We measure the desirability of legislation passed under a voting rule by assessing the total net benefits that it produces, not by determining whether it produces high net benefits per dollar incurred. Thus, a voting rule might produce greater total net benefits, even though it enacts lower quality laws, by passing a large number of such low quality (but still beneficial) laws.

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In fact, when majority rule is functioning well and producing better legislation than a supermajority rule, one would expect exactly this situation to hold. The laws that pass under majority rule, but are impeded by a supermajority rule--the laws that can only secure a mere majority--are likely to produce positive, but relatively small, net benefits. On average, they will not produce significant benefits, or else they could secure additional votes. Still, such low but positive quality laws should be enacted because they will contribute to the total net benefits of legislation. Because a supermajority rule prevents such laws from being enacted, majority rule that is functioning well is likely to produce better legislation than the supermajority rule. [\[FN120\]](#)

When majority rule is functioning poorly, however, we would expect the laws that can secure only a bare majority to be undesirable. [\[FN121\]](#) A supermajority rule might then be able to increase the total net benefits by preventing these undesirable laws from being enacted. Moreover, the laws that a supermajority of the legislature would pass, instead of these undesirable laws, are also likely to be of higher quality. Thus, when majority rule is functioning poorly, supermajority rules may be able to enact better legislation.

2. Costs of Supermajority Rules

While a supermajority rule may improve the net benefits of laws that would pass under the legislature, supermajority rules also have costs, including administrative and substitution costs. Administrative costs refer principally to the costs derived from the need to define the category of legislation that is subject to the supermajority rule. [\[FN122\]](#) The costs can be low if the category is easily identified but can be high if the category does not admit of easy definition. Substitution costs are the costs of enactments that are passed under majority rule in order to avoid the supermajority rule. If a majority is blocked by a supermajority rule from passing a measure, it can sometimes reformulate the legislation so that it can be passed in a different category that faces only majority rule.

Supermajority rules work best when the benefits are large and the costs small. The secret, then, to establishing a supermajority is to find a category of decisionmaking where there are significant defects in majority rule, and where that category can be clearly defined and would not produce significant substitution costs. Here we argue that entrenched legislation satisfies these conditions.

B. Entrenchment Requires a Supermajority Rule

A supermajority rule for measures that entrench would be beneficial because it would result in better legislation and yet have low administrative and substitution costs. To begin with, a supermajority rule is likely to improve the quality of the entrenched enactments. An important feature of ordinary legislation is that it can be repealed if it turns out to be undesirable. If the legislature concludes that an earlier statute is harmful because of new information, changed preferences, or recognition that it made a mistake, it can readily repeal ordinary legislation. Eliminating entrenched legislation that turns out to be undesirable, by contrast, is made more difficult in proportion to the degree it is entrenched.

We have seen that when majority rule is functioning well, the legislation that can secure only a mere majority of political support is likely, on average, to produce positive but small net benefits. This result, however, assumes that the legislation is not entrenched and can be repealed. If a legislative majority can entrench legislation, then the entrenched legislation that can only secure a mere majority will be even worse and is therefore likely to be undesirable. [\[FN123\]](#) It would thus be beneficial to have a supermajority rule that would prevent the enactment of entrenched legislation with only majority support, while permitting entrenchments with more substantial support.

Of course, one might argue that the legislators themselves will know about the lack of easy repeal of entrenched provisions. Therefore, they will only vote to entrench high-quality legislation because they will make appropriate tradeoffs between the benefits of entrenchment that Posner and Vermeule note and the dangers that we have discussed above. Unfortunately, there are strong reasons why the legislators are unlikely to behave in this beneficial manner.

First, because voters tend to judge legislators based on the short-run consequences of their actions, self-interested legislators lack incentives to weigh adequately the long-term effects of legislation. [\[FN124\]](#) The public cannot adequately police the long-term consequences of legislative decisions, because it lacks the knowledge and incentives to understand these complex effects and because legislators may have moved on before these long-term consequences became apparent. [\[FN125\]](#) Although this is a familiar claim in the public choice literature, Posner and Vermeule surprisingly do not discuss it when they consider public choice objections to entrenchment. [\[FN126\]](#)

Second, the legislature will sometimes fail to represent the views of the electorate because the legislative majority may be aberrational. A political party might secure a majority based on a scandal, a particular governmental failure, or presidential coattails, and yet not represent the electorate's views on many issues. [\[FN127\]](#) It could nevertheless entrench its views on those issues and make it difficult for more representative Congresses in the future to reverse them. [\[FN128\]](#)

Third, partisanship may also cause legislators to behave more imprudently with entrenched legislation than they would with ordinary legislation. A political party that would otherwise refrain from passing risky legislation might behave differently in a competitive political situation. Having gained a legislative majority, the party might believe that this is its opportunity to enact and entrench its agenda, because it believes the other party will do the same once it gets into power again. Thus, legislators may justify imprudent action as a means of competing with and defending against their political opponents.

Finally, even altruistic and nonpartisan legislators may tend to underrate the likelihood of changed circumstances that would require repeal. Because the future is uncertain, people use a "representativeness" heuristic by which they assume that future patterns of events will resemble the past patterns with which they are familiar. [\[FN129\]](#) Legislators will thus tend to underestimate the likelihood of a destabilizing change and the possibility that a good policy today will not remain a good policy tomorrow, thereby causing legislators to have too favorable a view of entrenchment.

If these problems show that majority rule for entrenchments will lead to low-quality entrenchments, they also suggest why a supermajority rule would tend to result in more desirable entrenchments. A supermajority rule would make it harder for an aberrational majority to entrench legislation because the rule would require more of a bipartisan consensus for entrenchment. The consensus required by a supermajority rule would also constrain the desire to entrench out of partisanship, since political parties would find it more difficult to enact entrenchments and would have less reason to fear that the other party could entrench after it gained power.

A supermajority rule would also make it harder for legislatures to enact programs with short-term benefits and long-term costs, because the rule would give more leverage to legislators with longer time horizons. Finally, a supermajority rule would also help correct the difficulty that legislators have in predicting low probability changes in circumstances, because it would give additional influence to those legislators who are especially sensitive to the possibility of such changes.

As we discussed in our response to Posner and Vermeule's specific arguments for majoritarian

entrenchment, supermajority rules will not only improve the quality of entrenched legislation, but they will also have low administrative and substitution costs. [\[FN130\]](#) Administrative costs are low because entrenched legislation is very easy to define. Substitution costs for entrenchments are also relatively low because it would be difficult to design ordinary legislation that would have the same constraining effects as entrenched legislation. For instance, it would be impossible for ordinary legislation to provide anything like a substitute for entrenching either a ban on estate taxes or a requirement of a minimum wage.

C. The Presumption of Symmetric Entrenchment

While these considerations show that entrenchment should be subject to a supermajority rule, they also suggest the appropriate strictness of that rule. The voting rule that governs the enactment of an entrenched provision should be the same as the voting rule governing its repeal. We maintain that there should be a strong presumption in favor of permitting only such symmetric entrenchments.

This symmetry requirement flows naturally from the arguments that support a supermajority rule for entrenchments. As one increases the strictness of the supermajority rule needed to repeal entrenched legislation, the expected costs created by public choice problems, aberrational elections, partisanship, and imperfect heuristics are likely to rise. A requirement of symmetric entrenchment compensates for those costs by making stricter the supermajority rule needed to enact the entrenched measure. As that supermajority rule becomes stricter, the quality of the entrenching legislation should also rise.

Our argument for symmetric entrenchment also comports with the common claim that one generation should not be able to rule another through the dead hand of past enactments. [\[FN131\]](#) In our view, symmetric entrenchments treat all generations fairly, because they give each generation an equal opportunity to enact and repeal entrenched provisions. This equality can be justified based on both a deontological principle of generational fairness [\[FN132\]](#) as well as the consequentialist ground that there is no reason to believe any one generation would produce better enactments if it were subject to a more lenient voting rule. Posner and Vermeule's majoritarian entrenchment position, by contrast, would create a serious dead hand problem, since a legislative majority from a prior generation would be able to enact provisions that current majorities could not repeal. Thus, they would unfairly privilege past generations without any reason for believing those generations should have greater influence.

Our own Constitution conforms in important respects to the principle of symmetric entrenchment. Although some commentators complain that the Framers had an undue influence on the document, [\[FN133\]](#) each generation has, as to almost the entire Constitution, the same ability to enact constitutional provisions as the Framers had. [\[FN134\]](#) The Framers followed what in essence was a double supermajority rule to enact constitutional provisions, and successive generations must do so as well. Moreover, at the legislative level, the Constitution also embraces symmetry. The Constitution requires that a majority always be able to repeal any measure, which allows a majority to enact any measure as well. [\[FN135\]](#)

We recognize that there is one respect in which the Framers had more power than succeeding generations: The Framers were able to decide the strictness of the entrenchment rules that they would apply to themselves and to future generations. Thus, in the metagame of determining the framework of rules, they had a first-mover advantage. [\[FN136\]](#) But such an advantage is theoretically inevitable in any constitutional system, because constitutionalism involves one generation establishing rules to govern itself and succeeding generations. At least under symmetric entrenchments, the Framers are required to employ the same rules to themselves as they impose on future generations. Moreover, the Framers' decision to establish a stringent

supermajority rule for entrenchments in the original Constitution and the amendment process was not anomalous, but was consistent with other rules then in use. For instance, the Articles of Confederation required the support of nine of the thirteen states for many important decisions of the early federal republic. [\[FN137\]](#) This suggests that the Framers were not abusing their first-mover advantage in establishing the nine-thirteenths rule but were following the emerging American tradition of requiring such supermajority rules for the most substantial decisions.

