

SINS OF OMISSION: ABSTENTION IN DEMOCRATIC INSTITUTIONS

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Assumptions regarding the effect of an abstention guide the theory and practice of abstention across the full range of democratic decisionmaking. Sometimes, however, these assumptions are false, and may prevent voters from achieving their objectives. This Article examines the effect that abstention has under common voting procedures, dispelling many assumptions that voters make about the effect of an abstention.

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I. INTRODUCTION

Voters make a couple of assumptions about the effect of an abstention. First, they assume that an abstention is neutral with respect to the result: that it affects all alternatives in equal measure.¹ Second, and related, they think that their preferred alternative is more likely to win if they vote and, conversely, less likely to win if they abstain.² These assumptions guide the theory and practice of abstention across the full range of democratic decisionmaking. As it turns out, however, these assumptions are often false.

Under many common voting procedures, an abstention has the effect of casting a weighted vote in favor or against the proposition. Moreover, there are a range of circumstances in which voters are more likely to achieve their desired outcomes by abstaining rather than by voting their true preferences. Together, these two features of abstention undermine widespread beliefs about the consequences of abstention and may prevent voters from achieving their objectives.

The counterintuitive effects of abstaining would not be that significant if the occasions that gave rise to them occurred infrequently (or not at all). But, alas, this is not the case. Instead, a wide range of democratic institutions, from garden clubs to state legislatures, make use of vulnerable voting procedures. And, in many cases, even where professional lawmakers are involved, voters are fooled into voting or abstaining when they would be better off, by their own measures, by doing the opposite.

The first part of this Article will briefly (and, I hope, painlessly) lay out the mechanics of voting situations where abstention can have counterintuitive results. In the second part, comprising the bulk of the Article, I will closely examine two specific situations where this occurs, where vulnerable voting procedures are used by relatively unsophisticated voters. The first involve the smaller deliberative bodies—from municipal corporations to business entities to nonprofit organizations—that rely on the parliamentary procedures and advice of *Robert's Rules of Order*. The second situations involve larger electorates—the general public, really—participating in an election method commonly used throughout the South in both state and federal elections: the plurality runoff procedure. Together, these two situations involve countless voters making mistaken assumptions about the consequences of abstaining in ways that alter electoral outcomes and prevent them from achieving their goals.

1. See Grant M. Hayden, *Abstention: The Unexpected Power of Withholding Your Vote*, 43 CONN. L. REV. 585, 596 (2010).

2. See *id.* at 601.

II. THE UNEXPECTED POWER OF WITHHOLDING YOUR VOTE

A. *The Power of Abstention*

The effect of an abstention depends upon the election procedures, and a key element of those procedures is the quota. The quota is the decision threshold—such as a majority, two-thirds, and the like—and may be either an absolute or relative requirement. An absolute quota demands a certain number of votes in favor of a proposition; a relative quota merely requires a certain fraction of votes in favor of a proposition.³ In a democratic organization with 100 members, a question requiring an absolute majority would require 51 votes in favor in order to pass, no matter how many members actually voted. A question requiring a relative majority would require only a majority of the votes cast. If, for example, 20 members abstained, then the question would require only 41 votes (a majority of the remaining 80 voters). Simply put, an absolute quota does not change with respect to the number of voters, but a relative quota does.

Absolute quotas are not as prevalent as relative quotas. When they do occur, they are typically required of votes that effectuate some profound change to an institution.⁴ Proposed amendments to the U.S. Constitution, for example, require ratification by an absolute quota of three-fourths of the states,⁵ and corporate mergers must be approved by an absolute majority of shareholders.⁶ Once in a while, such quotas are used for more mundane matters—some states, for example, require their legislatures to pass laws using absolute majority quotas. But most organizations follow the lead of *Robert's Rules of Order* and disfavor absolute quotas in such situations.

The consequences of abstaining in absolute quota situations is relatively straightforward: an abstention has the same effect on the outcome as casting a vote against the proposition.⁷ In terms of voting weights, an abstention with an absolute quota functions the same as casting a vote weighted one 100 percent *against* the proposition. While an abstention in these situations does not express anything close to indifference, it is difficult to imagine that many voters, once they know they are voting in an absolute quota situation, will make such a mistake.

Relative quotas, though, are a different matter. Though they are used much more frequently than absolute quotas,⁸ the effect of abstentions is not as straightforward. When a voter decides to abstain, it re-

3. For a more extensive discussion of this, see *id.* at 605–06.

4. For a general discussion of absolute majority quotas, see Adrian Vermeule, *Absolute Majority Rules*, 37 BRIT. J. POL. SCI. 643, 643–47 (2007).

5. U.S. CONST. art. V (providing that amendments “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 . . .”).

6. See, e.g., DEL. CODE ANN. tit. 8, § 251(c) (2014).

7. See Hayden, *supra* note 1, at 606.

8. See *id.* at 607.

moves the potential voter's support for (or opposition to) the proposition *and* it reduces the number of votes needed to pass the proposition.⁹ The abstainer's potential support or opposition to the proposition, however, is not necessarily reduced in equal measures; instead, it is removed in proportion to the quota.¹⁰ "In other words, . . . abstaining has the same effect on the outcome as casting a vote in favor of the proposition weighted at the level of the quota."¹¹

Some simple examples show how this works.¹² Take an organization with 24 members making a decision with a three-fourths relative quota. If all 24 members vote on the proposition, then 18 votes are needed for passage. A straw poll taken before the actual vote, however, reveals that 17 members support passage and 7 oppose it, meaning the proposition will likely fail. But let's say that 4 members—2 in favor and 2 opposed—decide to abstain. If abstentions don't have any effect on outcomes, then we would generally expect the result to stay the same, because we have an equal number on each side of the question withholding their votes. What actually happens, though, is that the measure passes 15 to 5. The abstentions were not the fifty-fifty propositions the voters (and we) might have expected; instead each abstention had the effect of casting a vote weighted three-fourth (the level of the quota) in favor of passage.

