Blinded by a Bright Line: An Analysis of the Fairfield Formula and Its Impact on Existing Laws and Legislative Procedure

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I. INTRODUCTION

In Board of Trustees of the School District of Fairfield County v. State, the South Carolina Supreme Court applied the “plain meaning rule” of statutory construction to find the General Assembly’s practice of overriding gubernatorial vetoes with less than the affirmative vote of two-thirds of a quorum to be unconstitutional. Such a method of constitutional interpretation, however, may

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1. S.C. CONST. art. IV, § 21 (emphasis added).
4. See Fairfield, 395 S.C. at 279, 284, 718 S.E.2d at 211, 214.
well have produced a result at odds with the original meaning of the South Carolina Constitution and its framers’ intent regarding gubernatorial veto overrides. The court’s opinion failed to recognize that the facts, though similar to cases cited as precedent, presented a novel question worthy of an analysis of the framers’ theories and intent, regardless of whether the result would have been the same. 

Even though both Chief Justice Toal and the General Assembly found the language of the constitution capable of another reasonable interpretation,\(^5\) the majority found a “plain reading” of the language of article IV, section 21 to be “unambiguous.”\(^6\) The majority appears to have been so blinded by its bright line rule that it failed to look beyond the four corners of article IV, section 21 to address constitutional questions related to the separation of powers, despite its own mandate to do so.

Upon further review, however, the bright line used to create the *Fairfield* formula may be murkier than the originalist arguments the court employed regarding veto mathematics. Though afforded the opportunity, the court refused to offer any guidance as to whether its ruling was prospective or retrospective. The result is uncertainty and instability regarding many existing laws enacted, not only over gubernatorial vetoes, but also, perhaps, those passed by less than a majority of a quorum. Additionally, the court has somewhat shifted the balance of power between the legislative branch and the executive branch without addressing its own constitutional limitations. Finally, does a logical extension of the *Fairfield* formula now impose a participation quorum requirement on all actions of the General Assembly?

Part II of this Note describes the background of *Fairfield*, the facts of the case, the procedural history, and the reasoning employed by both the majority and the dissent. Part III, after discussing the constitutional provision at issue in *Fairfield* and relevant precedent, analyzes resulting issues and concerns related to the constitutional separation of powers. Part IV analyzes the impact of the court’s decision, both on existing laws and on legislative procedure. Finally, Part V concludes.

II. BACKGROUND

A. Facts and Procedural History

In 2010, the South Carolina General Assembly “passed” Act 308.\(^7\) The Act transferred oversight of the financial operations of the Fairfield County School

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\(^6\) *Id.* at 279, 718 S.E.2d at 211 (majority opinion).

\(^7\) *See id.* at 278, 718 S.E.2d at 211 (citing 2010 S.C. Acts 308); *see also* 2010 S.C. SENATE J. 992 (indicating that H. 4431 and H. 4432 “were read the third time and having received three
District from a popularly elected Board of Trustees to a finance committee appointed by the Fairfield County Legislative Delegation. Governor Sanford vetoed the legislation.

The House of Representatives voted to override Governor Sanford’s veto by a vote of 33-to-10. At the time of the vote, a quorum of the House was present. Although only 43 representatives voted on the matter, 120 members of the 124 member body were present for roll call. Having deemed the Governor’s veto to have been overridden in the House, it was then sent to the Senate for consideration of the Governor’s objections.

The Senate voted 1-to-0 to override the Governor’s veto. Although a quorum was present, only a single senator voted on the matter. While other senators agreed with the Governor’s position, or otherwise disagreed with the Act, they abstained, citing “long-held precedent in the Senate where members do not vote on legislation affecting solely one county, also known as local legislation.” Following the 1-to-0 vote, it was noted in the Senate Journal that “[t]he necessary two-thirds vote having been received, the veto of the Governor was overridden.”

The plaintiff, Board of Trustees, filed an action against the State of South Carolina and the Fairfield County Legislative Delegation in circuit court, challenging the constitutionality of Act 308. The Board alleged that Act 308 was invalid as having been adopted in violation of article IV, section 21 of the South Carolina Constitution, maintaining that the Governor’s veto was not properly overridden by the requisite two-thirds of each “house” of the General
Assembly.  Both bodies of the General Assembly moved to intervene as defendants. Having consented to the motion to intervene, the parties jointly petitioned the South Carolina Supreme Court to hear the case in its original jurisdiction.

The South Carolina Supreme Court, after agreeing to hear the case, held by a 4-to-1 margin that Act 308 was unconstitutional, and thus invalid, because the General Assembly did not override the Governor’s veto in accordance with the constitutional requirements. Defendant Legislative Delegation and Defendant/Joint Intervenor Bobby Harrell, as Speaker of the House of Representatives, jointly petitioned the court for a rehearing, urging it to reconsider, modify, or vacate its opinion. The court subsequently denied the petition for rehearing.

B. Justice Kittredge’s Opinion for the Court

In concluding that Act 308 was unconstitutional, Justice Kittredge defined the question before the court: “[W]hat does the constitutional mandate ‘two-thirds of that house shall agree’ mean?” The court determined that its own precedent and a “plain reading” of the supposedly “unambiguous” constitutional provision “compel[led] a construction that the two-thirds requirement means two-thirds of a quorum ‘shall agree.’” In arriving at its decision, the court noted that this interpretation of the constitutional text was consistent with the General Assembly’s “longstanding understanding and application” of its authority with regard to veto overrides “until relatively recently.”

The court began its analysis by acknowledging that each house of the General Assembly, absent a constitutional commitment providing otherwise, is free to set its own rules of procedure without interference by either the executive or judicial branches. As such, the court recognized that while the General

19. See id. at 277, 718 S.E.2d at 210. The Board further asserted that Act 308 was invalid in that it was impermissible special legislation enacted in violation of article III, section 34 of the South Carolina Constitution. Id. at 277, 718 S.E.2d at 210–11. While outside the scope of this Note, South Carolina’s local and special legislation jurisprudence is itself deserving of extensive review.

20. See id. at 278, 718 S.E.2d at 211.

21. Id.

22. See id. at 284, 718 S.E.2d at 214. Having found the Act unconstitutional on the ground that the veto was not properly overridden, the court did not reach the Board’s special legislation challenge. Id.


26. Id. (quoting S.C. CONST. art. IV, § 21).

27. Id.

28. Id. (citing S.C. CONST. art. III, § 12).

https://scholarcommons.sc.edu/sclr/vol63/iss4/4
Assembly normally acts by majority vote,\footnote{29} in certain instances, the constitution requires a supermajority to act.\footnote{30} Noting that the General Assembly’s veto override authority is one such example mandating the heightened vote threshold\footnote{31} the court referenced its decision in Smith v. Jennings, interpreting the requirement and comparing it to other provisions where a supermajority is required to act.\footnote{32} The Smith court, in discussing the juxtaposition of the General Assembly’s veto override authority with other provisions where a heightened standard was explicitly required,\footnote{33} stated that “[w]hen the Constitution speaks of ‘two-thirds of that house’ as the vote required to pass a bill or joint resolution over the veto of the Governor, it means two-thirds of the house as then legally constituted, and acting upon the matter.”\footnote{34} Given that a quorum “possesses the power of the whole body,”\footnote{35} the Fairfield court applied Smith, and the authorities cited therein, to “manifestly require two-thirds of a quorum to override a governor’s veto.”\footnote{36}

The court turned next to what it described as the persuasiveness of the two-thirds voting requirement and the inherent check and balance that it provides.\footnote{37} Although the executive veto was intended to serve as a check on the General Assembly’s plenary or “allegedly venal”\footnote{38} power, the constitution allows the legislative branch to override this executive action.\footnote{39} This specific legislative power, however, is “limited and circumscribed by the heightened vote requirement.”\footnote{40} Citing Morton, Bliss & Co. v. Comptroller General, the court emphasized that the heightened vote requirement is necessary when “a greater
number than a mere majority should unite where acts of a certain class of a more important character than the ordinary subjects of legislation are involved."