This dual process for establishing measures--either through the constitutional enactment process or through the legislative process--has significant advantages for our political system. The strict double supermajority rule for enacting constitutional provisions helps to ensure that there is a high-quality fundamental law that can be relied upon by individuals and governments alike. This supermajority rule makes it likely that the fundamental law will be durable, will promote the public interest, and will secure the allegiance of the different parts of a large and multicultural country. [\[FN138\]](#) At the legislative level, the requirement of majoritarian symmetry prevents the legislature from infringing on the constitutional amendment process and allows the legislature to pass measures that reflect current opinion, without having to overcome prior entrenchments. Yet, majoritarian symmetry still allows a majority to pass legislative supermajority rules for a particular category of legislation so long as they are repealable by a majority. [\[FN139\]](#) As a normative matter, such rules can serve as modest precommitments, making it harder for legislators to engage in bad policies, and thus serve in some measure the functions that Posner and Vermeule seek for legislative entrenchment. [\[FN140\]](#)

D. Overcoming the Presumption

While these arguments support a strong presumption of symmetry, this Section addresses several circumstances when this presumption may be overcome. First, we discuss asymmetric entrenchments in the constitutional amendment process. These include both the equal state suffrage provision, that the Constitution itself purports to insulate from constitutional amendment, and the aspect of Article V, as we have construed it, that permits the passage of unamendable amendments. Second, we address asymmetric legislative entrenchments that the Constitution authorizes. Because the Constitution allows Congress (or the state legislatures) to create property rights or form contracts by ordinary legislation but protects these property and contracts from being eliminated by ordinary legislation, the Constitution authorizes a significant asymmetric legislative entrenchment. We show that many of these constitutional and legislative entrenchments have substantial benefits that justify overriding the presumption of symmetry. We conclude that, in the main, the Constitution does a strong, but not perfect, job of determining when asymmetric entrenchments should be permitted.

1. Asymmetric Constitutional Entrenchments

The Constitution on its face contains an important asymmetric entrenchment-- the provision that prohibits eliminating equal state voting rights in the Senate. [\[FN141\]](#) As an asymmetric entrenchment, we view the provision quite suspiciously. Yet, we acknowledge that this entrenchment might be seen as beneficial on the ground that it was needed to establish the political union of the Constitution in the first place. It may not be possible to form a political union without the entrenchment of provisions that assure the parties that certain interests will be protected. If the Constitution could only have been formed with the entrenchment of the equal state voting provision--which is entirely plausible--then the benefits of that Constitution would outweigh the additional costs imposed by the equal voting provision, however problematic that provision may seem to many of us today. We might consider ourselves quite fortunate to inherit from the Framers that small defect as an inseparable part of the blessings of liberty and property. [\[FN142\]](#)

In contrast, once a constitution is up and running, it is much harder to overcome the presumption of symmetry. At that point, a functioning legislature can pass measures that forge compromises and strengthen trust among interests. We deem it a definite flaw in our Constitution that the amendment process, as we are constrained to construe it, allows constitutional amendments that can be entrenched against future constitutional amendments. Fortunately, no entrenched amendments have passed, [\[FN143\]](#) and it may well be that the strict supermajority rules of the constitutional amendment process, which tend to generate high-quality enactments, are responsible for filtering out these problematic provisions. [\[FN144\]](#)

2. Asymmetric Entrenchments of Property and Contracts

While the Constitution allows a limited place for asymmetric constitutional entrenchments, the most important asymmetric entrenchments it permits are asymmetric legislative entrenchments involving the creation of property rights and contracts by the legislature. Unfortunately, it is not possible in an Essay of this length and focus to discuss all of the possible entrenchments in this area. Here, we discuss in some detail two of the most important cases of asymmetric legislative entrenchments: the creation of traditional property rights and the formation of government contracts for debt.

a. The Creation of Traditional Property Rights

Surprisingly, Professors Posner and Vermeule do not address what is arguably the most important example of an asymmetric legislative entrenchment that the Constitution does permit--Congress's ability to create new property rights. For instance, if Congress authorizes the establishment of private property rights through a Homestead Act, the Takings Clause of the Constitution prevents a future Congress from eliminating this property right. Thus, the Homestead Act constitutes an asymmetric entrenchment. Congress has created rights through ordinary legislation that cannot be extinguished in the future by such legislation. [\[FN145\]](#) To be a symmetric entrenchment, the creation of new property rights would have to be established by constitutional amendment since these rights can only be taken away by amending the Takings Clause.

This asymmetric entrenchment is clearly justified, because enforceable property rights of the traditional variety are of overwhelming benefit. To require that property rights be created through the strict procedures necessary to pass constitutional amendments would discourage the establishment of what is often an extremely beneficial institution. To name just a few of the many virtues of property that traditional and modern theories have recognized: Property provides incentives for making the best use of resources over time; [\[FN146\]](#) property (through markets) generates economically essential information in the form of prices; [\[FN147\]](#) property reduces social conflict and harmful rent-seeking by conferring rights on individuals that are not subject to the political process; [\[FN148\]](#) and, finally, property makes possible the independence of resources that is necessary for individuals to have autonomy from the state. [\[FN149\]](#)

These virtues would be dramatically reduced, and, in some cases, completely eliminated, if property rights were not entrenched. If Congress could abrogate property rights, individuals would have far less incentive to make the best use of their property through time. [\[FN150\]](#) The threat of a future taking would deter individuals from making the long-term investments that productive economic activity, especially in the modern world, requires. [\[FN151\]](#) Uncertainty about future ownership rights would also reduce the incentive that individuals have to conserve their property for future uses. [\[FN152\]](#) Moreover, the legislative power to transfer valuable property rights would lead to substantial rent-seeking--both to secure transfers and to defend against them--as Congress would be in a position to threaten the reallocation of extremely valuable resources. [\[FN153\]](#) Greater social disharmony would also result. Finally, independent action, such as criticizing the government, would be greatly chilled if the government had the power to seize property. [\[FN154\]](#)

In fact, this exception to symmetric entrenchment flows from the same considerations of agency costs, partisanship, and imperfect information about the future that generally disfavor asymmetric entrenchments. Agency costs would be greatly increased if the government could revoke property rights. [\[FN155\]](#) Monitoring of governmental (re)allocations of property would tend to be ineffective because the citizenry lacks the incentives to engage in this extremely difficult monitoring task--a task that is comparable to the one that is only adequately performed by a stock market filled with individuals who have expertise and monetary incentives. [\[FN156\]](#) Moreover, the ability of government agents quietly to threaten revocation of property rights would exacerbate agency costs because it would be especially difficult to hold agents accountable for such stealth behavior.

Partisanship might also be increased since the legislature would have a ready means in revocation of property to reward its supporters and punish its opponents. [\[FN157\]](#) Finally, one of the most important ways to correct for the "representativeness" heuristic is to create a structure that provides continuously new information about changing circumstances. [\[FN158\]](#) When property rights are protected, market prices provide such information, reflecting economically motivated predictions about the future. [\[FN159\]](#) In markets with unprotected property, however, this information would be seriously distorted.

Thus, allowing Congress asymmetrically to entrench property rights would further the very values that generally justify the presumption of symmetric entrenchment. It is the exception that proves the rule.

b. Public Debt Contracts

Another example of asymmetric entrenchment involves government contracts. [\[FN160\]](#) If the Contracts Clause and analogous principles applied to the federal government protect public contracts from abrogation, then such contracts are authorized by ordinary legislation but cannot be changed by such legislation. This kind of entrenchment is less restrictive than the entrenchment of property rights because contract rights are limited in duration. Once the contract is over, the legislature can change the rules prospectively.

The strongest case for asymmetric entrenchment of public contracts is for debt contracts. These contracts, which allow the government to borrow money, permit the efficient financing of capital goods that provide continuing benefits to the public over time. [\[FN161\]](#) Although such contracts might be formed without constitutional protection, with the government relying on its reputation to induce lenders to provide the funds, this method is likely to result in significantly higher borrowing costs for the government.

Despite these advantages, however, debt contracts present a serious problem. Public choice considerations and experience suggest that government agents will sometimes use this borrowing authority to shift onto future generations the costs of spending that benefits only the present generation. [\[FN162\]](#) One way of addressing this issue is to allow borrowing only for capital goods that provide continuing benefits, but defining such goods would have huge administrative costs. In light of these costs and of the benefits of entrenching government debt contracts, such contracts might optimally be governed by a rule that splits the difference between majoritarian entrenchment and a completely symmetric entrenchment (which would require each instance of government debt to be authorized by constitutional amendment). A three-fifths supermajority rule for government debt--such as that contained in the Balanced Budget Amendment--would allow asymmetric entrenchment but would reduce the degree of asymmetry. [\[FN163\]](#)

c. Other Entrenchments: Public Contracts and Nontraditional Property

Although there are several other instruments that the Constitution potentially subjects to asymmetric

entrenchments, little would be served by addressing them here since we have illustrated our main points: There are beneficial asymmetric entrenchments for property and contract; these entrenchments are, to some extent, recognized by the Constitution; and their legitimate scope is governed by many of the same considerations that underlie the symmetry presumption itself. Nonetheless, it may be useful to mention two additional types of actions that could potentially be entrenched, but about which we tend to be dubious.

First, we are skeptical about permitting asymmetric entrenchments of public contracts that provide regulatory or tax benefits to private citizens. The entrenchment of such contracts would be hard to distinguish from the entrenchment of ordinary legislation. [\[FN164\]](#) Moreover, there is little need for such contracts, since services that are provided to the government can be compensated effectively, and less dangerously, through the payment of money. While contracts that conferred regulatory or tax benefits were frequently used in the early part of the nineteenth century, their advantages appear to have been outweighed by the abuses that they occasioned. [\[FN165\]](#) Thus, there is good reason not to recognize such asymmetric entrenchments. Significantly, the traditional constitutional rule that emerged during the nineteenth century largely reflected this understanding, since it strongly presumed that governments cannot contract away their sovereign powers. [\[FN166\]](#)

Second, the asymmetric entrenchment of nontraditional property also raises serious concerns. Nontraditional property need not generate the benefits that practice and theory indicate that traditional property produces. Requiring a constitutional amendment to protect such property, however, also seems excessive, because some types of nontraditional property--such as tradable pollution rights--appear beneficial and would need protection. [\[FN167\]](#) While the optimal solution to this question is not clear, interestingly, constitutional doctrine may not be too problematic. Under existing interpretations of the Takings Clause, the Constitution appears more likely to protect a property right the more similar it is to traditional property. That is a plausible resolution, albeit one that involves substantial legal uncertainty. [\[FN168\]](#)

E. Toward Dual Lawmaking: Fixed Rather Than Variable Entrenchments

While the presumption of symmetry tells us that asymmetric entrenchments are generally problematic, it does not tell us how many different types of symmetric entrenchments should be permitted. We can distinguish two different constitutional arrangements that would respect the symmetry presumption. First, a constitution might establish a variable entrenchment procedure, under which the legislature may symmetrically entrench statutes at any level it desires. For example, suppose that fifty-seven percent of the legislature happened to support a bill at a particular time. Then, the legislature could choose to pass the bill under a fifty-seven percent supermajority rule and require that it be repealed under the same voting rule. By contrast, a constitution could establish a fixed entrenchment approach that would allow the legislature to pass measures only under a few predetermined symmetric procedures. The United States Constitution follows the fixed entrenchment approach, since it essentially allows only two types of laws--ordinary legislation and constitutional provisions. [\[FN169\]](#) We maintain that fixed entrenchments are normatively superior to variable entrenchments.