The same holds true for any relative quota. With a relative quota of unanimity (100 percent support), an abstention has the same effect as casting a full vote in favor of the proposition.¹³ With a relative quota of, say, one-fourth, an abstention has the effect of casting a vote weighted one-fourth in favor of passage (and three-fourths against). Only with a relative majority quota does an abstention have a neutral effect on the result, because in that case, a vote weighted at the level of the quota is, as expected, a fifty-fifty proposition.¹⁴

What this means is that in situations using relative quotas other than a simple majority, there may be a disconnection between perception and reality. People might expect that abstentions will have no effect on outcomes—that withholding a vote is essentially the same as casting a vote fifty-fifty for and against a proposition. In reality, this will not be true in any relative quota situation other than a simple majority. This counterintuitive effect is compounded by the fact that minority and supermajority quotas are used to facilitate or hinder passage of certain types of propositions, and abstentions in those situations have the opposite effect. In su-

9. See *id.* at 607–08.

10. See *id.* at 608.

11. See *id.*; Sreejith Das, *Abstaining (Almost) Never Expresses Indifference: A Short Note on Abstention in Weighted Voting Games*, 3–4 (2009) (unpublished manuscript) (on file with the author).

12. For additional examples, see Hayden, *supra* note 1, at 608–13.

13. See *id.* at 608.

14. See *id.* at 612. This is true of the most common definition of a majority quota, which is "more than half." But, if the majority quota is defined as fifty percent of those casting a vote plus one vote, the abstention actually casts a weighted vote in favor of the proposition, with the exact weight depending upon the number of voters. See *id.* at 611–12.

permajority situations, where voting procedures are designed to make passage most difficult, abstentions have the effect of casting a vote weighted *in favor* of passage.¹⁵ And in situations demanding less than majority support, where voting procedures are designed to make passage relatively easy, abstentions are weighted *against* passage.¹⁶ All of this makes it likely that voters contemplating an abstention will make mistakes. But the unexpected power of abstention in relative quota situations is not the only way voters may fall victim to the hazards of withholding their votes.

B. Abstaining to Win

There are other potential voting situations where people's expectations are at odds with reality. One of the most significant of these is when voters are more likely to achieve their desired outcomes by abstaining rather than voting their true preferences. This surprising feature of abstention can happen when election procedures and voter preferences combine to produce something known as the "No-Show Paradox."¹⁷

The No-Show Paradox occurs when a voter is better off by not voting than by voting her preferences.¹⁸ Consider, for example, a group of 9 people trying to make a decision about what type of ice cream to purchase (vanilla, chocolate, or strawberry) using a common legislative process, the amendment procedure.¹⁹ The group's preference profile over the three alternatives, with the most desired alternative on top, is as follows:²⁰

TABLE 1

2 voters	3 voters	2 voters	2 voters
Vanilla	Chocolate	Strawberry	Strawberry
Chocolate	Strawberry	Vanilla	Chocolate
Strawberry	Vanilla	Chocolate	Vanilla

15. See *id.* at 611 (emphasis added).

16. See *id.* at 614 (emphasis added).

17. The paradox was first described by Peter C. Fishburn and Steven J. Brams in *Paradoxes of Preferential Voting: What Can Go Wrong with Sophisticated Voting Systems Designed to Remedy Problems of Simpler Systems*, 56 MATHEMATICS MAG. 207 (1983). See also Hayden, *supra* note 1, at 596–98; HANNU NURMI, VOTING PARADOXES AND HOW TO DEAL WITH THEM 49 (1999).

18. See NURMI, *supra* note 17, at 49.

19. For a full description of the procedure, see WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE 69–73 (1982); see also HENRY M. ROBERT ET AL., ROBERT'S RULES OF ORDER 130–67 (2004); Grant M. Hayden, Note, *Some Implications of Arrow's Theorem for Voting Rights*, 47 STAN. L. REV. 295, 301–02 (1995).

20. This is an example of the strong no-show paradox. See Hannu Nurmi, *Monotonicity and Its Cognates in the Theory of Choice*, 121 PUB. CHOICE 25, 33–34 (2004).

If the agenda of pairwise votes in the amendment procedure is Vanilla vs. Chocolate, winner to face Strawberry, then the social choice if everyone votes is Chocolate (since Chocolate beats Vanilla 5 to 4 in the first round, and Chocolate beats Strawberry 5 to 4 in the second round). But if the two voters on the right decide to abstain, then Strawberry, their first-ranked alternative, wins (since Vanilla beats Chocolate 4 to 3, and then Strawberry beats Vanilla 5 to 2). If those two abstaining members had voted their true preferences, their first-ranked alternative would have lost. As it happened, by withholding their votes, their first-ranked alternative wins, and it's strawberry ice cream for all!

Aside from the fiction that anybody actually likes strawberry ice cream,²¹ there's nothing terribly implausible about this scenario. The amendment procedure is a well-known parliamentary voting procedure.²² In fact, every voting procedure that picks the Condorcet winner, when one exists, is vulnerable,²³ as are parliamentary procedures that use a quorum requirement.²⁴ And the ability of people to vote strategically—that is, vote against one's true preferences to ultimately achieve their desired outcome—has long been part of the democratic equation.²⁵ So while it hasn't been the subject of much scholarly attention, it shouldn't be that surprising that voters can also manipulate outcomes by strategically abstaining in such situations. Many of these vulnerable procedures, though, are used in legislative bodies, where we might expect members to be more aware of the possible consequences of abstaining. But some voting methods used in large-scale elections, such as plurality runoff procedures, involve less sophisticated voters. And it is these situations where voters may be more likely to make mistakes.

21. Well, it turns out that quite a few people actually do like strawberry ice cream—indeed, it's the fifth most popular flavor in the United States. I suppose I should have said “any person with good taste.”