Finally, the court turned to a historical analysis of the legislature's voting procedure, rejecting the General Assembly's argument that its practice of overriding quorums of local legislation with less than the requisite two-thirds of a quorum was rooted in custom, tradition, and "long-held precedent." Instead, the court found the purported custom to be nothing more than a "recently adopted practice." The court further rejected the General Assembly's reference to, and reliance on, various manuals of legislative and parliamentary procedure as support for its position that two-thirds of those members "present and voting" satisfies the constitutional requirement. Again, although recognizing the General Assembly's ability to determine its own procedural rules, the court found these parliamentary manuals to provide nothing more than "default rules," which cannot be invoked or relied upon when the "constitution unambiguously declares the process to be followed." Having noted that a quorum possesses the power of the entire body, the court interpreted the two-thirds threshold of article IV, section 21 of the South Carolina Constitution to require no less than the affirmative vote of two-thirds of a quorum in order to effectively override a gubernatorial veto. Assuming full membership, the court noted that a minimum quorum requires the presence of sixty-three members in the House of Representatives and twenty-four in the Senate. Accordingly, the court calculated that two-thirds of such a quorum

41. Id. at 282, 718 S.E.2d at 213 (quoting Morton, Bliss & Co. v. Comptroller Gen., 4 S.C. 430, 463 (1873), overruled in part by Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997)).
42. Id. at 282–83, 718 S.E.2d at 213.
43. Id. at 283 n.4, 718 S.E.2d at 213 n.4. Notably, however, the majority was relying in large part on the Plaintiff/Joint Petitioner's disputed, and often incorrect, documentation of votes in the General Assembly. See id. at 282–83, 718 S.E.2d at 213 (noting that the data relied upon was provided by the Plaintiff); Final Joint Brief of Defendant/Joint Petitioner Legislative Delegation of Fairfield County and Intervenors/Joint Petitioners Glenn F. McConnell and Robert W. Harrell, Jr. at 15 n.4, Fairfield, 395 S.C. 276, 718 S.E.2d 210 (No. 27035) [hereinafter Final Joint Brief] ("Defendant/Joint Petitioner has identified 37 inaccuracies in Plaintiff/Joint Petitioner's chart . . . ."). Additionally, the court provided no guidance as to what length of time would have been sufficient to justify judicial recognition.
45. Id. at 284 n.5, 718 S.E.2d at 214 n.5 (majority opinion).
46. See id. at 280, 718 S.E.2d at 212 (quoting Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 823 (1903)).
47. Id. at 284, 718 S.E.2d at 214 (citing S.C. CONST. art. IV, § 21).
48. Id. (assuming a full membership of 124 members in the House of Representatives and 46 in the Senate); see also S.C. CONST. art. III, § 11 ("[A] majority of each house shall constitute a quorum to do business . . . .").
requires that a minimum of forty-two house members and sixteen senators must vote to override in order for a gubernatorial veto to be validly overridden.\(^\text{49}\) Having received only thirty-three votes in the House, and one in the Senate, the court held that both veto override votes fell short of the constitutional mandate such that the Governor's veto of Act 308 was sustained.\(^\text{50}\)

C. Chief Justice Toal's Dissenting Opinion

Chief Justice Toal, in her lone dissent, adamantly maintained that the General Assembly had effectively overridden the Governor's veto of Act 308.\(^\text{51}\) Agreeing with the principle stated by the majority that, absent a constitutional provision mandating otherwise, each house in the General Assembly is free to determine its rules of procedure without the interference of its coordinate branches, the Chief Justice, instead, took issue with the court's determination that the constitution expressly provides otherwise with regard to veto overrides.\(^\text{52}\) Chief Justice Toal opined that the court's interpretation of article IV, section 21 incorrectly requires the affirmative vote of two-thirds of a quorum to override a veto, in turn dispensing with the court's "long-standing precedent requiring the affirmative vote of two-thirds of the membership present and acting upon the matter, so long as a quorum is present to conduct business."\(^\text{53}\) She expressed her belief that the majority's reliance on the total number of affirmative votes cast, rather than the ratio of votes constitutionally mandated, was misguided and in conflict with both the constitutional text and the court's precedent.\(^\text{54}\) The Chief Justice noted that, under the majority's holding, a vote of 42-to-0 would override a veto, while a vote of 41-to-1 would sustain it.\(^\text{55}\) Maintaining that the two-thirds requirement "applies only to those members voting in the presence of a quorum,"\(^\text{56}\) Chief Justice Toal interpreted Morton differently than the majority, placing particular emphasis on the phrase "present and acting."\(^\text{57}\) She further relied on language from Smith, which, in addressing the specific constitutional

\(^{49}\) Fairfield, 395 S.C. at 284, 718 S.E.2d at 214.

\(^{50}\) Id. For purposes of this discussion, Justice Beatty's concurring opinion is omitted. While agreeing with the majority's holding that the governor's veto of Act 308 was not validly overridden, Justice Beatty wrote separately to express his opinion that Act 308 was also unconstitutional special legislation. See id. at 285, 718 S.E.2d at 214-15 (Beatty, J., concurring).

\(^{51}\) See id. at 285, 718 S.E.2d at 215 (Toal, C.J., dissenting). Chief Justice Toal, having determined the veto was validly overridden, also reached the Board's second constitutional challenge and concluded that Act 308 represented constitutionally permissible special legislation. See id.

\(^{52}\) See id. at 286, 718 S.E.2d at 215.

\(^{53}\) Id.

\(^{54}\) See id.

\(^{55}\) See id.

\(^{56}\) Id. (citing Morton, Bliss & Co. v. Comptroller Gen., 4 S.C. 430 (1873), overruled in part by Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997)).

\(^{57}\) See id. (quoting Morton, 4 S.C. at 463).
provision at issue in this case, interpreted the two-thirds threshold to "mean[]
two-thirds of the house as then legally constituted and acting upon the matter."

In addition to relying on judicial precedent, Chief Justice Toal also discussed
and emphasized the significance of legislative precedent and tradition, citing
both a floor debate and the rules of the respective chambers of the General
Assembly. Drafted and established in reliance on the court's decisions in
Morton and Smith, the General Assembly's rules used the "present and voting"
language. Further, the Chief Justice noted that the court's precedent aligns
with significant parliamentary authority, which also supports the principle that
legislation may be passed "as long as a quorum is present and those voting meet
the constitutionally prescribed ratio of votes required." Finally, the Chief
Justice, in re-emphasizing the General Assembly's reliance on the court's
precedent for over one hundred years in crafting its rules, as well as the typical
immunity of legislative procedure to judicial review, noted that "the interest of
promoting the stability of existing laws" supported finding "that when a quorum
of the voting body is present, it ... effectively overrides a gubernatorial veto
when two-thirds of the votes cast affirm the passage of that bill."