One problem with variable entrenchments is that they allow the legislature to entrench to a greater extent than the long-term legislative support for a bill would justify. The degree of legislative support that a bill can command will often fluctuate over time. [\[FN170\]](#) Consequently, under a variable entrenchment regime, supporters of a bill could wait until the legislative support for a measure was at its apex and then entrench it at whatever level the legislature would approve. [\[FN171\]](#) This entrenchment would not, however, be an accurate reflection of the continuing support for the law. By contrast, under a fixed entrenchment regime,

such as that found in our Constitution, the legislature cannot choose whatever amount of support a measure happens to have and then entrench it under a rule requiring that amount of support for repeal, because a constitutional amendment initiated by the legislature must have a direct amount of support (two-thirds of Congress and three-fourths of the state legislatures) to be enacted. [\[FN172\]](#)

The Constitution further reduces the power of legislatures to entrench when the legislative support happens to exceed popular support by requiring constitutional entrenchments to obtain two supermajorities—one from Congress and another from state legislators or state conventions. Because state legislatures and conventions are elected at different times and through different processes than the federal legislature, [\[FN173\]](#) this provides another check against the possibility that the accidents of politics will result in a situation where the legislative support for a constitutional entrenchment is greater than its popular support. Thus, yet another unacknowledged virtue of our fixed, double supermajoritarian constitutional amendment process is that it goes a long way toward assuring that temporary variations in legislative support will not result in opportunistic entrenchment. [\[FN174\]](#)

A second problem with variable entrenchment is that it would create an unwieldy system that would eliminate many of the benefits generated by higher lawmaking. Variable entrenchment would allow the passage of so many different levels of entrenchment that it would be difficult to keep track of which law was entrenched at what level. Even more importantly, this mass of different entrenchments would undermine the fundamental distinction between ordinary legislation and higher law, replacing this basic dualism with a spectrum of varying entrenchments. As a result, constitutional provisions would lose much of their majesty in the public mind as higher law. This would be a great loss, since it would reduce the extent to which a constitution can function symbolically as a common source of allegiance in a multicultural, multiethnic, and geographically diffuse nation. This reduction in a constitution's special role would also decrease the attention that the public gives to proposed constitutional amendments, thereby increasing the power of special interests. [\[FN175\]](#)

F. A Symmetric Entrenchment Critique of Posner and Vermeule's Theory

Given this framework of analysis, we now reconsider the normative arguments of Professors Posner and Vermeule for majoritarian entrenchment. Before criticizing their position, we should note our major points of agreement with Posner and Vermeule. We share their view that entrenchments can sometimes be beneficial and their criticism of theorists who oppose all entrenchments on the ground that majorities should always have the authority to change the law. [\[FN176\]](#) Nonetheless, our basic disagreement with Posner and Vermeule remains: We believe that asymmetric majoritarian entrenchments are usually undesirable and that only symmetric entrenchments should generally be allowed. For these reasons, we believe, unlike Posner and Vermeule, that a constitution should prohibit majoritarian entrenchment, except in areas where there are compelling considerations to the contrary. In this Section, we criticize three additional aspects of Posner and Vermeule's argument.

1. Cycling and the Lack of a Majority Victor

Professors Posner and Vermeule argue that majoritarian theorists have failed to appreciate that majority voting rules are often plagued by problems such as cycling. Cycling occurs when there is no majority victor—that is, where no one proposal can defeat all others in pairwise contests. Consequently, proposal A may defeat B, B may defeat C, but C may defeat A. As they correctly note, "[u]nder quite general conditions, voting will cycle rather than establish a majority victor." [\[FN177\]](#)

Peculiarly, though, Posner and Vermeule fail to appreciate that these problems do not just afflict ordinary legislation, but also majoritarian entrenchment. It is true that if a majority entrenches a provision, there is unlikely to be cycling because the entrenchment may prevent other proposals from defeating the provision. But that does not solve the normative problems. The entrenched measure may still not have been a majority victor and therefore would not have necessarily had more legislative support than other measures that the legislature failed to adopt. Moreover, the failure to pass a majority victor may be more problematic as to entrenched legislation than as to ordinary legislation. An ordinary enactment that is not a majority victor can at least be repealed in the future. Entrenched legislation that is not a majority victor, in contrast, may continue to constrain policy indefinitely.

These problems can be largely avoided, however, by symmetric entrenchment. Symmetric entrenchments generally employ supermajority rules, and supermajority rules reduce cycling. [\[FN178\]](#) The provisions that secure passage under a supermajority rule are much more likely to survive contests against other proposals. Indeed, under reasonable assumptions about the preferences of legislators, a supermajority rule of sixty-four percent or more can eliminate cycling and ensure that there is a proposal that, if selected under that rule, cannot be defeated by any other proposal. [\[FN179\]](#) Thus, a supermajority rule is more likely than majority rule to pass provisions that are in a meaningful sense preferred by the legislature.

This argument about the effects of supermajority rules on cycling presents additional evidence for the desirability of the constitutional amendment process. In this Essay and in previous work, we have offered various reasons why the double supermajority rules for constitutional amendments are beneficial. [\[FN180\]](#) But here we provide another important reason why constitutional amendments are likely to be of high quality: Supermajority rules help ensure that enacted measures cannot be defeated by other measures that the legislatures could have adopted.

2. The Underinclusiveness of Entrenchment Restrictions

Professors Posner and Vermeule also argue that whatever objections can be made to entrenched legislation can also be made to certain instances of ordinary legislation that is not normally restricted. [\[FN181\]](#) For example, Posner and Vermeule discuss a situation in which a majority of the legislature seeks to entrench its preference against riding bicycles in the park. While the legislature could entrench this bar on bicycle-riding by requiring a two-thirds vote to repeal it, the legislature could accomplish the same goal by paving the park with gravel, thereby making it extremely expensive for a future legislature to reintroduce bicycles. [\[FN182\]](#) The essence of their argument appears to be that a rule restraining formal entrenchments would be underinclusive since it would not cover laws that have the effect of entrenching--what might be called informal entrenchments.

This argument is insufficient. That informal entrenchments appear to require a supermajority rule is not obviously a reason for exempting formal entrenchments from a supermajority rule. If anything, it would seem to suggest that informal entrenchments should be subject to a supermajority rule as well. [\[FN183\]](#)

In any event, there are strong reasons grounded in administrative costs why one would want to apply a supermajority rule to formal entrenchments, but not to informal ones. Our theory of supermajority rules shows that such rules work best when they apply to an easily identifiable category of legislation that would benefit from a supermajority requirement. While these conditions are satisfied by formal entrenchments, they are not satisfied by informal ones. It is difficult to distinguish ordinary legislation that substantially constrains future majorities, which would be subject to a supermajority rule, from legislation that does not impose substantial constraints, which should not be subject to the rule.

Consider the effects of applying a supermajority rule to an indeterminate category such as "legislation having a substantial constraining effect on future majorities." This constitutional rule would be the subject of substantial litigation with two kinds of costs. First, judges would sometimes mistakenly assess what legislation would substantially constrain future majorities, which would reduce the benefits of the supermajority rule by applying it to categories that should be governed by majority rule. Second, the very open-ended nature of the inquiry would lodge discretion in the judiciary and subject it to attack for acting politically.

Of course, there may be other categories of legislation with effects similar to those of formal entrenchments that might benefit from a supermajority rule. For instance, the argument for a supermajority rule contained in the Balanced Budget Amendment focuses in large measure on problems that debt legislation shares with entrenchment. Like entrenchment, some of the costs of debt legislation occur largely in the future and tie the hands of unrepresented generations. [\[FN184\]](#) A supermajority for debt legislation might therefore be beneficial if one can cheaply define a category of debt legislation that should be subject to the rule.

Another possible basis for criticizing the application of supermajority rules to formal entrenchments, but not informal ones, is substitution costs. If the supermajority rule only applies to formal entrenchments, it might be thought that the legislature could simply substitute informal entrenchments for formal ones. It is not true, however, that the legislature will often be able to find an informal substitute for formal entrenchments. Even in the gravel example, it is quite possible that the legislature will refuse to pave the park with gravel because it is too expensive or otherwise undesirable to do so, even though the legislature would have passed a formal entrenchment. More generally, it is difficult to imagine what informal devices might be used to entrench other principles such as liberty of contract or mandatory welfare benefits. Because informal entrenchments are usually very imperfect substitutes for formal ones, a supermajority rule that applies only to formal entrenchments could still have a significant beneficial effect.

3. An Alleged Incongruity

Our theory also dissolves an alleged incongruity that Professors Posner and Vermeule think plagues opponents of majoritarian entrenchment. They argue that there is an incongruity between opposing entrenchment and permitting sunset provisions. [\[FN185\]](#) The idea here seems to be that if the earlier legislature can choose to terminate its statutes at a predetermined time, even if the later legislature would not have wanted the statute to terminate, then the earlier legislature should also be able to entrench its statutes, even though a later legislature would want the power to repeal the entrenched measure.

We do not find incongruity in permitting majorities to enact sunset provisions while prohibiting them from passing entrenchments. It is true that both sunset and entrenchment provisions involve issues concerning the duration of laws, but that hardly suggests that the two matters must be treated in the same manner. The real question, as Posner and Vermeule recognize, is whether there is "any (nonarbitrary) justification" for treating these matters differently. [\[FN186\]](#) The answer is clearly yes. Sunset provisions raise none of the special problems of public choice, aberrational majorities, partisanship, or imperfect psychological heuristics that make majoritarian entrenchment problematic. Indeed, by permitting a fresh legislature to consider a problem anew, sunset provisions reduce the power of aberrational majorities. [\[FN187\]](#) Although an excessive use of sunset provisions might impose undue costs on future legislatures, there is no evidence that legislatures overemploy them. [\[FN188\]](#) Furthermore, they have little incentive to do so because sunset provisions generally reduce their power.



This Essay has defended the symmetric theory of entrenchment from both a positive and normative perspective. Symmetric entrenchment provides a middle way between the Scylla of prohibiting all entrenchment and the Charybdis of permitting majoritarian entrenchment. A fixed system of symmetric entrenchment allows the polity to derive the benefits of entrenchment while avoiding the peculiar dangers of entrenched legislation. While it is founded in theory, symmetric entrenchment also has intuitive appeal: It seems to be common sense that the same rule should govern both the enactment and the repeal of legislative and constitutional rules.