22. For a full description of the procedure, see RIKER, *supra* note 19, at 69–73; Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 1012–14 (1989) (noting the ubiquity of the amendment procedure and its vulnerability to voting paradoxes); *Implications of Arrow's Theorem*, *supra* note 19, at 301–02.

23. See Hervé Moulin, *Condorcet's Principle Implies the No Show Paradox*, 45 J. ECON. THEORY 53, 55 (1988). The Condorcet winner is the option that would beat each of the other options in a series of simple pairwise contests. For background on the Condorcet voting procedures, see RIKER, *supra* note 19, at 67–69.

24. See Paulo P. Côte-Real & Paulo T. Pereira, *The Voter Who Wasn't There: Referenda, Representation and Abstention*, 22 SOC. CHOICE & WELFARE 349, 351 (2004); Luís Aguiar-Conraria & Pedro C. Magalhães, *Referendum Design, Quorum Rules and Turnout 2* (Sept. 5, 2009) (unpublished Am. Political Sci. Ass'n, 2009 Toronto Meeting Paper) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451131; see also Hayden, *supra* note 1, at 600–01.

25. Indeed, the most famous corollary of Arrow's Impossibility Theorem is the Gibbard-Satterthwaite theorem—that all nondictatorial voting procedures are vulnerable to strategic manipulation. See Allan Gibbard, *Manipulation of Voting Schemes: A General Result*, 41 ECONOMETRICA 587, 587 (1973); Mark Allen Satterthwaite, *Strategy-Proofness and Arrow's Conditions: Existence and Correspondence Theorems for Voting Procedures and Social Welfare Functions*, 10 J. ECON. THEORY 187, 188 (1975).

III. MISTAKEN ABSTENTIONS: THE SINS OF OMISSION

The degree of this disconnection between perception and reality, and thus the likelihood of unexpected results, will depend on the situation. The two key variables are the sophistication of the voters and the structure of the voting process. Professional legislators, especially those assisted by party whips and parliamentarians, are not likely to be fooled by the effects of an abstention (though, as we'll see below, this is not always the case). Members of smaller, less professional institutions (school boards, homeowners associations, civic clubs, and the like), and citizens casting ballots in more ordinary political elections, are much more vulnerable. Any counterintuitive features of a voting process are likely to lead unsophisticated voters to make mistakes with respect to abstention—mistakes that lead them to vote or abstain against their own interests—whether or not they ever realize it.

The structure of a particular vote will also play a major role in producing unexpected outcomes. As we've seen, the effect of abstention with an absolute quota is relatively straightforward—abstaining is the same as voting against a proposition. Relative quotas, though, are a different matter, with a mix of expected and unexpected possibilities. Where a vote is taken using a simple majority quota—which, thankfully, describes most situations—the effect of an abstention won't fool anybody. Most people who abstain expect that it will have no effect on the outcome and, with such a quota, they are exactly right—withholding your vote has a neutral effect on the outcome, similar to casting a vote weighted fifty-fifty for and against the proposition. The same is not true, however, for any relative quota other than a majority quota: it is these voting situations that can cause the most trouble.

A. *Small Electorates Using Two-Thirds Quotas*

There are many decisions that require something other than a relative majority quota, though they don't occur with equal frequency. Some, in fact, hardly arise at all. The U.S. Constitution, for example, requires that one-fifth of those present may demand a roll call vote in either house of Congress.²⁶ If members abstain by being absent from the chambers, the abstention, as it does in all relative quota situations, functions as a vote in favor of the proposition weighted at the level of the quota. But because the quota here is less than a majority, such an abstention actually functions as a vote weighted 80 to 20 *against* having a roll call vote.²⁷ That's the kind of counterintuitive effect that could catch voters off guard, but, in this case, we're talking about professional legislators voting on a relatively insignificant procedural requirement. Relative quota requirements at other levels—three-fifths, three-quarters, unanimous, and the like—

26. U.S. CONST. art I, § 5, cl. 3.

27. An extended discussion of this example is found in Hayden, *supra* note 1 at 612–13.

also show up occasionally, and while abstaining in such situations might produce some unexpected results, those relative quotas do not show up as part of the democratic machinery of very many democratic institutions or, when they do, they do not get invoked that often.

The one exception is the two-thirds supermajority quota. This requirement shows up quite often in a variety of circumstances, legislative and non-legislative, and is often used in very significant votes. In the most well-known example, Congress may override a presidential veto on a two-thirds vote of both houses.²⁸ Congress is required to meet the same quota when proposing constitutional amendments,²⁹ and the Senate must meet that quota to ratify treaties³⁰ or convict someone in an impeachment proceeding.³¹ State legislatures also have similar requirements for important decisions.³²

Many organizations also use two-third relative quotas to make significant decisions. The Board of Governors of the International Atomic Energy Agency, for example, is a 35-member body that elects its Director General using a two-thirds relative quota.³³ And the many organizations using *Robert's Rules of Order*, as we shall see, use the quota to do things like remove people from office,³⁴ take away membership,³⁵ or close debate on a question.³⁶ These are all significant decisions, and they all require a two-thirds relative majority quota. They are also the situations where voters (or, more correctly, abstainers) are most likely to make a mistake.

Here's how that might happen. Take a simple example of a body with 18 voters making a decision that requires a two-thirds relative quota. If all members cast a ballot, 12 votes are required for approval. Let's say that, in the first round of voting, the vote is 11 to 7 in favor of the proposal. The measure fails. Now let's assume that, prior to a second round of voting, 3 of the original voters against the proposition are persuaded to abstain. These 3 voters aren't complete fools, though, and take care to ensure that an equal number of voters in favor of the proposition also abstain. In other words, they "pair" their abstentions with members of the

28. U.S. CONST. art. I, § 7, cl. 2.

29. *Id.* art. V.

30. *Id.* art. II, § 2, cl. 2.

31. *Id.* art. I, § 3, cl. 6.