III. ANALYSIS

Relying largely on what it deemed to be "a plain reading" of "an
unambiguous constitutional provision," the court, in Fairfield, interpreted
article IV, section 21 of the South Carolina Constitution to require, at a

58. Id. (quoting Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 823 (1903)) (internal
quotation marks omitted).
[1984] 2 S.C. HOUSE J. 3465-69 (recordig a floor debate and discussion regarding a point of order
involving then-Representative Toal)).
60. See id. at 287, 718 S.E.2d at 215-16 (citing RULES OF THE SENATE 50; RULES OF THE
HOUSE 10.3(4) (stating that a veto may be overridden by two-thirds vote of those members "present
61. See id. (citing RULES OF THE SENATE 50; RULES OF THE HOUSE 10.3(4), reprinted in
2011 LEGISLATIVE MANUAL, supra note 60, at 254, 315). For purposes of her analysis, Chief
Justice Toal treated "present and voting" the same as "present and acting." See id.
63. Fairfield, 395 S.C. at 288, 718 S.E.2d at 216.
64. Id. at 279, 718 S.E.2d at 211 (majority opinion).
minimum, that "two-thirds of a quorum 'shall agree'" in order to pass legislation over the objection of the governor. The court, however, failed to recognize or acknowledge that this was indeed a novel question deserving of a detailed analysis of the constitutional text and the framers' intent. Other constitutional questions, such as the separation of powers, the political question doctrine, and the theory of acquiescence, went unaddressed. While the court's interpretation and outcome might well have been the same (and perhaps even appropriate), given the significance of the issue and the constitutional territory at stake, as well as the resulting uncertainty from the court's decision, a more searching and thorough analysis was required.

A. Textual and Historical Analysis of Article IV, Section 21's "Unambiguous" Language

Article IV, section 21 mandates that two-thirds of each house of the General Assembly "shall agree" in order to pass a bill or joint resolution over the objection of the governor. However, given the traditional "canon of construction 'expressio unius est exclusio alterius,'" [which] holds that 'to express or include one thing implies the exclusion of another, or of the alternative," it is important to look at not only what language was included in the text of article IV, section 21, but also what was considered and rejected.

First, it is important to note that the constitutional framers, at both the Constitutional Conventions of 1868 and 1895, were familiar with a variety of other phrases and methods by which to require increased participation and/or assent to act. This awareness is evidenced by the fact that the framers were presented, at one point or another and in various contexts, with numerous different voting thresholds and requirements. Considering the court's holding in Fairfield in light of phrases either adopted or rejected by the constitutional framers in various contexts, noticeably absent from article IV, section 21 are

65. *Id.* (quoting S.C. CONST. art. IV, § 21).
69. See, e.g., JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF SOUTH CAROLINA 32 (1895) [hereinafter JOURNAL OF 1895 CONVENTION] ("a vote of two-thirds of the members present") (emphasis added); id. at 56 ("any item or section of said bill not approved by the Governor shall be passed by two-thirds of the members elected to each of the two houses of the General Assembly") (emphasis added); id. at 72 ("the concurrence of two-thirds of the whole representation in each House of the General Assembly") (emphasis added).
70. See supra note 69 and accompanying text.
the terms "quorum" and "vote." 71 Had the framers of the South Carolina constitution of 1895 intended the yeto override provision to require two-thirds of an actual or minimum quorum 72 to affirmatively vote, rather than simply acquiesce or agree, 73 they could have expressly required as much. 74 Such an omission by the framers is necessarily presumed to be intentional. 75

When viewed in the context of other constitutional provisions, it is worth noting that the framers were also familiar with a method of requiring, not only a particular ratio for quorum and voting thresholds, but a specific numerical requirement as well. 76 As such, the framers' failure to impose a specific numerical, rather than fractional, requirement on the General Assembly with respect to both a quorum and the votes needed for specific actions, must also be taken into consideration when examining article IV, section 21 in light of the constitution's context and structure. Perhaps making this comparison more significant is the fact that many of the delegates to the Constitutional Convention of 1895 were recognized as having been former or current members of the General Assembly. 77

Article IV, section 21's use of the term "agree," 78 rather than the perhaps more explicit term "vote," may also be of particular significance. 79 The term agree arguably indicates the delegates' recognition of the historic parliamentary and democratic theory regarding acquiescence, a theory previously referenced and acknowledged by the South Carolina Court of Constitutional Appeals in 1821. 80 While the delegates to the Constitutional Convention of 1895 imposed on themselves a duty to vote, 81 an obligation they obviously declined to impose

71. See S.C. CONST. art. IV, § 21.
72. See Petition for Rehearing, supra note 23, at 7 (discussing potential "absurd results" under the Fairfield formula).
75. See Morton, Bliss & Co. v. Comptroller Gen., 4 S.C. 430, 466 (1873) ("The inference is that the omission was intentional."). overruled in part by Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997).
76. See S.C. CONST. art. V, § 2 ("The Supreme Court shall consist of a Chief Justice and four Associate Justices, any three of whom shall constitute a quorum for the transaction of business... In all cases decided by the Supreme Court, the concurrence of three of the Justices shall be necessary for a reversal of the judgment below.").
77. See JOURNAL OF 1895 CONVENTION, supra note 69, at 9–10 (addressing the Convention, Governor John Gary Evans, after his election as President of the Convention, stated: "The legislative department needs your serious consideration; but I deem it useless to go into an extensive discussion of that department, as I see before me many delegates who have been for years members of the House and Senate.").
78. S.C. CONST. art. IV, § 21.
79. See supra note 69 and accompanying text.
81. See JOURNAL OF 1895 CONVENTION, supra note 69, at 29 ("Every member who shall be within the bar of the Convention when a question is stated from the Chair shall vote thereon... ")
on the members of the General Assembly, the convention did, on its twenty-first
day, adopt a rule permitting delegates to “pair” on questions presented to the
convention.\textsuperscript{82} Such a rule, recommended after the rules of the convention had
been established, adopted immediately,\textsuperscript{83} and utilized frequently thereafter,\textsuperscript{84}
may perhaps imply that the convention later required less than an affirmative
vote from each delegate in order to conduct business.

Having clearly adopted the word “vote” elsewhere in the constitution and its
drafting process,\textsuperscript{85} its omission from article IV, section 21 must presumably have
been intentional.\textsuperscript{86} Requiring only that two-thirds of each house “agree”\textsuperscript{87} rather
than “vote,” especially where voting itself is not compelled by the body,\textsuperscript{88} may
arguably be interpreted as legitimizing or recognizing the General Assembly’s
practice of viewing abstention as merely acquiescence in the will of those
present and voting.

B. Analysis of Precedent

The South Carolina Supreme Court has interpreted constitutional provisions
requiring “a supermajority of the legislature to act”\textsuperscript{89} on three other occasions.\textsuperscript{90}
Although the court, prior to \textit{Fairfield}, had never addressed or been presented
with the novel issue of the constitutional validity of a veto override vote with
less than two-thirds of a quorum voting to override, further analysis of the
court’s precedent is instructive. Moreover, given the significant weight afforded
these cases by the majority in \textit{Fairfield}, further analysis is required in order to
illustrate the simplicity of the court’s treatment of the precedent as having
controlled the truly unique issue it was asked to address.