Our own Constitution largely conforms to symmetric entrenchment. Despite Posner and Vermeule's arguments, the Constitution prohibits legislative entrenchment. Constitutional enactments also, to a significant extent, conform to the symmetry requirement. The original Constitution was enacted through essentially the same procedures that are needed to amend it. Nonetheless, it is true that under our view the Constitution permits constitutional amendments that cannot be repealed, but these have not passed, in large part because the strict supermajority rules for enacting amendments have prevented them. The original Constitution also asymmetrically entrenched the equal voting rights of states, but it is quite possible that this entrenchment was necessary to establish the Constitution and therefore was worth it.

Thus, the Constitution largely tracks a sound normative approach to entrenchment, although it is certainly not a "perfect constitution." The general soundness of the constitutional architecture as to entrenchment is the result of the Framers combining English traditions against legislative entrenchment with the innovations of an entrenched, written Constitution. In this area, as in others, the Constitution's mixture of innovation and tradition has created institutions that continue to fulfill normative ideals two centuries after its framing.

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[FN1]. 2 Annals of Cong. 1666 (1790).

[FN2]. See, e.g., David Dana & Susan P. Koniak, [Bargaining in the Shadow of Democracy](#), 148 U. Pa. L. Rev. 473, 533-34 (1999); Julian N. Eule, Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity, 1987 Am. B. Found. Res. J. 379; Catherine Fisk & Erwin Chemerinsky, The [Filibuster](#), 49 Stan. L. Rev. 181, 247-49 (1997).

[FN3]. See Eric A. Posner & Adrian Vermeule, [Legislative Entrenchment: A Reappraisal](#), 111 Yale L.J. 1665 (2002).

[FN4]. Id.

[FN5]. Id. at 1681.

[FN6]. Id. at 1671-73.

[FN7]. Id. at 1681.

[FN8]. Id. at 1691-92.

[FN9]. Id. at 1665 (arguing that legislators should be able to bind their successors). Posner and Vermeule's examples involve entrenched provisions repealable by a supermajority, see, e.g., id. at 1669, but their theory permits legislative entrenchment more generally, see id. at 1665 (permitting entrenchment "subject to any [constitutional] limits in force"). Under this view, a legislature could require that its entrenched provisions bind its successors absent repeal by unanimous vote because the Constitution does not independently prohibit this kind of entrenchment.

[FN10]. Id. at 1686.

[FN11]. Id. at 1681-82.

[FN12]. We define an entrenched law as any law that can only be repealed through a more difficult process than passing ordinary legislation. The Constitution provides that legislation must pass through both the House of Representatives and the Senate and then be presented to the President. [U.S. Const. art. I, §7, cl. 2](#). We have argued that while the Constitution allows each house to employ any voting rule that it desires, it requires that a majority of each house be able to repeal these voting rules and, therefore, be able to enact a bill by majority vote. See John O. McGinnis & Michael B. Rappaport, [The Constitutionality of Legislative Supermajority Requirements: A Defense](#), 105 *Yale L.J.* 483 (1995) [hereinafter McGinnis & Rappaport, *The Constitutionality of Legislative Supermajority Requirements*]. Thus, an entrenched law is any law that cannot be repealed through the ordinary bicameral process, in which a majority of each house can choose to pass the repeal. This would include both legislative entrenchments--ordinary statutes that cannot be repealed through the above procedures--as well as constitutional amendments that can only be repealed through the supermajoritarian process of Article V.

The process for passing ordinary legislation is often referred to as majoritarian, perhaps because of the common use of majority voting rules by both houses. Yet, this process is not really majoritarian. It has been shown that the process for passing ordinary legislation functions much like an implicit supermajority rule, since it is harder to enact legislation through a bicameral legislature than through a unicameral legislature that employs majority rule. See John O. McGinnis & Michael B. Rappaport, [Our Supermajoritarian Constitution](#), 80 *Tex. L. Rev.* 703, 770-74 (2002) (discussing scholarship on this issue) [hereinafter McGinnis & Rappaport, *Our Supermajoritarian Constitution*]. Nonetheless, we here follow common usage and refer to the

entrenchments passed through ordinary legislation that Professors Posner and Vermeule endorse as majoritarian entrenchments.

[FN13]. Because we follow an original meaning approach to constitutional interpretation, we do not address Posner and Vermeule's arguments that tradition does not support an antientrenchment principle. See Posner & Vermeule, *supra* note 3, at 1678-79.

[FN14]. We thus are pursuing original meaning originalism rather than original intent originalism. For an explanation of the distinction, see Randy E. Barnett, The [Original Meaning of the Commerce Clause](#), 68 *U. Chi. L. Rev.* 101, 105 (2001) (explaining that original meaning jurisprudence looks to the public meaning of the text as understood by a reasonable observer at the time, while original intent jurisprudence focuses on the intentions of the Framers). In our view, original intentions are relevant only insofar as they create public meaning and influence the meaning that a reasonable observer would attach to the text.

[FN15]. Structure, purpose, and history are the traditional methods for resolving questions that are not answered by the text. See 1 William Blackstone, *Commentaries* *59-62 (looking to words, context, subject matter, effects and consequences, and reason and spirit to interpret laws); see also Michael W. McConnell, [Federalism: Evaluating the Founders' Design](#), 54 *U. Chi. L. Rev.* 1484, 1486-87 (1987) (reviewing Raoul Berger, *Federalism: The Founders' Design* (1987)) (explaining this approach to constitutional interpretation); Michael B. Rappaport, [Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions](#), 93 *Nw. U. L. Rev.* 819, 823-24 (1999) (same).

[FN16]. See Rappaport, *supra* note 15, at 824.

[FN17]. For further discussion of our disagreement with Posner and Vermeule on this point, see *infra* text accompanying notes 78-80.

[FN18]. [U.S. Const. art. I, §1](#).

[FN19]. A threshold issue is what text is relevant to determining whether entrenched legislation is constitutional. We suggest here that "legislative power" is the relevant term because all entrenched measures are legislative. On the other hand, it might be thought that "rules of proceeding" in the Rules of Proceeding Clause, [U.S. Const. art. 1, §5, cl. 2](#), is the more relevant term. One might argue that the entrenchment--the prohibition on repeal or the imposition of a supermajoritarian or other procedure in order to repeal--always constitutes a rule of proceeding. We do not believe much turns on the distinction between rules of proceeding and legislative power because any rule of proceeding is clearly an exercise of legislative power even if it does not constitute power to pass legislation. Perhaps the answer turns on whether the Framers' generation had a technical lawyer's understanding that this matter was governed by rules of proceedings, or an ordinary person's understanding that would be more likely to focus on legislative power.

[FN20]. Some might argue that our resolution of the ambiguity in "legislative power" is unnecessary, because an entrenched statute would encroach upon a subsequent Congress's constitutional authority to pass legislation within its enumerated powers. As beguiling as this simple argument may be, we do not believe that it works. Entrenched legislation violates Congress's legislative authority only if that entrenched legislation was not constitutionally enforceable in the first place. If the Framers had understood "legislative power" to encompass the authority to entrench, then entrenched legislation would not impermissibly preclude Congress from legislating within its enumerated powers. Instead, it would simply involve Congress respecting its own constitutionally valid legislation.

[FN21]. See John F. Manning, [Textualism and the Role of The Federalist in Constitutional Adjudication](#), 66 *Geo. Wash. L. Rev.* 1337, 1353-54 (1998) (arguing that a modern textualist might legitimately consult Blackstone to ascertain the established meaning of constitutional terms).

[FN22]. *Id.*

[FN23]. For a review of English parliamentary practice, see A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 84-87 (MacMillan & Co. 1915) (1885) (stating that, under the British system, Parliament has the power "to alter any law, fundamental or otherwise, as freely and in the same manner as other laws"). The antientrenchment understanding in the colonies and the states of the pre-Constitution republic is reflected in the Virginia Statute of Religious Freedom. See *infra* notes 71-72 and accompanying text.

[FN24]. See Leonard W. Levy, On the [Origins of the Free Press Clause](#), 32 *UCLA L. Rev.* 177, 183 (1984) (calling Blackstone "the oracle of common law to the American Framers").

[FN25]. 1 Blackstone, *supra* note 15, at *90.

[FN26]. This American understanding of the traditional Blackstonian view continued to be followed over the years. For example, in 1868, Cooley stated this view in his famous treatise on constitutional limitations. See Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 125-26 (Boston, Little, Brown & Co. 1868).

[FN27]. St. George Tucker's edition of Blackstone's Commentaries provides additional evidence that the English legislative antientrenchment principle continued in full force on this side of the Atlantic. Tucker, one of the great legal theorists of the early republic, habitually annotates Blackstone to show divergences between Blackstone's statements about the law of England and the contemporary law of Virginia. See, e.g., 1 William Blackstone, *Commentaries* *76 n.7, *82 n.9, *86 n.13, *90 n.19 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803). He does not indicate that there were any divergences from the antientrenchment principle. *Id.* at *90.

[FN28]. In reaching the conclusion that the Constitution prohibits legislative entrenchment, it is significant that

the antientrenchment principle was traditionally understood as a limitation on the power of the legislature. 1 Blackstone, *supra* note 15, at *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not."). If the principle had been simply thought to be a good policy that was consistently followed by legislatures, there would be less justification for finding a constitutional limitation on the legislature's power.

[FN29]. See Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. (forthcoming Spring 2003) ("[O]ther things being equal, [constitutional interpreters] should prefer readings that comport with prevailing attitudes or established practices.") (on file with the Virginia Law Review Association).

[FN30]. See [U.S. Const. art. V](#):

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress....

[FN31]. It might be thought that our argument constitutionalizes all traditional institutional practices, including judges' practice of wearing wigs. But this view is mistaken. The considerations adduced here to support finding an antientrenchment principle in the term "legislative power" are quite restrictive and would rule out the constitutionalization of most traditional practices. These considerations include: that the practice was consistently followed so that people regarded it as an ordinary part of the institution, that it was followed as a matter of legal obligation rather than simply as a matter of good policy, and that failing to incorporate the practice would significantly undermine the structure of the Constitution. While these circumstances are unlikely to hold as to most practices, when they do hold, it is essential that the practice be recognized as part of the Constitution. Otherwise, principles that were so well-accepted and uncontroversial as not to bear mentioning would be omitted from the Constitution.

[FN32]. Posner & Vermeule, *supra* note 3, at 1674-78.

[FN33]. *Id.* at 1678-79.