32. N.Y. CONST. art. IV, § 7 ("[I]f approved by two-thirds of the members elected to that house, it shall become a law notwithstanding the objections of the Governor"); S.C. CONST. art. XVI, § 1 ("If it is agreed to by two-thirds of the members elected to each House, the amendment or amendments must be entered on the Journals respectively . . ."); Ill. CONST. art. IV, § 14 ("Impeachments shall be tried by the Senate).

33. See IAEA, THE STATUTE OF THE IAEA, arts. VI-VII, available at <http://www.iaea.org/About/statute.html> (last visited Nov. 1, 2015); Sharon Otterman & Alan Cowell, *Atomic Agency's New Chief Favors Strict Policy on Iran*, N.Y. TIMES, July 3, 2009, at A12. For a discussion of the abstention that resulted in the election of the current Director General, see Hayden, *supra* note 1, at 609-11.

34. HENRY M. ROBERT ET AL., ROBERT'S RULES OF ORDER NEWLY REVISED IN BRIEF 122 (First Da Campo Press eds., 2004).

35. *Id.* at 122-23.

36. *Id.* at 35-36. For a list of all votes requiring a two-thirds majority, see *id.* at tbl. E 197.

opposition, thinking that, in so doing, they are ensuring that their abstentions will not affect the outcome of the vote.³⁷

So what happens in the second round of voting? The vote is 8 to 4, and, to surprise of at least three of the abstaining members, the measure passes. The math is simple enough. With 6 members abstaining, only 8 votes are needed for approval (two-thirds of the remaining 12 voters). By abstaining, the 6 voters did not merely cancel each other out as they would if abstentions had the effect of casting a vote weighted fifty-fifty. Split fifty-fifty, the effective vote would have been the same 11 to 7 tally, and the outcome would not have changed. But, because of the two-thirds relative quota, the abstentions had the effect of casting 6 votes weighted two-thirds in favor of the proposition, or 4 in favor and 2 against. This means that the effective vote moved from 11 to 7 to 12 to 8, and the measure passed. Whether we describe these abstentions as weighted votes or as a reduction in the quota with an uneven effect on the proposition, the result is the same. The abstentions were not neutral, but equivalent to votes weighted at the level of the quota.

1. Legislatures

The structure of a two-thirds relative majority quota, then, provides fertile ground for mistakes. This can even happen to the most sophisticated voters. Terry Radtke describes just such a situation involving members of the Wisconsin Assembly.³⁸ The Wisconsin legislature was attempting to override a gubernatorial veto of a bill on bar integration.³⁹ Wisconsin law, like that of the federal government and many other states, required a two-thirds supermajority to override the veto.⁴⁰ The Wisconsin Senate overrode the veto 22 to 8.⁴¹ The vote was much closer, though, in the Wisconsin Assembly, where the bill had originally passed 60 to 31.⁴² When the bill returned to the Assembly for the override vote, eight of its members were absent and, according to custom, those eight members paired their votes with members on the other side of the issue.⁴³ This is where the mistake was made.

Wisconsin, like the U.S. Congress, allowed pairing, a practice in which absent members agree to be recorded on opposite sides of the issue.⁴⁴ The paired votes are not counted in the vote total (and are thus abstentions), but are usually reported in the record to assure constituents that the absence of their representative did not affect the outcome of the

37. More on the process of “pairing” below.

38. Terry Radtke, *The Last Stage in Reprofessionalizing the Bar: The Wisconsin Bar Integration Movement, 1934–1956*, 81 MARQ. L. REV. 1001, 1012–14 (1998).

39. *Id.* at 1013.

40. *Id.*

41. *Id.*

42. *Id.* at 1012–13.

43. *Id.* at 1013.

44. *Id.*

vote.⁴⁵ This all works perfectly well with the more usual relative majority quota; it does not work so well, without some tinkering, with any other quota. After pairing off eight sets of two votes, the Wisconsin Assembly voted 51 to 25 to override the governor's veto, meeting, just barely, the required two-thirds majority.⁴⁶ When the speaker declared that the Assembly had overridden the governor's veto, the announcement "caused an uproar in the Assembly."⁴⁷ The mistaken decision to pair the votes one-to-one was critical—had the paired votes been cast, the vote would have been 59 to 33, short of the two-thirds requirement. Each of the abstentions functioned not as a fifty-fifty proposition, but as a vote weighted two-thirds in favor of the bill. As it was, Wisconsin legislators learned about the power of abstention the hard way.

While professional lawmakers are not often caught off guard like this, this anecdote shows that the counterintuitive effects of an abstention can fool even the best of them. The U.S. Senate, for example, appears to have taken this lesson to heart. While Senators often engage in vote pairing,⁴⁸ they make sure that, in situations requiring a two-thirds majority, the votes are "paired" in the ratio of two votes in favor to one vote against.⁴⁹ One suspects that this more sophisticated understanding of the power of abstention is the norm, that legislators, and certainly legislative leaders, would be wise to this sort of potential outcome (even if they don't fully understand how it works). The same cannot be said, however, for amateurs.

2. "Ordinary Societies"

We would expect problems like this to arise more frequently in smaller, less professional democratic institutions—in particular, those institutions large enough to formalize decision procedures yet not so large as to expect the kind of expertise that comes with professional (or even semi-professional) parliamentarians. In the United States, millions of these institutions make countless decisions every day. The list includes governmental organizations (municipalities, school boards, and other local governmental entities), business firms (corporations, partnerships, and other forms of business ownership), and nonprofit organizations (charitable organizations, community associations, churches, and civic clubs).

45. *Id.*; Hayden, *supra* note 1, at 611.

46. Radtke, *supra* note 38, at 1013.

47. *Id.*

48. See CHARLES TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE: A REFERENCE, RESEARCH, AND LEGISLATIVE GUIDE 543–45 (Greenwood Press, 1989).