\textsuperscript{82} See \textit{id.} at 321 (stating that in cases where a delegate was absent from the convention, he
was allowed to “pair” with a present delegate who was then required to “state how he would have
voted if the other party to the pair had been present”).

\textsuperscript{83} See \textit{id.}

\textsuperscript{84} See, e.g., \textit{id.} at 599–600 (counting the paired votes and stating how, if not paired, the
delagate would have voted).

\textsuperscript{85} See, e.g., \textit{S.C. CONST.} art. XV, \textsection\ 1.

\textsuperscript{86} See Morton, Bliss & Co. v. Comptroller Gen., 4 S.C. 430, 466 (1873), \textit{overruled in part}

\textsuperscript{87} See \textit{S.C. CONST.} art. IV, \textsection\ 21.

\textsuperscript{88} See \textit{RULES OF THE HOUSE 7}, \textit{reprinted in 2011 LEGISLATIVE MANUAL}, \textit{supra} note 60, at
302–06.

\textsuperscript{89} Bd. of Trs. of the Sch. Dist. of Fairfield Cnty. v. State, 395 S.C. 276, 279, 718 S.E.2d
210, 211 (2011).

\textsuperscript{90} See Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 823 (1903); Walker v. State (\textit{Bond
Debt Cases}), 12 S.C. 200, 281 (1879); \textit{Morton}, 4 S.C. at 463–64.
1. Morton, Bliss & Co. v. Comptroller General

The court first addressed a two-thirds requirement in *Morton.* The question presented in *Morton* was “whether, under [s]ection 7, [a]rticle IX, of the Constitution [of 1868], it is competent to pass Bills intended to create a public debt by two-thirds of a quorum of each House, or only by two-thirds of the whole membership of each House.” The constitutional provision at issue in *Morton* was entirely different, however, from the one in *Fairfield.* While the court interpreted “two-thirds of that house shall agree” in *Fairfield,* the court, in *Morton,* interpreted a provision that required a bill to “have been passed by the vote of two-thirds of the members of each branch of the General Assembly.” Given that the provision at issue in *Morton* is different from the provision involved in *Fairfield,* neither the constitutional requirements nor the cases are apt for direct comparison. Although distinguishable from *Fairfield* in the issues it aimed to address, the reasoning and analysis provided by the court in *Morton* is instructive nonetheless.

In “conclud[ing] that a vote of two-thirds of the members present at the time the vote was taken satisfies the requirements of the Constitution,” the court noted that “[i]f the rule is the mere majority rule, then a majority of the quorum present and acting is intended; if the rule is that of two-thirds, then two-thirds of such quorum must concur for effective action.” While the majority in *Fairfield* relied on the second half of the above statement—that “if the rule is that of two-thirds, then two-thirds of such quorum must concur for effective action”—it neglected to apply the prefatory language of “present and acting” to the portion it quoted and on which it relied. Although again presented with the issue of what constituted two-thirds of the members of the General Assembly under the South Carolina Constitution of 1868 in the *Bond Debt Cases,* the court referred to *Morton* as controlling the question.

2. Smith v. Jennings

Following the *Bond Debt Cases,* it was not until 1903, in *Smith v. Jennings,* that the court again sought to interpret a constitutional supermajority

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91. *See Morton,* 4 S.C. at 462.
92. *Id.*
94. *Morton,* 4 S.C. at 462 (quoting S.C. CONST. art. IX, § 7 (1868)).
95. *Id.* at 467 (emphasis added).
96. *Id.* at 463 (emphasis added).
100. 67 S.C. 324, 45 S.E. 821 (1903).
requirement, this time under the South Carolina Constitution of 1895. The question presented in Smith was whether, in the context of the General Assembly's constitutional veto override authority, "the language 'two-thirds of that house' means two-thirds of the total membership of the Senate . . . and two-thirds of the total membership of the House of Representatives . . . or means two-thirds of the members of each of said bodies voting upon the question, a quorum being present." In Smith, the General Assembly had declared the Governor's veto overridden following votes of 28-to-13 in the Senate and 60-to-25 in the House of Representatives. Having found that the House of Representatives was "lawfully constituted" at the time of the veto override vote (given that a quorum was present), the court, in Smith, held that the vote satisfied the "two-thirds of that house" as required by the constitution. In arriving at its conclusion, the court stated that "[w]hen the Constitution speaks of 'two-thirds of that house' as the vote required to pass a bill or joint resolution over the veto of the governor, it means two-thirds of the house as then legally constituted and acting upon the matter." The court further noted that "[w]henever the framers of the Constitution intended otherwise, the purpose was expressly declared." While not perfectly on point, in that the court was neither presented with, nor did it reach, the question of the constitutional sufficiency of a vote amounting to less than two-thirds of a quorum, Smith nonetheless established the rule that "[w]hen the Constitution speaks of 'two-thirds of that house' as the vote required to pass a bill or joint resolution over the veto of the governor, it means two-thirds of the house as then legally constituted and acting upon the matter.

Although having, perhaps, stated the rule by which to determine the validity of a veto override vote, the court left room for further interpretation in the phrase "as then legally constituted and acting upon the matter." A quorum of each house having been deemed to "possess[] the power of the whole body" such that, when present, each chamber is "legally constituted" and "acting in all its potentiality," results in the lingering question: what constitutes "acting upon

101. See id. at 327, 45 S.E. at 822 (interpreting S.C. CONST. art. IV, § 23 (renumbered 1973)).
102. Id. (emphasis added).
103. See id.
104. Id. at 328, 45 S.E. at 823.
105. See id. at 329, 45 S.E. at 823 (quoting S.C. CONST. art. IV, § 23 (renumbered 1973)).
106. Id. at 328, 45 S.E. at 823 (emphasis added).
107. Id. ("[A]s in [article 15, § 1], 'a vote of two-thirds of all members elected shall be required for an impeachment,' and in [article 16, § 1], where in proposing amendments to the Constitution, 'two-thirds of the members elected to each house' must agree thereto." (quoting S.C. CONST. art. XV, § 1 & XVI, § 1)).
108. Id.
109. Id.
110. Id.; see also Morton, Bliss & Co. v. Comptroller Gen., 4 S.C. 430, 463 (1873) (citing S.C. CONST. art II, § 14 (1868)) (stating that a quorum "is competent to transact all business not embraced in certain special provisions requiring for action the concurrence of a greater number of votes than the number required to constitute such quorum"), overruled in part by Weaver v. Recreation Dist., 328 S.C. 83, 492 S.E.2d 79 (1997).
the matter". While ultimately rejected by the majority in *Fairfield*, the argument remains valid, based on an interpretation of the rules laid down in *Morton* and *Smith*, that, should the act of voting be considered to be or amount to "acting upon the matter," the concurrence of two-thirds of those "present and acting" would satisfy the constitutional requirements, provided that a quorum was present. Additionally, despite the court in *Fairfield* having applied *Smith* to "manifestly require two-thirds of a quorum to override a governor's veto," *Smith* may have simply stated that two-thirds of a quorum was sufficient to do so, as the court in *Smith* was not asked, nor required, to go so far as to expressly require more than was necessary to dispose of the challenge.