[FN34]. *Id.* at 1680-82.

[FN35]. Compare [U.S. Const. art. I, §1](#) ("All legislative Powers herein granted shall be vested in a Congress of the United States...."), with [U.S. Const. art. II, §1, cl. 1](#) ("The executive Power shall be vested in a President of the United States of America."), and [U.S. Const. art. III, §1](#) ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

[FN36]. Posner & Vermeule, *supra* note 3, at 1675.

[FN37]. See Charles Fried, *Types*, 4 Const. Comment. 55, 78 (1997) (noting that the phrase "herein granted" imposes a limit on the national government's power).

[FN38]. It is interesting to note that this same analysis would apply even to the most expansive constructions of the vesting clauses in the Constitution. For instance, in *Pacificus*, Hamilton claimed that "[t]he general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument." Alexander Hamilton, *Pacificus*, No. 1 (June 29, 1793), in 4 *The Works of Alexander Hamilton* 432, 439 (Henry Cabot Lodge ed., Fed. ed. 1904). Even this formulation would not include within the executive power matters that were historically understood to be outside its ambit.

[FN39]. See U.S. Const. art. I, §9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

[FN40]. Posner & Vermeule, *supra* note 3, at 1675.

[FN41]. See *The Federalist* No. 83, at 464-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (criticizing the application of the *expressio unius canon* by antifederalists and illustrating proper uses of the canon).

[FN42]. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (arguing that the Constitution should not be construed as if it were a legal code).

[FN43]. Indeed, Alexander Hamilton had been drawn into a controversy about ex post facto laws shortly after the revolution, when loyalists were punished for being loyal to Britain, although previous laws had not made that loyalty a crime. See Joseph C. Cascarelli, Is Judicial Review Grounded in and Limited by Natural Law?, 30 *Cumb. L. Rev.* 373, 396 (2000); see also Alexander Hamilton, *A Letter from Phocion to the Considerate Citizens of New York* (1784), in 3 *The Papers of Alexander Hamilton: 1782-1786*, at 483, 484-85 (Harold C. Syrett & Jacob E. Cooke eds., 1962); Alexander Hamilton, *Second Letter from Phocion* (1784), in 3 *The Papers of Alexander Hamilton: 1782-1786*, *supra*, at 530, 555-56 (discussing the injustice of ex post facto laws).

[FN44]. The best structural argument for concluding that ex post facto laws would be unconstitutional absent the ex post facto clause is that the passage of such laws constitutes judicial rather than legislative power, because they apply retroactively. See John Hart Ely, *Democracy and Distrust* (1980). This structural argument, however, is relatively weak, because its premise is extremely doubtful. A retroactive civil law, whatever its constitutionality under the Due Process Clause, is generally considered to be the exercise of legislative power. Ronald D. Rotunda & John E. Nowak, II *Treatise on Constitutional Law* §15.8-9 (3d ed. 1999) (discussing retroactive legislation and noting that there is no general prohibition on such legislation). Secondly, the Framers would have had another reason for adding the prohibition on federal ex post facto laws,

given that they were also including a prohibition on state ex post facto laws. See U.S. Const. art I, § 10. The absence of a federal prohibition might have been thought implicitly to empower Congress to pass such laws. Thus, the structural argument for concluding that the legislative power did not include the power to pass ex post facto laws is considerably weaker than the structural argument for concluding that the legislative power excluded the power to entrench laws.

[FN45]. Posner and Vermeule suggest that the ex post facto prohibition is but one of many examples in Article I, §9 of Congress prohibiting matters that were already disfavored by the common law. Posner & Vermeule, *supra* note 3, at 1675. But most of the prohibitions in Article I, §9 deal with matters that never arose at common law because they referenced new issues that had become matters of concern as a result of America's new constitutional order, such as the prohibition against port preferences and the regulation of the slave trade. [U.S. Const. art. I, §9, cls. 1, 6](#). Three other prohibitions, however, concern matters that might conceivably have been addressed at common law: habeas corpus, bills of attainder, and appropriations. See *id.* at [art. I, §9, cls. 2, 3, 7](#). But the same kinds of considerations that led the Framers to include an express prohibition on ex post facto laws would have led them to address these issues as well. Unlike entrenchment, they were all hot-button issues. Attainder and habeas corpus concerned personal liberty directly, and legislative control over the purse implicated taxation--the spark of revolution.

Moreover, unlike entrenchment, the common law principles implicated by these express prohibitions were either not clear or were being modified by the Framers (and therefore could not have been left implicit). In the case of bills of attainder, the common law prohibition was not clear, see 4 William Blackstone Commentaries, *373-79 (describing practice of attainder without condemning it), especially because attainders had been passed in the revolutionary states less than twelve years before the Constitutional Convention. See 1 Blackstone, *supra* note 27, app. at 293 (describing case of attainder in Virginia in 1778). In the case of habeas corpus, the Framers were adopting a principle that was more specific than the common law principle, since common law had not made clear either the circumstances under which habeas corpus could be suspended or the governmental branch that could suspend it. As to appropriations, English practice had not categorically forbidden the executive from spending funds without an appropriation. See Michael B. Rappaport, [The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York](#), 76 Tul. L. Rev. 265, 323-24 (2001) (describing the use of hereditary funds). Finally, unlike entrenchment, these principles are not strongly confirmed by structural arguments from the rest of the Constitution. Thus, the Framers needed to specify these prohibitions to ensure that the principles they desired would be enforced.

[FN46]. Posner & Vermeule, *supra* note 3, at 1678.

[FN47]. See Dicey, *supra* note 23, at 62-64 (explaining the antientrenchment principle and exceptions).

[FN48]. Posner & Vermeule, *supra* note 3, at 1678. Posner and Vermeule also cite the Act of Union with Ireland as well as the Northern Ireland Constitution Act of 1979, but these are of no relevance to an original understanding of the Constitution. They are post-framing foreign practices that neither influenced the Framers nor were endorsed by them.

[FN49]. See David M. Walker, 5 *A Legal History of Scotland* 85-86 (1998).

[FN50]. The treaty power is, of course, located in Article II, the article defining the executive power. [U.S. Const. art. II, §2, cl. 2](#); see also John C. Yoo, [Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding](#), 99 Colum. L. Rev. 1955, 2072 (1999) (making that case that the treaty power is an executive power).

[FN51]. Walker, *supra* note 49, at 91.

[FN52]. *Id.* at 90.

[FN53]. Posner & Vermeule, *supra* note 3, at 1677.

[FN54]. See Akhil Reed Amar, The [Bill of Rights as a Constitution](#), 100 Yale L.J. 1131, 1140-41 (1991).

[FN55]. Cf. H. Jefferson Powell, [Rules for Originalists](#), 73 Va. L. Rev. 659, 671-72 (1987) (arguing that drawing inferences from silence is an unreliable way to determine original meaning).

[FN56]. Posner and Vermeule do note that Hamilton approvingly discussed the last-in-time rule of statutory interpretation, under which the later statute takes priority over a prior statute that conflicts with it. Posner & Vermeule, *supra* note 3, at 1677 (citing The Federalist No. 78 (Alexander Hamilton)). But Hamilton raised this issue merely to explicate the controversial question of the authority of courts to engage in judicial review under the new Constitution. See The Federalist No. 78, at 434-36 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Indeed, insofar as Posner and Vermeule believe that arguments from silence can be powerful evidence of original meaning, they should count this passage as additional evidence against their position. Had entrenched statutes been accepted, as Posner and Vermeule claim, Hamilton could have explicated judicial review through such statutes. In response to the claim that judicial review placed the judiciary over the legislature, Hamilton could have simply said that judicial review was no different than the situation where a court was refusing to enforce a later statute that had interfered with an entrenched statute. This would be a more analogous example than the last-in-time rule that Hamilton employed to explicate judicial review. That Hamilton did not raise this example of entrenched legislation may suggest that such legislation would have been regarded as strange and undesirable.

[FN57]. Posner & Vermeule, *supra* note 3, at 1677.

[FN58]. *Id.*

[FN59]. See The Mind of the Founder: Sources of the Political Thought of James Madison 229 (Marvin Meyers ed., 1973) (quoting letter from Thomas Jefferson to James Madison (Sept. 6, 1789)).

[\[FN60\]](#). Id.

[\[FN61\]](#). See Letter from James Madison to Thomas Jefferson (Feb. 4, 1790), in *The Mind of the Founder: Sources of the Political Thought of James Madison*, supra note 59, at 230.

[\[FN62\]](#). Id.

[\[FN63\]](#). Id. at 231.

[\[FN64\]](#). Id. at 230.

[\[FN65\]](#). Id. at 231.

[\[FN66\]](#). [U.S. Const. amend. V](#). We argue that this kind of entrenchment is fully justified by our general theory of entrenchment. See infra notes 133-39 and accompanying text.

[\[FN67\]](#). See [U.S. Const. art. 1, §10, cl. 1](#); see also Cooley, supra note 26, at 147-48 (understanding government's ability to enter into binding contracts as an exception to the antientrenchment principle). We lack space here to determine whether this conventional view accords with the original meaning of the Constitution. It would be important to discover whether the Contracts Clause was understood to apply to public as well as private contracts and whether, despite the general antientrenchment principle, it was thought illegal in the colonies and in Britain to abrogate government contracts without compensation. For normative thoughts on the question of whether contractual obligations should be restricted in the same manner as legislative entrenchments, see infra notes 160-63 and accompanying text.

[\[FN68\]](#). Jefferson's remarks about a self-terminating Constitution obviously do not cohere with the actual Constitution.

[\[FN69\]](#). The statute, the Virginia Statute on Religious Freedom, is discussed infra notes 71-75 and accompanying text.

[\[FN70\]](#). James Madison's remarks are discussed infra notes 76-77 and accompanying text.

[\[FN71\]](#). Documents of American Constitutional & Legal History: From Settlement through Reconstruction 83-85 (Melvin Urofsky ed., 1989). Jefferson drafted the statute. Id. at 83.

[\[FN72\]](#). Id. at 84-85.

[\[FN73\]](#). Id. at 84.

[\[FN74\]](#). Id. (stating that succeeding assemblies possess "powers equal to" the enacting assembly).

[\[FN75\]](#). Id. at 84-85.

[\[FN76\]](#). See Stanley Elkins & Eric McKittrick, *The Age of Federalism* 160-61 (1993).

[\[FN77\]](#). 2 Annals of Cong. 1666 (1790) (emphasis added).