49. See, e.g., C.P. Trussell, *Senate Approves 4 Peace Treaties, Rejecting Delay*, N.Y. TIMES, June 6, 1947, at 1, 3 (describing how Senators in favor of ratification of a treaty were "paired" against two Senators who opposed ratification).

a. The Significance of “Ordinary Societies”

These more “ordinary societies” play a significant role in the lives of their members. Take, for example, community associations. Community associations are real estate developments where the owners are bound to membership in the organization.⁵⁰ They come in a variety of forms—homeowner associations, condominiums, and cooperatives, to name a few—and many different legal names—a common interest development in California is much like a planned unit development in Georgia.⁵¹ Whatever the name, though, these are a significant and growing feature of the real estate landscape and, thus, people’s day-to-day lives.

These community associations play a significant social and economic role in the United States. As of 2014, there were over 333,600 community associations with over 66 million residents in the United States, with thousands of new associations formed each year.⁵² Close to a quarter of all homes in the United States, valued at over \$4.5 trillion, are now part of such associations;⁵³ they collect yearly assessments totaling \$70 billion from their homeowners.⁵⁴ And over 2 million people serve on community association boards.⁵⁵

b. Robert’s Rules of Order

Community associations, like most organizations making group decisions, usually adopt some form of decisionmaking procedures. And the most commonly used manual of procedure, by a great margin, is *Robert’s Rules of Order*.⁵⁶ Henry Martyn Robert, a Colonel in the U.S. Army, first published his manual of procedure in 1876.⁵⁷ His interest in the subject was sparked in 1863, when he was asked to preside over a meeting and felt that he lacked the necessary knowledge of procedure.⁵⁸ After subsequent stints in several other social organizations, and extensive study of the more formal parliamentary law used by legislative bodies, he devised and published a system designed to be used in more “ordinary societies.”⁵⁹ His manual, now in its eleventh edition and titled *Robert’s Rules of*

50. See Jim Slaughter, *Community Association Statutes and Procedures*, <http://www.jimslaughter.com/Community-Association-Statutes-and-Procedures-.cfm> (last visited Nov. 1, 2015).

51. See *id.*

52. See Foundation for Community Association Research, *Community Association Fact Book, National and State Statistical Review for 2014*, available at http://www.cairf.org/research/factbook/2014_statistical_review.pdf (last visited Nov. 1, 2015).

53. See *id.*

54. See *id.*

55. See *id.*

56. See Jim Slaughter, *Parliamentary Procedure in 2005*, THE TOASTMASTER (Feb. 2005), available at <http://www.jimslaughter.com/Parliamentary-Procedure-in-the-21st-Century.cfm>.

57. See HENRY M. ROBERT III ET AL., ROBERT’S RULES OF ORDER NEWLY REVISED xxiii (11th ed. 2011).

58. See *id.* at xl.

59. See *id.* at xliii.

Order Newly Revised,⁶⁰ runs to over 650 pages and has been supplemented by more user-friendly *In Brief* edition⁶¹ (a mere 176 pages) and various online resources.⁶²

Robert's Rules of Order, like any manual of procedure, is often formally adopted by an organization. Let's return to community associations to see how that might work. Members of community associations are subject to a governing set of documents—the Covenants, Conditions and Restrictions (CCRs)—that require compliance with various rules and the payment of assessments.⁶³ Community associations also typically have a constitutions and/or bylaws that, among other things, provide the decisionmaking procedures for the association boards.⁶⁴ Most community associations use *Robert's Rules of Order*.⁶⁵ Indeed, several states provide *Robert's Rules* as the default decisionmaking procedure by statute.⁶⁶ North Carolina is typical of this approach, requiring of its planned communities that “[e]xcept as otherwise provided in the bylaws, meetings of the association and the executive board shall be conducted in accordance with the most recent edition of *Robert's Rules of Order Newly Revised*.”⁶⁷ Thus, millions of homeowners are bound to associations that must—by contract, statute, or both—make decisions in a way that complies with *Robert's Rules of Order*.

Community associations are, of course, just one example of the many types of organizations that make use of *Robert's Rules*. Many municipalities, for example, use the rules as their procedural guide.⁶⁸ A wide range of other public and private entities do so as well. In most cases, the choice of procedural rules is made through the organization's constitution or bylaws, or perhaps even more informally. But in some cases, as with community associations, states require *Robert's Rules* as the default procedure for certain organizations. This is true of groups ranging from the Kansas Credit Union Council⁶⁹ to the Alabama Board for Registered Interior Designers.⁷⁰ *Robert's Rules of Order Newly Revised* is the manual of choice when it comes to group decisionmaking in the United States.⁷¹

60. *Id.*

61. *Id.*

62. *The Official Robert's Rules of Order Web Site*, ROBERT'S RULES, <http://www.robertsrules.com/> (last visited Nov. 1, 2015).

63. *See Community Association Statutes and Procedures*, *supra* note 50.

64. *See id.*

65. *See Parliamentary Procedure in 2005*, *supra* note 56.

66. *See, e.g.*, HAW. REV. STAT. § 514B-121(d) (2014) (Hawaii condominiums); N.C. GEN. STAT. § 47F-3-108(c) (2015) (North Carolina planned communities); OR. REV. STAT. § 94.657(1) (2015) (Oregon planned communities).

67. N.C. GEN. STAT. § 47F-3-108(c) (2014) (emphasis added).

68. A search for the term “Robert's Rules of Order” in the Lexis municipal code database turns up close to 1,500 results.

69. KAN. STAT. ANN. § 17-2232(c) (2013).

70. ALA. CODE. § 34-15C-4(e)(3) (2014).

71. It is the manual of choice of around eighty-five percent of democratic institutions in the United States. *See Parliamentary Procedure in 2005*, *supra* note 56.

In most ways, standardizing meeting procedures is a good thing. Henry Robert originally envisioned his manual of procedure as a way to save time and lend some predictability as people move among “ordinary societies.”⁷² It’s certainly done that. And given its long history, the editors of *Robert’s Rules of Order Newly Revised* have had plenty of time to work out the kinks. The problem with standardization, though, is that any problems that remain are thrust upon large numbers of groups. *Robert’s Rules*, unfortunately, has one of those problems when it comes to its counsel on the effect of abstentions in many relative quota situations.