C. Separation of Powers

1. The South Carolina Constitution

The South Carolina Constitution of 1895 expressly adopts and mandates enforcement of the doctrine of separation of powers, a principle "that is only implicit in the Constitution of the United States." Article I, section 8 of the South Carolina Constitution requires that "the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other." This "separation of powers mandate" is closely followed by articles III, IV, and V, each of which serves to "delineate the authority and functions of the three departments of government." Each branch has certain distinct powers and responsibilities

111. *Smith*, 67 S.C. at 329, 45 S.E. at 823; see also *Morton*, 4 S.C. at 463 ("present and acting").
116. Id. at 280, 718 S.E.2d at 212 (Kittredge, J., majority opinion).
117. See *Smith*, 67 S.C. at 328–29, 45 S.E. at 823 (quoting S.C. CONST. art. IV, § 23 (renumbered 1973)) ("As the house at the time of the passage of the joint resolution was lawfully constituted with eighty-five members present, and as sixty of these voted for its passage, the vote was 'two-thirds of that house,' in the sense of [article 4, section 23] of the Constitution.").
that may not be assumed, usurped, or performed by a separate branch. Article III specifically says that “[t]he legislative power of this State shall be vested in . . . the ‘General Assembly of the State of South Carolina.’” One of the primary reasons and justifications for the constitutional separation of powers is the inherent benefit of spreading out the responsibility for the operation of the government, as it is “[t]he legislative department [that] makes the laws; the executive department [that] carries the laws into effect, and the judicial department [that] interprets and declares the laws.”

While the general rule regarding the constitutionally required separation of powers is relatively easy to state, “some difficulty arises in its application.” Nonetheless, despite difficulties in applying the separation of powers doctrine, “the perfection of the system requires that the lines which separate and divide [the three] departments shall be broadly and clearly defined.” Although some authorities suggest that there is not an absolute division of powers, but rather a more cooperative effort among the branches, such an effort among the branches does not suggest that the judiciary may stray from its constitutionally defined sphere of authority and assume a legislative role.

2. Separation of Powers Concerns Must Be Confronted

As required by the court’s own separation of powers jurisprudence, the majority in Fairfield should have thoroughly addressed and analyzed the relevant separation of powers concerns before proceeding, irrespective of the effect of doing so on the court’s final disposition of the challenge. While it is the
court's duty to interpret and declare the meaning of the constitution,\footnote{132. See Segars-Andrews, 387 S.C. at 123, 691 S.E.2d at 461 (citing Abbeville Cnty. Sch. Dist. v. State, 335 S.C. 58, 67, 515 S.E.2d 535, 539 (1999)).} \footnote{133. Yonce, 274 S.C. at 85, 261 S.E.2d at 305.} \footnote{134. See id.} “[i]here is [also] no authority save the court to determine when there is and when there is not a violation of the separation of powers provision of the constitution.”\footnote{135. 194 S.C. 105, 9 S.E.2d 218 (1940).} \footnote{136. Id. at 108–09, 9 S.E.2d at 219.} \footnote{137. See id. at 107–08, 9 S.E.2d at 218–19 (citing S.C. CONST. art. II, § 2 (renumbered 1971); S.C. CONST. art. III, § 24).} Therefore, determining whether a violation of the requisite separation and balance of powers has occurred, or would occur if the matter were to be subjected to judicial review, depends wholly on the court's willingness to exercise judicial restraint.\footnote{138. See id. at 109, 9 S.E.2d at 219 (“[W]e deem this case to be one in which the Court should raise the same on its own motion and thereby make such disposition of the case as will fully accord with the governmental principles involved.”).} \footnote{139. Id.} \footnote{140. Id.} This restraint requires the court to analyze, at the outset, whether a particular constitutional challenge is within the court's jurisdiction and can appropriately be subjected to judicial review.

In Culbertson \textit{v}. Blatt,\footnote{141. See id. at 108, 9 S.E.2d at 218–19 (citing S.C. CONST. art. II, § 2 (renumbered 1971); S.C. CONST. art. III, § 24).} \footnote{142. See id. at 111, 9 S.E.2d at 220.} the South Carolina Supreme Court recognized “[a]t the threshold of the case,” that it was “met with issues affecting the fundamental powers and jurisdiction of [the] Court.”\footnote{143. See id.} \footnote{144. See id.} Presented in the context of allegations relating to the constitutional prohibition on dual office holding,\footnote{145. Id.} the court, in Culbertson, raised separation of powers concerns \textit{sua sponte}.\footnote{146. See id.} \footnote{147. See id.} The court held that the constitutional challenge was “precluded by a consideration of the traditional and constitutional division of powers among the legislative, executive and judicial branches of the government.”\footnote{148. Id.} \footnote{149. Id.} The court further stated that the “elementary constitutional doctrine” of separation of powers “puts it beyond the power of [the] court on a mere allegation that the Legislature has violated a constitutional mandate, to issue a prohibitive or other injunctive or mandatory decree which would have the effect of undoing such violation.”\footnote{150. Id.} \footnote{151. Id.} While recognizing the constitutional prohibition on dual office holding,\footnote{152. See id.} the court declined to rule on the matter, finding that the election of university trustees is a legislative function.\footnote{153. Id.} Having determined the matter to be a power of the legislature, the court held that it was beyond the purview of the court to direct the legislature on how to perform its duties in that regard, as it was aware of “no judicial ground upon which in this case we could declare the office of trustee of the University vacated after the Legislature has undertaken to fill it, or
the office of Senator vacated, when the Senate, by its non-action, has otherwise ruled.\textsuperscript{143} Most notably, the court affirmatively stated:

Just as it is not within the power of the General Assembly to reverse a judicial decision by retroactive legislation, or to otherwise interfere with or nullify the judicial process, so it is not within the power of this Court to impinge upon the exercise by the Legislature of a power vested in that body, merely because in the exercise of or failure to exercise that power, some constitutional provision has been violated.\textsuperscript{144}

Similarly, in \textit{Segars-Andrews v. Judicial Merit Selection Commission},\textsuperscript{145} while the court did not raise separation of powers concerns sua sponte, it did affirmatively state that, when the parties present the issue, "[the] Court must analyze the claim."\textsuperscript{146} Raised in the context of several constitutional challenges to a decision of the Judicial Merit Selection Commission,\textsuperscript{147} the court, in \textit{Segars-Andrews}, extensively discussed whether a separation of powers violation had been conclusively demonstrated.\textsuperscript{148}

In summary, the court must confront and dispense with separation of powers concerns before proceeding, whether presented by the parties or by the subject matter itself, as this issue affects the jurisdiction of the court.\textsuperscript{149} In \textit{Fairfield}, despite having been fully briefed and argued by the parties, the court failed to properly address or analyze the separation of powers concerns inherent in the constitutional challenge.\textsuperscript{150} Given the significance of the constitutional territory at stake in \textit{Fairfield}, as well as the resulting uncertainty, a thorough and exhaustive analysis should have been undertaken, and was even required by the court’s own precedent.\textsuperscript{151}

\textsuperscript{143} \textit{Id.}

\textsuperscript{144} \textit{Id.}


\textsuperscript{146} \textit{Id.} at 123, 691 S.E.2d at 461.

\textsuperscript{147} \textit{Id.} at 116, 691 S.E.2d at 457.