[\[FN78\]](#). Posner and Vermeule discuss the filibuster in a separate section at the end of their essay. Posner & Vermeule, *supra* note 3, at 1694-95. The extent to which they believe it bears on the original meaning is unclear.

[\[FN79\]](#). The current rule requires three-fifths of all Senators to gain cloture, except for cloture to amendments to the Senate rules, which requires two-thirds of those voting to gain cloture. S. Doc. No. 102-25, at 15-16 (1992).

[\[FN80\]](#). See *id.*

[\[FN81\]](#). See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801*, at 120-21 (1997) (arguing that the behavior of early Congresses sheds light on the contemporaneous meaning of the Constitution).

[\[FN82\]](#). The historical record of the filibuster is incomplete. Although procedural rules adopted formally in the House of Representatives and informally in the Senate may have disapproved of the filibuster, there is evidence that such debate did occur. See Fisk & Chemerinsky, *supra* note 2, at 188-89.

[\[FN83\]](#). See *id.* at 187 ("[S]trategic use of delay in debate is as old as the Senate itself.").

[\[FN84\]](#). See *id.* at 201 (discussing the evolution of the silent filibuster where "a senator could filibuster an issue without uttering a word on the Senate floor").

[FN85]. The Senate first adopted a cloture rule in 1917. It permitted a two-thirds majority to gain cloture. *Id.* at 198.

[FN86]. See Sarah A. Binder & Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate 175-82* (1997).

[FN87]. Vice Presidents Richard M. Nixon, Hubert H. Humphrey, and Nelson Rockefeller ruled that a majority could change the Senate's rules at the beginning of Congress. See *id.* at 175-76, 180-81. Vice President Humphrey's ruling was overruled by a majority on a point of order, but Vice President Rockefeller's ruling was sustained. *Id.* at 180-81.

[FN88]. Posner & Vermeule, *supra* note 3, at 1681.

[FN89]. *Id.* at 1680-81.

[FN90]. There are two types of laws that might violate the Constitution. Some types of laws purport to make illegal an activity that is constitutionally protected, such as a law prohibiting the burning of flags for expressive purposes. Other types of laws purport to make legal an activity that was previously constitutionally impermissible, such as a law that would allow Congress to pass bills of attainder.

[FN91]. See [McCulloch v. Maryland, 17 U.S. \(4 Wheat.\) 316, 407 \(1819\)](#) ("[W]e must never forget that it is a constitution we are expounding."). Other aspects of constitutional law show that structural balances can be upset by imperfect but close substitutes. Similarly, the Senate could not assert the power to remove executive officials by claiming that it was not usurping the impeachment power because impeachment permits the Senate not merely to remove the officer, but also to deny him the opportunity ever to serve in a federal office. See [U.S. Const. art. 1, §3, cl. 7](#).

[FN92]. In *The Federalist No. 78*, the classic paper justifying judicial review, Alexander Hamilton wrote of: those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

The Federalist No. 78, *supra* note 56, at 437 (Alexander Hamilton). Hamilton also justified the presidential veto (which we have argued is a mild implicit supermajority rule, see McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 12, at 773-74) on the ground that "impressions of the moment may sometimes hurry [the legislature] into measures which itself, on maturer reflection, would condemn." *The Federalist No. 73*, at 411 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[FN93]. As Madison wrote in *The Federalist No. 43*, the double supermajoritarian process for constitutional amendments guards against making amendments too easy to enact, "which would render the Constitution too

mutable." The Federalist No. 43, at 246 (James Madison) (Clinton Rossiter ed., 1961).

[FN94]. Posner & Vermeule, *supra* note 3, at 1681.

[FN95]. The equal state suffrage provision is not merely an entrenchment, but an asymmetric entrenchment. All constitutional provisions are entrenched, because none of them can be repealed by ordinary legislation. While most constitutional provisions are symmetrically entrenched (in that the method for passing them was essentially the same as the method for repealing them), this provision is asymmetric. A stricter procedure is needed to repeal it (essentially a unanimous vote of the states) than was required to enact it (approval by at least nine of the thirteen states). But see discussion *infra* this Section (rejecting an interpretation by which this provision is symmetric).

[FN96]. Although [Article V](#)'s equal state suffrage provision appears to be an example of an entrenchment that absolutely prohibits further constitutional change (barring, of course, consent of an affected state), it is not clear that this is the case. One might argue that the provision can be changed in a two- step amendment process, with the initial amendment eliminating the entrenchment and the later amendment changing the suffrage. See Akhil Reed Amar, [The Consent of the Governed: Constitutional Amendment Outside Article V](#), 94 *Colum. L. Rev.* 457, 461 (1994). Even under this reading, the entrenchment would still be asymmetric, since it would be much harder to change the equal state suffrage provision than it was to enact it under Article VII.

[FN97]. There is surprisingly little literature on the question of whether [Article V](#) permits unamendable amendments. Professor Douglas Linder argues that they are not permitted, but his reasons seem more rooted in normative than originalist considerations. See Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 *Ariz. L. Rev.* 717, 731 (1981). Professor Linder argues that unamendable amendments are incompatible with a "living Constitution," and that they might incite a revolution. See also John R. Vile, *Limitations on the Constitutional Amending Process*, 2 *Const. Comment.* 373, 385-87 (1985) (critiquing Professor Linder's arguments).

We do not address Professor Akhil Amar's contention that the people retain the sovereignty to amend even unamendable amendments. See Amar, *supra* note 96, at 458-59. That contention depends on his very controversial argument that the Constitution can be amended outside of [Article V](#). See Henry Paul Monaghan, [We the People\[s\], Original Understanding, and Constitutional Amendment](#), 96 *Colum. L. Rev.* 121, 121-22 (1996) (criticizing Professor Amar's argument).

[FN98]. [U.S. Const. art. VII](#).

[FN99]. [U.S. Const. art. V](#).

[FN100]. See Stewart Sterk, *Retrenchment on Entrenchment*, 71 *Geo. Wash. L. Rev.* (forthcoming April 2003) (on file with the Virginia Law Review Association).

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[\[FN101\]. U.S. Const. art. VII.](#)

[\[FN102\]. U.S. Const. art V.](#)

[\[FN103\]](#). Instead, this proportion is relevant to whether states consented to a constitution. That is a different matter than the degree of overall support that the document enjoyed, which as we discuss below is related to how desirable the document was and how appropriate it would be to permit it to be entrenched against easy repeal.

[\[FN104\]](#). By contrast, the Constitution was not enacted under a rule that required all of the states that were offered it to approve it, as the Articles of Confederation had required. See Articles of Confederation, art. XIII. Indeed, if the states had been subject to that unanimity requirement, the Constitution almost certainly would not have been enacted. Under this strict rule, the initial refusals to assent to the Constitution by North Carolina and Rhode Island would have defeated the proposed Constitution. See Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 127- 28 (1996) (discussing North Carolina); Bruce Ackerman & Neal Katyal, [Our Unconventional Founding](#), 62 *U. Chi. L. Rev.* 475, 527 (1995) (discussing Rhode Island).

[\[FN105\]](#). One might say that constitutional entrenchment intrudes upon a revolutionary regime change. If an earlier generation sets too restrictive a rule, future generations can, of course, always drop the constitution and change the regime. The possibility of revolution, however, does not suggest that constitutional entrenchment would improperly substitute for the right of revolution. Indeed, revolution can supersede any type of entrenchment.

It might also be argued that a prior generation that entrenches its provision unfairly imposes its view on future generations. As a normative matter, we have a good deal of sympathy for this argument. See *infra* notes 131-32 and accompanying text. The question here, however, is not one of political theory but of originalist constitutional law.

[\[FN106\]](#). For our reasons, see *infra* Part II.

[\[FN107\]](#). Posner & Vermeule, *supra* note 3, at 1676.

[\[FN108\]](#). It is worth noting here that, even as a normative matter, we believe Posner and Vermeule to be mistaken. We admit there is a sense in which all legislatures with entrenchment power are equal. But that is a weak and idiosyncratic understanding of equality. A prior legislature that has entrenchment powers possesses more power than a subsequent legislature, given that there is a finite social world to regulate. If legislature A regulates subject matter alpha through entrenched legislation, then alpha has been removed from legislature B's regulatory jurisdiction, and B has less regulatory authority than A. It is true that B may pass entrenched legislation regarding subject matter beta, but that leaves legislature C even less to regulate. It does not give legislature B the same opportunity as legislature A. Perhaps Posner and Vermeule are arguing against this point when they suggest that each legislature has a new bundle of potential issues because of

technological and other changes. See Posner & Vermeule, *supra* note 3, at 1676 n.31. But certainly many issues like taxes and regulations endure, and Posner and Vermeule's version of the equality of legislatures gives upstream legislatures more power than legislatures situated downstream.

[FN109]. Posner & Vermeule, *supra* note 3, at 1703. Posner and Vermeule also contend that Congress's undisputed authority to make sunset laws is inconsistent with a prohibition on its authority to entrench. *Id.* at 1676- 77. Again, whether or not this inconsistency makes sense as a normative matter--an issue we discuss in Part III--this asymmetry does not provide a strong constitutional argument, absent some evidence, that the Framers embraced symmetry in these matters.

[FN110]. See 3 William Blackstone, *Commentaries* *24-25.

[FN111]. See Michael Herz, *Choosing Between Normative and Descriptive Versions of the Judicial Role*, 75 Marq. L. Rev. 725, 752-54 (1992) (explaining that precedent limits policymaking because it constrains imposition of judges' own preferences). In the end, we are not sure why Posner and Vermeule ignore these basic distinctions about original meaning. One possibility, though, is that they embrace an essentialist version of legal meaning. That might explain why normativity and symmetry, which are ordinarily not significant to originalists, appear so important to them. These concepts help us understand the essence of the concept of legislation. While this is certainly not the place to discuss the merits of essentialism, we note that it is very difficult to square essentialism with originalism. To do so, one would have to show that the Framers had an essentialist understanding of words and expected and intended future constitutional interpreters to have the power to replace the meaning of terms held by the Framers' generation with what they believed to be the best meaning of these words. This is, to put it mildly, a difficult task.

[FN112]. See David Dana & Susan P. Koniak, *Bargaining in the Shadow of Democracy*, 148 U. Pa. L. Rev. 473, 533 (1994).

[FN113]. U.S. Const. amend. XVIII, §1, repealed by U.S. Const. amend XXI.

[FN114]. Although ordinary legislation is not usually thought to be entrenched, the procedures for passage and repeal of such legislation are symmetric. The same procedure for enacting a law--passage through bicameralism and presentment--governs its repeal.