Most of the votes taken under *Robert’s Rules of Order* use a simple majority quota. But the rules also require a two-thirds majority for a number of significant organizational decisions, including those involving some fundamental and potentially contentious issues. (Indeed, supermajority quotas are usually reserved for these more important decisions in order to ensure consensus on important matters.) The two-thirds quota, for example, is mandated for motions to suspend the rules and to close debate on a question.⁷³ The quota is also used for votes on fundamental organizational changes such as removing members,⁷⁴ removing officers,⁷⁵ and amending an organization’s bylaws.⁷⁶ Paradoxically enough, a two-thirds vote is also required to adopt a parliamentary authority.⁷⁷ In all of these two-thirds quota situations, as with any other votes under the rules, members have the option to abstain.⁷⁸ The question then becomes: what does the parliamentary authority say about the impact of such abstentions?

Robert’s Rules of Order Newly Revised, along with its brief guide and online resources, gives quite a bit of guidance on the subject of abstentions. With respect to withholding a vote in situations with an absolute quota (generally disfavored by *Robert’s Rules*),⁷⁹ it accurately notes that such an abstention functions as a vote against the proposition.⁸⁰ The rest of its advice about abstentions assumes they are made in the more favored relative quota situations, and complies with the commonplace understanding that abstentions are *neutral* with respect to outcome. For example, members with are counseled to abstain on questions in which they have a direct personal or pecuniary interest.⁸¹ This advice wouldn’t make sense if the abstention were thought to affect the outcome.

More straightforwardly, and more troubling, *Robert’s Rules of Order* supplementary guides advise that, for all relative quotas, abstentions have

72. See ROBERT ET AL., *supra* note 57, at xl–xlv.

73. See *id.* at 401.

74. See *id.* at 648.

75. See *id.* at 653–54. This may also be done by a majority vote of the entire membership. See *id.*

76. See *id.* at 307, 592. This may also be done by a majority vote of the entire membership. See *id.*

77. See *id.* at 13. This may also be done by a majority vote of the entire membership. See *id.*

78. See *id.* at 407.

79. See *id.* at 403.

80. See *id.* It does so, though, in a rather confused fashion. See Hayden, *supra* note 1, at 606.

81. See ROBERT ET AL., *supra* note 57, at 407.

no effect on the outcome. Take, for example, the manual's advice when it comes to the all important step when the chair puts a question to the group: "Most motions require a majority of those present and voting to pass. Some require a two-thirds vote. (Abstentions—instances in which members who are present do not vote—are not counted and *have no effect on the result.*")⁸² The online guide contains similar advice, noting that "abstentions *have absolutely no effect on the outcome of the vote* since what is required is either a majority or two thirds of the votes cast."⁸³

This advice, as we now know, is wrong. In relative quota situations, abstentions reduce the number of votes necessary to pass the proposition, and, importantly, do so in proportion to the quota. With relative majority quotas, this isn't a problem, because abstentions reduce the number of votes on a one-to-one basis so, as advertised, they do not affect the outcome. But with two-thirds quotas, the reduction comes unevenly, resulting in an abstention being equivalent to casting a vote weighted two-thirds in favor of the proposition. This effect, as recounted above, has fooled even professional legislators—it would certainly catch less sophisticated voters off guard.

There's little doubt, given the multitude of organizations relying on *Robert's Rules of Order*, that many have made mistakes like this on important votes. Such problems are even more likely on votes to remove members or officers, where tensions run high and the interpersonal costs of voting may prompt more abstentions than usual. It is here that we would expect most mistakes to be made. Indeed, we see evidence of organizational reliance on this misleading advice when membership disputes spill over into the courts. In a recent New York case, for example, the plaintiff, Melvyn Meer, challenged his removal from a School Leadership Team that used *Robert's Rules of Order*.⁸⁴ The chair of the organization "informed the SLT members that a two thirds majority vote was required, and that abstentions had no effect on the outcome of a vote under their bylaws and *Robert's Rules of Order*."⁸⁵ Meer was subsequently removed on a five to one vote with six abstentions, and the court ruled against his claim.⁸⁶

There are, then, many situations involving relative quotas other than a simple majority where voters, both sophisticated and not, have been fooled by the effect of abstaining. This shouldn't be surprising, especially in the case of members of more ordinary societies like community associations, both because the effects are counterintuitive and because the parliamentary bible of such societies, *Robert's Rules of Order*, gives them advice that is patently false. But there are also situations where even

82. See *id.* at 24 (emphasis added).

83. See *Frequently Asked Questions: Question 6*, ROBERT'S RULES, <http://www.robertsrules.com/faq.html> (last visited Nov. 2, 2015) (emphasis added).

84. Meer v. Klein, 2008 N.Y. Sup. Ct. 108315-08, 2008 WL 5108134 (N.Y. Sup. 2008).

85. *Id.* at *4 ¶ 2 (emphasis added).

86. See *id.* at *6 ¶ 2.

larger electorates may be fooled by the power of abstention in the form of the No-Show Paradox.