\textsuperscript{148} \textit{See id.} at 116–23, 691 S.E.2d at 457–61.

\textsuperscript{149} \textit{Culbertson}, 194 S.C. at 108–09, 9 S.E.2d at 219.


\textsuperscript{151} \textit{See Segars-Andrews}, 387 S.C. at 123, 691 S.E.2d at 461; \textit{Culbertson}, 194 S.C. at 109, 9 S.E.2d at 219. Given the inherent conflict involved in the judicial branch dictating legislative procedure, "the ends of justice [are] best subserved by recognizing the foregoing constitutional limitations upon the field of judicial action as the fundamental and controlling reason" why such challenges should not be adjudicated. \textit{Culbertson}, 194 S.C. at 114, 9 S.E.2d at 221.
3. Political Question Doctrine

a. Generally

While judicial involvement in a certain matter may not, by itself, violate or obfuscate the requisite separation of powers, an issue may nonetheless be nonjusticiable, as the court "may not...intervene in what is a political question."152 The political question doctrine is a judicial construct and prudential consideration whereby a court determines that certain allegations of unconstitutional governmental conduct are inappropriate for judicial review, despite all other jurisdictional and justiciability requirements having been satisfied.153 Such a finding is based on a determination that the allegations at issue are best left to the politically accountable branches of government and the political process in general.154

In Baker v. Carr,155 the United States Supreme Court attempted to define what issues or subject matters presented a nonjusticiable political question.156 Acknowledging the "delicate exercise of constitutional interpretation" involved in this analysis, as well as the need for case-by-case inquiry, the Baker Court extracted the "analytical threads"157 present in its existing jurisprudence to establish criteria for determining whether a particular issue constitutes a nonjusticiable political question.158 According to Baker, cases involving political questions are marked by one or more of the following characteristics:

[A] textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.159

152. Segars-Andrews, 387 S.C. at 120, 691 S.E.2d at 459.
154. See id.
156. See id. at 217.
157. See id. at 210-11.
158. Id. at 217.
159. Id.; see also Louis Henkin, Is There a "Political Question" Doctrine?, 85 YALE L.J. 597, 622-23 (1976) (discussing the proper contents of the political question doctrine).
While each of these factors serves to independently test for the existence of a political question, they are likely listed in descending order, both in terms of their importance and the certainty they provide.  

\[ b. \textit{Justifications} \]

Generally, the political question doctrine is a product and function of the separation of powers.  

161  Although it has long been understood to be the duty of the judiciary to ‘say what the law is,’ the political question doctrine serves to restrict the range of constitutional issues that courts may decide.  

163  As such, the doctrine necessitates that courts pass upon matters where the Constitution has ‘entrusted’ the issue to a separate and coequal branch of government, or the electorate as a whole.  

166  With respect to such issues, the courts do not define the constitutional limits.

As stated by Professor Alexander Bickel, the foundation of the political question doctrine rests on ‘the Court’s sense of lack of capacity, compounded in unequal part[] of the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.’  

Moreover, the political question doctrine seeks to assign constitutional decisions to the branches of government possessing superior expertise in the particular area at issue.  

While the constitutional and prudential significance of the political question doctrine are derived from, and justified by, the desire to limit the judiciary’s role in a democratic society, it is clear that judicial restraint does not indicate or amount to judicial abdication. Instead, it is important to emphasize that “judicial unwillingness to intrude upon the domain of political questions emerges not as meek deference, but rather as the judiciary’s assertion of its role as the ultimate decider of constitutional spheres of authority.”

164. Vieth, 541 U.S. at 277.
165. See DuRant, supra note 122, at 539.
166. See Stern, supra note 163, at 405 (quoting Tribe, supra note 163, § 3-16, at 72).
167. See id. (quoting Tribe, supra note 163, § 3-16, at 72).
170. See DuRant, supra note 122, at 539.
171. See Stern, supra note 163, at 416.
172. Id. at 415.
c. Role in State Courts

While the controversy surrounding the substantive content and applicability of the United States Supreme Court’s political question jurisprudence “has subsided in importance if not intensity,” the precept of the political question has not been without continued significance, as state supreme courts have recognized the concept of inherently nonjusticiable constitutional matters and have espoused their own political question doctrines. Despite the fact that some commentators have questioned the applicability of the federal political question jurisprudence to state cases, it, or its rationale, has nevertheless been adopted in many instances. Justice Brennan specifically encouraged state courts to examine the rationales underlying “constitutional federal decisions and use them as ‘guideposts’ when interpreting similar state issues.”

Although the various state formulations of the political question doctrine are all but identical, consistent trends and “a certain parallelism” can be gleaned from the approaches that state courts have taken. The most common, and least controversial, of the trends is the reluctance of state courts to interject themselves into the electoral process via the interpretation of electoral results. This seemingly logical application of the tests for a political question has also spilled over into the context of disputes involving the general machinery of government. These parallel concerns related to the separation of powers have “fostered the belief that the machinery of government should regulate itself with minimal judicial interference.” More specifically, “state courts have avoided dictating to the executive and legislative branches how government should be structured and how decisions should be made.”

While, generally, a challenged governmental act is removed from the domain of the political question doctrine when it violates an express constitutional prohibition, “state courts have been particularly reluctant to review legislative decisions that are not impermissible in substance but are

173. Id. at 406.
174. Id. at 406-07.
175. DuRant, supra note 122, at 540; see also Stern, supra note 163, at 422 (noting the refusal of state courts to “slavishly parrot the federal judiciary’s conception of political questions”).
178. Stern, supra note 163, at 407.
179. See id. at 408 (citations omitted).
182. Id. at 412.
183. Id.
184. See id.
challenged as having been reached or enacted in contravention of a constitutionally prescribed process.185 In abstaining from such disputes, courts often emphasize that such an intrusion is unwarranted, as passing upon the wisdom or advisability of a particular legislative procedure would ignore state constitutions’ textual commitments to the legislative branch for determining its own procedure.186 To do so would be disrespectful to a coequal branch of government and would jeopardize the independence required by the separation of powers doctrine.187

A salient example of a state court’s reliance on the political question doctrine in such a scenario can be seen in Birmingham-Jefferson Civic Center Authority v. City of Birmingham.188 In Birmingham-Jefferson, the Supreme Court of Alabama held that the question of whether the phrase “a majority of each house” required a bill to be passed by a majority of a quorum, or by a majority of votes cast in the presence of a quorum, presented a nonjusticiable political question more properly left to the legislative branch.189 In addressing a “practice of ‘local legislative courtesy,’” where members “abstain from voting on a bill of purely local application unless the bill is applicable to the legislator’s county,”190 the court noted that, while separation of powers concerns precluded it from exercising jurisdiction,191 the issue also constituted a political question.192 In light of the similar facts but fundamentally different holdings in Birmingham-Jefferson and Fairfield, an analysis by the majority in Fairfield explaining its rejection of the arguments addressed in Birmingham-Jefferson would have provided much needed clarity and guidance.

d. South Carolina’s Political Question Doctrine

In South Carolina, while the political question doctrine has been discussed relatively frequently in certain contexts,193 some commentators contend that it has remained conspicuously absent in others.194 Recently, however, in both