[FN115]. Posner & Vermeule, *supra* note 3, at 1666.

[FN116]. Decisionmaking costs are the time and effort needed to pass a measure. See McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 12, at 745. These costs are generally higher with supermajority rules because supermajority rules make coalition-building more difficult. This Essay will not discuss these costs further, since they do not significantly affect the decision of whether entrenchments should be covered by supermajority rules.

[FN117]. We have presented a fuller version of our theory of supermajority rules in some, but not all, respects in McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 12, at 734 n.136.

[FN118]. An economic approach is a useful heuristic in outlining the benefits and costs of supermajority rules. Moreover, it comports with our utilitarian assessment of government structure. Government institutions are to be judged on whether they provide public goods efficiently. But we have argued elsewhere that supermajority rules can also find support in rights-based approaches to politics. See John O. McGinnis & Michael B. Rappaport, [Supermajority Rules as a Constitutional Solution](#), 40 *Wm. & Mary L. Rev.* 365, 419-20 (1999).

[FN119]. In our view, the most important source of political support for a law is the (net) benefit that it provides. If a law produces benefits that are distributed widely across the public, then the greater those benefits, the more likely the public will be advantaged by the law and will support it. Other laws, by contrast, may provide concentrated benefits to powerful special interest groups, such as industries, labor unions, or government agencies. See Michael T. Hayes, *Lobbyists and Legislators: A Theory of Political Markets* 90-92 (1981) (showing that legislation will be generated by lobbying for concentrated benefits). Although these laws are likely to be less desirable than the former group, it is also true that the laws in this group that produce greater net benefits will be able to secure additional political support. Special interests will be able to secure additional political support for laws that produce large net benefits. It will make sense for them to spend more to lobby for these laws, and it is more likely that the larger net benefits will spill over or be conferred on other members of the population.

Yet, even if one believes that legislators support laws based on their political principles, the same conclusion is likely to hold. Suppose that legislators seek to promote ends that are regarded as the true ends of justice and law and seek to select the best means to produce these ends. While voters may disagree about these means and ends, the Condorcet jury theorem suggests that the greater the number of voters in favor of a measure, the more likely it is to be true. See H.P. Young, *Condorcet's Theory of Voting*, 82 *Am. Pol. Sci. Rev.* 1231, 1232-36 (1988). Thus, supermajority rules will result in principles and measures that are more likely to be "true" than those generated by majority rule. And if, as has often been noted, there is a strong overlap between the recommendations of political principles and consequentialist theories, like the economic approach, see Randy E. Barnett, *Foreword: Of Chickens and Eggs--The Compatibility of Moral Rights and Consequentialist Analyses*, 12 *Harv. J.L. & Pub. Pol'y* 611, 616-17 (1989), then the measures that can pass a supermajority rule because of their more substantial congruence with a consensus of preferences and principles are also more likely to produce large net benefits than the measures that can pass under majority rule.

[FN120]. Supermajority rules may also induce the passage of legislation that could not be passed under majority rule. Supermajority rules give legislators incentives to reformulate legislation that failed under majority rule so that it can pass under supermajority rule. While the total amount of such legislation may be relatively small, we would expect such legislation to be of higher quality than the average piece of legislation passed under majority rule. Thus, if applying majority rule to a particular category of legislation produced net benefits and if a supermajority rule would block some of these net benefits, the lost benefits must be compared to the gains in net benefits from supermajority-rule-induced legislation to assess whether majority or supermajority rule is superior.

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[FN121]. These laws will probably be the least desirable that majority rule produces and, therefore, are likely to produce net costs.

[FN122]. McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 12, at 744.

[FN123]. For discussion with examples of majoritarian legislation that is undesirable, see McGinnis & Rappaport, *supra* note 118, at 380-81.

[FN124]. See Martin Paldam, *Political Business Cycles*, in Dennis C. Mueller, *Perspectives on Public Choice* 342, 347 (1997).

[FN125]. For a discussion of the importance of agency costs in the public choice view of legislators, see A.C. Pritchard & Todd J. Zywicki, [Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation](#), 77 N.C. L. Rev. 409, 447-48 (1999). As the consequences of legislative actions become more difficult to evaluate, agency costs will rise, particularly because voters act in rational ignorance of much of complex politics. See William A. Niskanen, *Structural Reform of the Federal Budget Process* 6 (1973) (noting that, because information is expensive, people operate in "rational ignorance"). See also Sterk, *supra* note 100, at 16 (discussing the high costs in entrenchment decisions).

[FN126]. Posner and Vermeule do address a different public choice argument against entrenchment; namely, that the power to entrench will enlarge the cost of rent-seeking that comes from special interest legislation. They respond that rent-seeking costs may be as high without entrenchment because then special interests must continually incur costs to defend their non-entrenched legislation from repeal. Posner & Vermeule, *supra* note 3, at 1690-91. While this may be true, it seems to us that they miss some of the important costs of special interest legislation. This kind of legislation creates deadweight losses not only because of the time spent on rent-seeking but also because it is generally inefficient. Thus, if special interest entrenchments are more likely to endure than ordinary special interest legislation, the former will have greater costs. Moreover, special interest entrenchments are more likely to endure because the perturbations of politics frequently create opportunities for reforms of even special interest legislation.

[FN127]. See Nathaniel A. Persily et al., [The Complicated Impact of One Person, One Vote on Political Competition and Representation](#), 80 N.C. L. Rev. 1299, 1321 (2002) (suggesting that a legislature may be unusually unrepresentative because of presidential coattails or other factors).

[FN128]. We also discuss another advantage of supermajoritarianism--the reduction of cycling--in our response to Posner and Vermeule's affirmative arguments. See *infra* notes 177-79 and accompanying text.

[FN129]. The "representativeness" heuristic tends to make people extrapolate overconfidently about predicted characteristics of a class based upon a small sample size of which they happen to be aware. See Amos Tversky & Daniel Kahneman, *Belief in the law of small numbers*, in *Judgment under uncertainty: Heuristics*

and biases 23, 24-25 (Daniel Kahneman et al. eds., 1982). If the sample consists of events rather than objects, the heuristic should tend to make people extrapolate in a similarly irrational manner from events of which they are aware to uncertain future events. Thus, individuals will tend to think that future events will resemble past events more than probability warrants. See Kenneth J. Arrow, Risk Perception in Psychology and Economics, 20 Econ. Inquiry 1, 5 (1982). For an important present-day application, see Robert J. Shiller, Irrational Exuberance 144 (2000) (using work on the representativeness heuristic to suggest that people will think stock market patterns today will be those of tomorrow).

[\[FN130\]](#). See *supra* notes 113-17 and accompanying text.

[\[FN131\]](#). See Michael J. Klarman, [Antifidelity](#), 70 S. Cal. L. Rev. 381, 381 (1997) ("Why should today's generation be ruled from the grave?").

[\[FN132\]](#). See John C. Jeffries, Jr. & Daryl J. Levinson, The [Non-Retrogression Principle in Constitutional Law](#), 86 Cal. L. Rev. 1211, 1242 (1998) (offering fairness arguments against the dead hand of traditionalism).

[\[FN133\]](#). See Mark V. Tushnet, [Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles](#), 96 Harv. L. Rev. 781, 787 (1983) (explaining that strictly following the original Constitution forces the Framers' outmoded values on the modern polity).

[\[FN134\]](#). We previously addressed the exception of the equal suffrage provision in the Senate. See *infra* notes 94-105 and accompanying text.

[\[FN135\]](#). As we have discussed above, *supra* note 92 and accompanying text, what is frequently referred to as majority rule for ordinary legislation is actually a mild supermajority rule, because of the effects of bicameralism and presentment. But one can think of ordinary legislation as effecting a mild entrenchment through a rule of the same mildly entrenching degree. Bicameralism and presentment thus do not disturb the symmetry of the Constitution's approach to entrenchment.

[\[FN136\]](#). We discussed this advantage in the context of legislative entrenchment, see *supra* note 108.

[\[FN137\]](#). Articles of Confederation, art. IX, para. 6 (requiring approval of nine of thirteen states before Congress could take more than a dozen significant actions, including borrowing money, appropriating funds, making treaties, appointing a commander in chief, and declaring war).

[\[FN138\]](#). See McGinnis & Rappaport, Our Supermajoritarian Constitution, *supra* note 12, at 786-88.

[\[FN139\]](#). The Constitution allows each house to adopt legislative supermajority rules, which would require



bills (or legislative rules) to secure a supermajority in order to pass within that house. The Constitution, however, requires that these legislative supermajority rules be repealable by a majority of a house. Thus, even under such supermajority rules, a majority can always choose to repeal those rules, and can then enact or repeal legislation as it desires. For a discussion of these points, see McGinnis & Rappaport, *The Constitutionality of Legislative Supermajority Requirements*, supra note 12, at 500-07.

[FN140]. Posner & Vermeule, supra note 3, at 1670-73. For a discussion of the ability of legislative supermajority rules to create precommitments, see McGinnis & Rappaport, *The Constitutionality of Legislative Supermajority Requirements*, supra note 12, at 510-11.

[FN141]. For discussion of this entrenched provision, see supra notes 94-105 and accompanying text.

[FN142]. Similarly, even if one concluded that the union of Scotland and England were entrenched, it may have produced desirable results in terms of forming a larger union that enjoyed liberty.

[FN143]. One such amendment did make some progress toward passage. On the eve of the Civil War in 1861, Congress passed a constitutional amendment that was intended to avoid war. The amendment would have protected slavery within the states and could not have been modified without the unanimous consent of all the states. The language of the amendment read: "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State." See Edward McPherson, *The Political History of the United States of America, During the Great Rebellion* 59 (1864). This amendment had secured the ratification of three states when war intervened. See Linder, supra note 97, at 728. One of the principal advocates of the amendment was Abraham Lincoln, who believed it would help preserve the union. See John Ferejohn, *The Politics of Imperfection: The Amendment of Constitutions*, 22 *Law & Soc. Inquiry* 501, 511-12 (1997). Obviously, this entrenchment faced far stronger objections than the equality of state suffrage provision, because it would have tread so deeply on liberty and equality.

[FN144]. We also note below that these strict supermajority rules greatly reduce cycling in constitutional entrenchments--a serious problem with majoritarian entrenchment as advocated by Posner and Vermeule. See infra notes 177-79 and accompanying text.