B. Large Electorates Using Plurality Runoff Procedures

Many democratic bodies, small and large, use voting procedures that are vulnerable to the No-Show Paradox—situations where a person is better off abstaining than voting their true preferences. For example, virtually all legislative bodies, and some smaller bodies that follow standard parliamentary procedure, use some version of the sequential process known as the amendment procedure to pass laws, resolutions, and other propositions.⁸⁷ These procedures, as we saw above, are vulnerable to the Paradox.⁸⁸ Indeed, the amendment procedure can even give rise to situations where *every* voter is better off abstaining rather than voting.⁸⁹

Another version of the Paradox may occur in situations involving certain non-sequential voting procedure applied to just two alternatives.⁹⁰ Many legislative bodies and committees, for example, have quorum requirements, which require that a certain number of members be present to conduct business.⁹¹ If a voter is against a proposal, her goal is achieved if either the quorum requirement is met and a majority votes against the proposal or the quorum requirement is not met. Voters in this position sometimes make the (correct) calculation that they are more likely to defeat the proposal by abstaining (and thus not counting toward the quorum) than by showing up and voting against it.⁹² And, indeed, there is good evidence that this “quorum busting” version of the Paradox has occurred, as when several Democrats in the Texas state legislature fled to Oklahoma and New Mexico in 2003 to defeat a quorum requirement in an attempt to prevent passage of a redistricting bill.⁹³ But both of these examples—the amendment procedure and voting with a quorum requirement—usually involve relatively sophisticated voters, so we would not expect them to be fooled (indeed, in the case of quorum busting, legislators are *using* the effect to achieve their desired ends).

87. For a discussion of the procedure and its vulnerability to voting and abstention paradoxes, see Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 VA. L. REV. 971, 1012 (1989); Hayden, *supra* note 1, at 599–600.

88. See *supra* Part II.B and accompanying notes.

89. See Hayden, *supra* note 1, at 599–600; Nurmi, *supra* note 20, at 32.

90. For a discussion of these procedures, see Hayden, *supra* note 1, at 600–01.

91. See Côte-Real & Pereira, *supra* note 24, at 351; Aguiar-Conraria & Magalhães, *supra* note 24, at 2.

92. This has also happened on a large scale. In 2005, Italian voters were presented with a referendum that would have liberalized the regulation of in vitro fertilization. Italian law required both a majority participation quorum and majority support for passage. The Catholic Church opposed the measure, and Pope Benedict XVI gave a speech just four days before the vote asking, “What is the principle of wisdom, if not to abstain from all that is odious to God?” Even though ninety percent of people who actually voted supported the changes, turnout was well below the majority quorum, leading to defeat of the measure. See Aguiar-Conraria & Magalhães, *supra* note 24, at 2.

93. *Democrats on the Run, Again*, N.Y. TIMES, July 29, 2003, at A18.

1. *The Vulnerability of Runoff Procedures*

Certain voting procedures used in larger elections, however, are also vulnerable to the Paradox. The plurality runoff procedure is one such procedure. The plurality runoff procedure is a successive voting mechanism used to ensure majority support of a single candidate.⁹⁴ After the first round of voting, if any candidate receives majority support, then she is declared the winner. But if none of the alternatives receive majority support, then the two alternatives receiving the most votes are placed in a runoff to choose the winner.⁹⁵ At that stage, with only two remaining candidates, one will almost certainly receive majority support.⁹⁶

A simple example shows just how significantly the Paradox can affect a plurality runoff. Take the following preference profile over three candidates:⁹⁷

TABLE 2

47% of voters	2% of voters	26% of voters	25% of voters
Alan	Alan	Casey	Beth
Beth	Beth	Alan	Casey
Casey	Casey	Beth	Alan

If everyone votes, then in the first round, Alan (49%) and Casey (26%) make it to the runoff, while Beth (25%) is eliminated. In the runoff, Casey (51%) beats Alan (49%). Thus, if everyone votes, Casey wins the election. If the large group of voters on the left abstain, however, we get a different result, and one that is more in line with their preferences. Take those voters away, and the first round results in the need for a runoff between Casey (26%) and Beth (25%) (neither of those candidates receives a majority of the remaining 53% of the voters, for Alan plays the spoiler here). In the runoff, Beth (27%) beats Casey (26%). Thus, if the people on the left vote, the winner is Casey, and they are stuck with their least-preferred candidate. If, on the other hand, those people abstain, then Beth wins the election. And while Beth is not that group's favorite

94. See Hayden, *supra* note 1, at 598; RIKER, *supra* note 19, at 74–76, 85–88; Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 333 (2006).

95. There are at least two versions of plurality runoff procedures. This example uses top-two runoff voting, which is one of the most common election methods. See O'Neill, *supra* note 94, at 333. Another variation is an elimination runoff election, where the alternatives with the lowest totals are eliminated in successive rounds until there is a majority support for one alternative. *Id.* at 334. With just three alternatives, this distinction does not matter. The latter version also forms the basis of instant runoff voting, where voters rank the alternatives in order of preference. The votes are then distributed to the alternatives according to first choices. If none of the alternatives receives a majority, then the alternative with the fewest number of votes is eliminated and its votes transferred to the next choice, a process that gets repeated until an alternative has a majority. *Id.*

96. Yes, if there's an even number of voters, the two remaining candidates could tie. That doesn't happen very often in large elections.

97. This example is adapted from Nurmi, *supra* note 20, at 31 tbl.7.

candidate, she is still strictly preferred to Casey. All of the people on the left, then, should just stay at home during the election. While this example was manufactured to demonstrate a point, the plurality runoff procedure is truly vulnerable to the No-Show Paradox.

2. *Runoff Procedures in American Politics*

Runoffs are a well-established feature of the American political system: they are the most common single-winner election method in the United States after the simple plurality vote.⁹⁸ Most of the South—including Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, and Texas—still use it in their primaries to fill federal and state offices.⁹⁹ (South Dakota uses it in other situations.¹⁰⁰) And while there have been movements to reduce the frequency of runoff elections,¹⁰¹ the procedure remains an entrenched part of Southern politics.