185. Id. at 414.
187. See id. (quoting Malone, 650 P.2d at 356–57; Leek, 539 P.2d at 328).
188. 912 So. 2d 204 (Ala. 2005).
189. See id. at 221.
190. Id. at 210 & n.5 (a practice eerily similar to the one at issue in Fairfield).
191. See id. at 212.
192. Id. at 221. Specifically, the court held that the constitutional challenge involved: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, id. at 218, (2) the lack of judicially discoverable and manageable standards for resolving the question, id. at 219, and (3) a lack of the respect due coordinate branches of government, id. at 220.
194. See, e.g., DuRant, supra note 122, at 540 (arguing that, unlike the lower courts, the South Carolina Supreme Court should have refused to decide a public school reform issue in Abbeville
Segars-Andrews v. Judicial Merit Selection Commission, and South Carolina Public Interest Foundation v. Judicial Merit Selection Commission (SCPIF), the South Carolina Supreme Court has discussed the political question doctrine at length. Having already adopted the Baker framework in SCPIF, the Segars-Andrews court again acknowledged the familiar adage that the nonjusticiability of a political question is essentially a product of the separation of powers. Further noting the parallels between South Carolina's political question doctrine and its federal counterpart, the court stated that "[t]he fundamental characteristic of a nonjusticiable 'political question' is that its adjudication would place a court in conflict with a coequal branch of government."

Noting that courts should not rule on questions that are predominantly political rather than judicial in nature, the South Carolina Supreme Court, in Segars-Andrews, emphasized that it has declined to pass on issues involving authority that has been committed by the constitution to a coequal branch of government. Determining whether a particular matter has been delegated by the constitution to the legislative or executive branches, or whether the action at issue exceeds whatever authority has been delegated, requires case-by-case inquiry and amounts to "a delicate exercise in constitutional interpretation." Noting that Sloan v. Hardee illustrated the fundamental distinction between a legal controversy and a political one, the
court in Segars-Andrews emphasized that it "is duty bound to review the actions of the Legislature when it is alleged in a properly filed suit that such actions are unconstitutional."207 As such, "when the unconstitutionality of an act is clear to [the] court, beyond a reasonable doubt, then it is its plain duty to say so."208 In such instances, the requisite case-by-case inquiry "necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded."209

e. Applicability to Fairfield

As indicated and explained by South Carolina’s political question jurisprudence, the existence of a political question can largely be determined by applying the factors or tests set forth in Baker.210 The three Baker factors pertinent in Birmingham-Jefferson Civic Center Authority211 merited, but did not receive, a similar analysis by the court in Fairfield.

i. Textually Demonstrable Constitutional Commitment

In applying the first factor to the constitutional challenge in Fairfield, it must be determined whether there has been a "textually demonstrable constitutional commitment of the issue to a coordinate political department."212 While, admittedly, such a task involves "a delicate exercise in constitutional interpretation,"213 further analysis of the United States Supreme Court’s political question jurisprudence proves instructive.

In Nixon v. United States,214 the Court was presented with the question of whether Senate Rule XI, which allows for an evidentiary hearing before a Senate committee, rather than an impeachment hearing before the full Senate, was unconstitutional.215 The Court held that the matter presented a nonjusticiable political question,216 as the language of the Impeachment Trial Clause217 were serving in violation of the statute, and defining the meaning of the statute was clearly within the purview of the court. Id. at 500, 640 S.E.2d at 460.

208. Id. at 123, 691 S.E.2d at 461 (quoting Elliott v. Sligh, 233 S.C. 161, 165, 103 S.E.2d 923, 925 (1958)) (internal quotation marks omitted).
209. Id. at 122, 691 S.E.2d at 460 (quoting Baker v. Carr, 369 U.S. 186, 198, 210–11 (1962)).
212. Id. at 214–15 (quoting Baker, 369 U.S. at 217).
213. Baker, 369 U.S. at 211.
215. See id. at 226 (citing U.S. CONST. art. I, § 3, cl. 6).
216. See id.
indicates a textual commitment of the matter to the Senate. The Court explained that, in order to determine whether there is a textually demonstrable constitutional commitment of an issue to a coordinate political department, a court must, at the threshold of the case, interpret the text in question. The Court concluded both that the first sentence of the Impeachment Trial Clause amounts to a grant of authority to the Senate, and that the word “sole” indicates that the authority is vested in the Senate and nowhere else. The Court held, therefore, that the inclusion of the word “sole” in the Impeachment Trial Clause is evidence of a textual commitment, meaning that the Senate’s impeachment power is not subject to judicial review.

In Nixon, the Court’s extensive comparison of the case to, and distinction from, Powell v. McCormack is also illustrative. In Powell, the Court addressed whether the constitutional commitment to the House of Representatives of the authority to judge the qualifications of its members prevented judicial review of such a matter. While Article I, Section 5, provides that each body “shall be the Judge of the Elections, Returns and Qualifications of its own Members,” Article I, Section 2, outlines three requirements for membership in the House of Representatives. The Court held that the inclusion of those three specific membership requirements imparted “a precise, limited nature” to the word “qualifications.” Consequently, the Court determined that the House of Representatives’ argument that its authority to judge the qualifications of its members constituted a textually demonstrable commitment of unreviewable authority was overcome by the existence of the separate provision specifying the only qualifications which might be imposed for membership.

However, in Nixon, there was no separate provision of the Constitution that would have been defeated by granting the Senate final authority to interpret and determine the meaning of the word try in the Impeachment Trial Clause. The Court, in Nixon, acknowledged that, although courts do possess the power to review legislative and executive actions that surpass identifiable textual limits, the word try in the Impeachment Trial Clause does not provide an identifiable

218. See Nixon, 506 U.S. at 229.
219. See id. at 228.
220. See id. at 229.
221. See id. The Court also examined whether there were any “judicially discoverable and manageable standards for resolving” the political question which might keep the controversy from being nonjusticiable. Id. at 228-30 (quoting Baker v. Carr, 369 U.S. 186, 217 (1962)).
222. See id. at 236-37 (citing Powell v. McCormack, 395 U.S. 486 (1969)).
223. Powell, 395 U.S. at 519, 521.
225. See id. (citing U.S. CONST. art. I, § 2).
226. See id. (citing Powell, 395 U.S. at 522).
227. Id. (quoting U.S. CONST. art. I, § 2) (internal quotation marks omitted).
228. See id. (citing Powell, 395 U.S. at 548).
229. Id.
textual limit on the authority committed to the Senate to conduct impeachment proceedings.\textsuperscript{230} As a result, the Court concluded that the question of how the Senate may, within the bounds of the Constitution, try an impeachment amounted to a nonjusticiable political question.\textsuperscript{231}

The question presented to the South Carolina Supreme Court in \textit{Fairfield}, stated simply, was whether the rules and procedures of the General Assembly for overriding gubernatorial vetoes violated identifiable textual limits.\textsuperscript{232} As in \textit{Segars-Andrews}, the structure of the South Carolina Constitution may also provide the analytical framework for resolving or disposing of the challenge in \textit{Fairfield}, and in other cases involving the court’s intervention in the legislative process.\textsuperscript{233}