[FN145]. It is much more complicated to analyze the extent, if any, to which property rights that were established under state laws were asymmetrically entrenched under the Constitution. Consider just the following two situations. Assume that the Takings Clause did not apply to the states until the Fourteenth Amendment was ratified in 1872. Then, all property established prior to that time, either by state common law or state legislation, would have been entrenched by the Fourteenth Amendment. Since that amendment was passed pursuant to [Article V](#), the entrenchment would have been symmetric. By contrast, property established by state legislation after 1872 would constitute an asymmetric entrenchment at the state level that was authorized by the Constitution.

[FN146]. See Cass R. Sunstein, [Incommensurability and Valuation in Law](#), 92 Mich. L. Rev. 779, 831 (1994) (discussing incentive effects of property rights).

[FN147]. See James E. Krier & Clayton P. Gillette, The [Un-Easy Case for Technological Optimism](#), 84 Mich. L. Rev. 405, 414-16 (1985) (discussing the impact of prices on technological advancement).

[FN148]. See Robert C. Ellickson, [Property in Land](#), 102 Yale L.J. 1315, 1397-1400 (1993) (retaining property rights will reduce rent-seeking).

[FN149]. See James W. Ely, Jr., The Guardian of Every Other Right 26 (1992) (suggesting that the protection of property rights was an integral part of the effort to draw limits on governmental authority).

[FN150]. It might be argued that the government could create property without constitutional assurances, and that reputational constraints would protect the owners. See Peter M. van Zante, [Mandated Vesting: Suppression of Voluntary Retirement Benefits](#), 75 Notre Dame L. Rev. 125, 174-75 (1999) (discussing reputational constraints on opportunistic behavior). The difficulty with this arrangement is that property rights greatly depend on their long-term stability. Government, however, is controlled by agents who have relatively short-term horizons and who may be willing to encroach on property rights, even though that will create problems for subsequent agents. See Daniel B. Rodriguez, Comment, [Management, Control, and the Dilemmas of Presidential Leadership in the Modern Administrative State](#), 43 Duke L.J. 1180, 1186-87 (1994).

[FN151]. See Fred S. McChesney, [Just Let Me Read Some of That Rock 'n Roll Music](#), 1 Green Bag 2d 149, 151 (1998) ("The specter of political expropriation causes people to reduce production....").

[FN152]. See Carol M. Rose, [Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-Fashioned Common Property Regimes](#), 10 Duke Envtl. L. & Pol'y F. 45, 70-71 (1999) (arguing that property rights can align individual incentives with resource conservation).

[FN153]. See Fred S. McChesney, Rent Extraction and Rent Creation in the Economic Theory of Regulation, 16 J. Legal Stud. 101 (1987) (arguing that government can create rents through threats to exercise its powers).

[FN154]. See Ellickson, *supra* note 148, at 1352-53 (explaining that a commune's power to expropriate property chills speech).

[FN155]. For a discussion of agency costs as a justification for the presumption of symmetric entrenchment, see *supra* notes 124-26 and accompanying text.

[FN156]. See Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383, 383 (1970) ("[T]he ideal is a market in which prices provide accurate signals for resource allocation....").

[FN157]. For a discussion of partisanship as a justification for presumption of symmetric entrenchment, see *supra* text accompanying notes 127-29.

[FN158]. For a discussion of the representativeness heuristic as a justification for the presumption of symmetric entrenchment, see *supra* note 129 and accompanying text.

[FN159]. See Sanford Grossman, *Further Results on the Informational Efficiency of Competitive Stock Markets*, 18 J. Econ. Theory 81, 81 (1978) (suggesting that prices at equilibrium in markets represent optimal predictions of future value).

[FN160]. See Posner & Vermeule, *supra* note 3, at 1700-01 (discussing public contracts).

[FN161]. See Theodore P. Seto, [Drafting a Federal Balanced Budget Amendment That Does What It Is Supposed to Do \(And No More\)](#), 106 Yale L.J. 1449, 1485-87 (1997) (explaining that borrowing is needed to finance efficiently long-term government projects). Such borrowing also avoids certain forms of rent-seeking, since the funds are provided by markets, ensuring that no one enjoys monopoly rents from providing the funds.

[FN162]. See *id.* at 1462 (contending that the ability to pass debts to future generations may distort democratic decisionmaking).

[FN163]. H.R.J. Res. 1, 104th Cong. §6 (1995).

[FN164]. Cf. Dana & Koniak, *supra* note 2, at 537 (arguing on different grounds that regulatory contracts are indistinguishable from contracts for purposes of entrenchment).

[FN165]. These dangers were discussed systematically as early as Henry Carter Adams, *Relation of the State to Industrial Action* (1887), reprinted in *Two Essays by Henry Carter Adams* 57, 114-25 (Joseph Dorfman ed., 1969).

[FN166]. See [Stone v. Mississippi](#), 101 U.S. 814, 819-20 (1879) (holding that since a state cannot contract away power over morals and health, contracts that purport to do so are void and their abrogation does not violate the Contracts Clause).

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[FN167]. See William J. Baumol & Wallace E. Oates, *Economics, Environmental Policy, and the Quality of Life* 250-53 (1979) (noting that some economists argue that tradable pollution rights improve efficiency of pollution regulation).

[FN168]. See E. [Enters. v. Apfel](#), 524 U.S. 498, 539-51 (1998) (Kennedy, J., concurring) (holding that the Takings Clause protects only traditional property interests while the Due Process Clause protects nontraditional interests.); [Phillips v. Washington Legal Found.](#), 524 U.S. 156, 167 (1998) (holding that the Takings Clause protects against confiscatory regulation of "traditional [state] property interests"); see also Laurence H. Tribe, *American Constitutional Law* §9-7 (2d ed. 1988) (suggesting that judges make implicit decisions about what constitutes "traditional property" before offering protections under the Takings Clause).

[FN169]. The Constitution permits lawmaking by treaty as well. In the cases of treaties, the process for abrogating treaties appears to be easier than the process for forming them. Compare [U.S. Const. art. II, §2, cl. 2](#) (requiring the President and two-thirds of the Senate to consent to the making of new treaties), with [Restatement \(Third\) of Foreign Relations Law of the United States §339](#) (1987) (permitting the President to terminate treaties). An enactment that is easier to abrogate than to enact does not raise entrenchment concerns. For a discussion of the considerations that underlie the treaty-making structure, see McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 12, at 760-69.

[FN170]. The public's support for a measure may vary due to salient political events, temporary economic conditions, or scandals. Moreover, even if public support for a bill were to remain constant, an election might result in additional legislative support, because legislators who approved of the bill were elected for unrelated reasons. See Sherman J. Clark, [A Populist Critique of Direct Democracy](#), 112 *Harv. L. Rev.* 434, 463 (1998) (explaining that legislators may have different preferences from voters, because voters must vote for the lesser of two evils rather than a candidate who perfectly reflects their preferences).

[FN171]. The differences between variable and fixed entrenchment are mirrored by the differences between the federal electoral system, which schedules elections at fixed intervals of two or four years, and parliamentary systems, which allow the incumbent party to determine the date of elections. The parliamentary systems give an undue advantage to the incumbent party, because they can schedule the election at a time when their party has maximum support. See Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make a Difference?*, in *The Failure of Presidential Democracy* 3, 9-10 (Juan J. Linz & Arturo Valenzuela eds., 1994).

[FN172]. See [U.S. Const. art. V](#).

[FN173]. State legislatures are elected through different-sized districts than either the House of Representatives or the Senate. See Jerry K. Parkinson, *Reapportionment: A Call for a Consistent Quantitative Standard*, 70 *Iowa L. Rev.* 663, 682 (1985) (noting that states invariably have more legislative districts for their representatives than they have Members of Congress). For the same reasons, the processes for electing state conventions, as chosen by the states, may also differ from those for electing federal legislators.

[\[FN174\]](#). The Constitution also ensures that only relatively enduring sentiments can be entrenched. The difficult and extended process for passing a constitutional amendment, including passage through three-quarters of state conventions, means that an amendment will take long enough to pass that evanescent sentiments may not last long enough to sustain its passage.

[\[FN175\]](#). See McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 12, at 788.

[\[FN176\]](#). See Posner & Vermeule, *supra* note 3, at 1686.

[\[FN177\]](#). *Id.*

[\[FN178\]](#). See Dennis C. Mueller, *Constitutional Democracy* 109 (1996).

[\[FN179\]](#). See Andrew Caplin & Barry Nalebuff, *Aggregation and Social Choice: A Mean Voter Theorem*, 59 *Econometrica* 1 (1991); Andrew Caplin & Barry Nalebuff, *On 64%--Majority Rule*, 56 *Econometrica* 787 (1988). Caplin and Nalebuff's first article assumed that individuals vote for the proposal closest to their preference, and that social preferences have some degree of consensus and, therefore, are not extremely polarized. Their second article relaxed some of the conditions requiring a limited consensus, thereby expanding the situations under which their conclusions hold.

[\[FN180\]](#). See McGinnis & Rappaport, *Our Supermajoritarian Constitution*, *supra* note 12, at 786-90.

[\[FN181\]](#). See Posner & Vermeule, *supra* note 3, at 1691.

[\[FN182\]](#). See *id.* at 1687. As another example, they note that specific pieces of ordinary legislation, like radical reductions in military spending, can tie the hands of future majorities no less than formally entrenched legislation. See *id.* at 1671.

[\[FN183\]](#). If other kinds of legislation would be a perfect substitute for the entrenched legislation, the underinclusion argument might have more power, but we show below that this is not the case. See discussion *infra* this Section.

[\[FN184\]](#). See Donald J. Boudreaux & A.C. Pritchard, [Rewriting the Constitution: An Economic Analysis of the Constitutional Amendment Process](#), 62 *Fordham L. Rev.* 111, 159 (1993) (noting possible intergenerational wealth transfers that can be caused by unbalanced budgets).

[\[FN185\]](#). See Posner & Vermeule, *supra* note 3, at 1676.



[\[FN186\]](#). Id. at 1677.

[\[FN187\]](#). See Robert W. Hahn, [Achieving Real Regulatory Reform](#), 1997 U. Chi. Legal F. 143, 156 (1997) (arguing that sunset provisions can "induce Congress to revisit" regulatory choices).

[\[FN188\]](#). The one area where sunset provisions are employed regularly is appropriation legislation, which generally lasts for only one year. But the one-year duration of most appropriation laws is a traditional practice that has significant benefits, including the enhancement of Congress's ability to monitor the Executive and to reallocate priorities on a flexible basis. See Rappaport, *supra* note 45, at 318 (discussing the tradition of annual appropriation laws and their function).