Last year's election results reveal situations where the No-Show Paradox may have been at play. For example, in the first round of the Democratic Primary for Georgia's 1st Congressional District, Brian Reese captured 34% of the vote, Amy Tavio 33.8%, and Marc Smith 32.2%.¹⁰² This led to a runoff election, where Reese who clearly picked up most of Smith's supporters, crushed Tavio 63.1% to 36.9%.¹⁰³ Simplifying the numbers slightly, we can consistently redescribe the preferences and sequence of events in a way that bears remarkable similarity to the example with Alan, Beth, and Casey above:

98. See O'Neill, *supra* note 94, at 333.

99. Nat'l Conference of State Legislatures, *Primary Runoffs*, <http://www.ncsl.org/research/elections-and-campaigns/primary-runoffs.aspx> (last updated May 12, 2014); see also CHARLES S. BULLOCK III & LOCH K. JOHNSON, RUNOFF ELECTIONS IN THE UNITED STATES 2, 3 tbl.1.1 (1992); *Federal Primary Runoff Elections and Voter Turnout Declines, 1994-2014*, FAIRVOTE, Nov. 2014, <http://www.fairvote.org/research-reports/federal-primary-runoff-elections-and-voter-turnout-declines-1994-2014/>. Louisiana uses it in all of their elections, which is why their last race for the U.S. Senate was not decided until a December 6 runoff election. See Richard Fausset, *Mary Landrieu is Defeated by Bill Cassidy in Louisiana Senate Runoff*, N.Y. TIMES, Dec. 6, 2014, http://www.nytimes.com/2014/12/07/us/politics/mary-landrieu-is-defeated-by-bill-cassidy-in-louisiana-senate-runoff.html?_r=0.

100. Runoffs are held in South Dakota for U.S. Senator, U.S. Representative, and governor. S.D. CODIFIED LAWS § 12-6-51.1 (2014).

101. For example, a bill was introduced in the Alabama House of Representatives to decrease the percentage triggering a runoff to thirty-five percent from fifty percent. See H.B. 488 (Ala. 2013), available at <http://legiscan.com/AL/text/HB488/2013>. However, the bill was proposed indefinitely. See Legislative Research, *Alabama House Bill 488*, LEGISCAN, <http://legiscan.com/AL/research/HB488/2014> (last visited Nov. 2, 2015).

102. *Georgia's 1st Congressional District Elections, 2014*, BALLOTEDIA, available at http://ballotpedia.org/Georgia%27s_1st_Congressional_District_elections_2014 (last visited Nov. 2, 2015).

103. *Id.* Unfortunately for Reese, he later lost to Republican Earl "Buddy" Carter in the general election. *Id.*

TABLE 3

30% of voters	3% of voters	34% of voters	32% of voters
Tavio	Tavio	Reese	Smith
Smith	Smith	Tavio	Reese
Reese	Reese	Smith	Tavio

With these numbers, Reese (34%) and Tavio (33%) make it to the runoff, while Smith (32%) is eliminated, which is consistent with what actually happened. Then, in the runoff, Reese (66%) soundly beats Tavio (33%), also pretty consistent with the actual election results.

But what if the group of Tavio supporters on the left abstained in both rounds of voting? In that case, the first round results in a runoff between Reese (34%) and Smith (32%) (neither of those candidates receives a majority of the remaining 70% of the voters, for Tavio (3%) plays the spoiler). In the runoff, Smith (35%) beats Reese (34%). Thus, if the group on the left votes, the winner is Reese, and they are stuck with their least-preferred candidate. If, on the other hand, they abstain, then Smith wins the election. And while Smith is not the group's favorite, he is still strictly preferred to Reese.

Without more extensive information about voter preferences—such as rank-order preferences over the full range of candidates—it's hard to tell whether this was actually a situation where some significant portion of the electorate would have been better off staying home. But these large-scale, runoff elections are certainly situations that involve unsophisticated voters and vulnerable decision procedures. So it's certainly possible.

In a way, none of this should be all that surprising. We have known for a long time that runoff procedures were vulnerable to strategic voting, where members of the electorate could vote against their true preferences at certain stages of the process in order to achieve their ultimate objective (either by electing their candidate of choice or at least avoiding a less-preferred candidate). In fact, according to Arrow's theorem, this is true of every possible voting procedure that meets some minimal conditions of fairness and rationality.¹⁰⁴ We now know that voters may also strategically withhold their votes as well. That alone is, I think, significant. And the same sort of thing can also happen with respect to any election with a spoiler candidate.

In this article, though, I'm more interested in the flip side of these vulnerabilities. Yes, voting procedures, given certain conditions, are sus-

104. See generally KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); DUNCAN BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1963). For a recent summary of the state of social choice theory and Arrow's theorem, see 1 *HANDBOOK OF SOCIAL CHOICE AND WELFARE* (Kenneth J. Arrow et al. eds., 2002), see also *Implications of Arrow's Theorem*, *supra* note 19, at 301–02, for a basic explanation of the theorem.

ceptible to being manipulated by strategically voting or abstaining. But the fact that voters may *unwittingly* hurt themselves by merely voting their true preferences is more disconcerting. That is, the No-Show Paradox describes situations where voters are better off, by their own measures, staying at home on election day. Like the naïve followers of *Robert's Rules*, who withhold their votes in the mistaken belief that doing so cannot affect outcomes, voters in these situations oftentimes vote when they're better off abstaining.

IV. CONCLUSION

The counterintuitive effects of abstention are real-world features of democratic decisionmaking. When voters fall victim, they vote, or fail to vote, against their best interests (by their own measures). When this happens to legislators, it can, of course, have an immediate effect on the course of the law. But more troubling is the fact that the procedures of hundreds of thousands of “ordinary societies,” many of which have significant influence over the lives of their members, are vulnerable. The less sophisticated voters that populate those public and private boards and committees are much more likely to be caught off guard by the effect of an abstention on an outcome. And their decisions are often given legal effect under many state laws. Abstaining, then, carries with it real legal consequences that are often at odds with the intentions of many voters.

These counterintuitive effects of withholding votes are exacerbated by the lack of competent guidance about the consequences of abstaining in many common situations. Indeed, the American bible of parliamentary procedure, *Robert's Rules of Order*, gives mistaken advice about the effect of abstention in some of the most significant decisions that may be made under the rules. While there are not any voting procedures immune from all of the perverse effects of abstention, voters need to be aware of the possibilities to avoid being taken by surprise. Consider this Article the first attempt to remedy that situation.