It has been established that the legislature’s veto override authority “must be considered in conjunction with the provisions of Article 3, Section 12, which provides, in part, that ‘each house shall choose its own officers, determine its rules of procedure,’ etc.”\textsuperscript{234} Although the General Assembly is fully empowered by the constitution to determine its own rules and procedures,\textsuperscript{235} “[n]either House may by its rules ignore constitutional restraints.”\textsuperscript{236} Within such prescribed limitations, however, “all matters of method are open to the determination of the House” and are “absolute and beyond the challenge of any other body or tribunal.”\textsuperscript{237} While the power and authority of the General Assembly is plenary with regards to all matters of legislation, unless prohibited by some provision of the Constitution,\textsuperscript{238} provisions of the state constitution are not to be construed to impose limitations beyond their clear meaning.\textsuperscript{239} Despite the supposedly “unambiguous language in article IV, section 21,”\textsuperscript{240} evidence of a provision’s clear meaning can be gleaned from its previous understanding and application by the branch of government within whose purview lies all matters related to legislation.\textsuperscript{241} In support of such evidence, both the South Carolina Supreme Court and the United States Supreme Court have found that the

\begin{thebibliography}{240}
\bibitem{230} \textit{Id.} at 237–38 (citing \textit{Baker v. Carr}, 369 U.S. 186, 211 (1962)).
\bibitem{231} \textit{See id.} at 238.
\bibitem{235} \textit{See S.C. \textit{CONST.} art. III, § 12}.
\bibitem{236} Coleman, 181 S.C. at 22, 186 S.E. at 630.
\bibitem{237} \textit{Id.} (citing United States v. Ballin, 144 U.S. 1, 5 (1892)).
\bibitem{238} \textit{See id.} at 16, 186 S.E. at 628 (quoting \textit{Clarke v. S.C. Pub. Serv. Auth.}, 177 S.C. 427, 435, 181 S.E. 481, 484 (1935)).
\end{thebibliography}
judiciary should accord weight to previous legislative practices and interpretations. Unlike Powell, which involved express and identifiable qualifications for membership in Congress, there is no provision of the South Carolina Constitution expressly defining or explaining the requirements of the phrase “two-thirds of that house.” Moreover, no other provision of the South Carolina Constitution “would be defeated by allowing the [General Assembly] the final authority over its internal voting rules and procedures.” Indeed, such a result would be consistent with article III, section 12, the very provision the court previously stated was to be considered and interpreted alongside the General Assembly’s veto override authority.

Given that the constitution contains no specific numerical or other limitation on the manner in which the General Assembly might properly interpret the phrase “two-thirds of that house,” and because the constitution expressly grants to the General Assembly the power to determine its own rules of procedure, the question of whether the requisite “two-thirds of that house” has voted to override a governor’s veto must be governed by, and decided according to, the rules of the General Assembly. A complete analysis of the political question jurisprudence leads to the conclusion that there may well have been a textually demonstrable constitutional commitment to the legislative branch to determine what constitutes “two-thirds of that house,” such that it renders review of the General Assembly’s internal voting procedures a nonjusticiable political question.

ii. Lack of Judicially Discoverable and Manageable Standards

The second applicable Baker factor, the “lack of judicially discoverable and manageable standards” for resolving the dispute, provides further insight into

242. Id. (citing Okanagan, Methow Tribes v. United States (The Pocket Veto Case), 279 U.S. 655, 689 (1929) (“Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character.”); Powers v. State Educ. Fin. Comm’n, 222 S.C. 433, 441–42, 73 S.E.2d 456, 459 (1952) (stating that “[p]roper consideration must be given” to previous constitutional interpretations by the General Assembly)).


244. S.C. CONST. art. IV, § 21.


248. See Birmingham-Jefferson, 912 So. 2d at 217–18.

the political question analysis and determination. While "[l]aws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc," the law as "pronounced by the courts must be principled, rational, and based upon reasoned distinctions," as "judicial action must be governed by standard, by rule."251

Nixon provides even clearer guidance on the application of the second Baker factor.252 Maintaining that his challenge to the constitutionality of Senate Rule XI was justiciable, Nixon claimed that the word try in the Impeachment Trial Clause amounted to a constitutional mandate that an impeachment proceeding be conducted in the nature of a judicial trial.253 Rejecting Nixon's argument, the Court held that multiple definitions could be assigned to the word try and that the term consequently "lacks sufficient precision to afford any judicially manageable standard" for courts to apply in reviewing the legislative action.254 Furthermore, noting that "the concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving [a dispute],"255 the Court held that the lack of such a clear standard further strengthened its conclusion that there had also been a textual commitment of the matter to a coordinate political branch.256

The South Carolina Constitution, as the sole source of any limitation on the General Assembly's power,257 offers no clear standard by which the judiciary can review the General Assembly's rules and procedures with regard to veto override votes.258 As noted by the Supreme Court of Alabama in Birmingham-Jefferson, determining whether judicial review and intervention is appropriate involves "a discriminating analysis of the particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action."259 In Fairfield, such factors, if considered, would have counseled in favor of the judiciary's avoidance of the

250. See DuRant, supra note 122, at 540 (citing Brennan, supra note 177, at 502).
253. See id. at 229.
254. Id. at 229–30.
255. Id. at 228; see also Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204, 218 n.17 (Ala. 2005) (quoting Nixon, 506 U.S. at 228–29).
258. This is the same situation as in Birmingham-Jefferson, where the Supreme Court of Alabama, interpreting the Alabama Constitution, held that there were no standards for "the judicial branch to review the legislature's voting rules and procedures with respect to the legislature's determination that 'a majority of each house' voted." Birmingham-Jefferson, 912 So. 2d at 218–19.
259. Id. at 219 n.18 (quoting Baker v. Carr, 369 U.S. 186, 211–12 (1962)) (internal quotation marks omitted).
issue, as the facts of the case obviously indicate the susceptibility of the provision to several interpretations. Further, the South Carolina Constitution does not explain or define the phrase "two-thirds of that house," and the General Assembly's authority to determine its rules of procedure, particularly with regard to voting, is not expressly limited by any specific provision or text of the constitution. As evidenced by, if nothing else, the resulting ambiguities, no manageable standard exists, or has been articulated as of yet, by which the judicial branch can review the legislature's veto override procedure at issue in Fairfield. Consequently, the absence of a judicially discoverable and manageable standard for resolving the issue is indicative of its nonjusticiability as a political question.  

iii. Lack of the Respect Due a Coordinate Branch of Government

The final Baker factor implicated by the facts in Fairfield, "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government," further indicates the possible presence of a political question. While mere disrespect for a coordinate branch of government is not sufficient to create a political question, it may nevertheless be probative.

By invalidating the General Assembly's actions in overriding gubernatorial vetoes in Fairfield, the judicial branch may have demonstrated a lack of respect for the legislative branch, as the constitution provides that each house of the General Assembly shall independently determine its rules of procedure. Given that constitutional provision, coupled with the specific separation of powers mandate, the judicial branch "should presume that the [members of the General Assembly have complied] with their oath of office [in determining] and apply[ing] those rules." Instead, overturning and directing legislative procedure is indicative of a lack of the respect due the legislature.

261. See Birmingham-Jefferson, 912 So. 2d at 218–19; Segars-Andrews, 387 S.C. at 122, 691 S.E.2d at 460 ("In determining whether a question is political and nonjusticiable, '... the lack of satisfactory criteria for a judicial determination [is a] dominant consideration[].'" (quoting Coleman v. Miller, 307 U.S. 433, 454–55 (1939))).
263. See United States v. Munoz-Flores, 495 U.S. 385, 390 (1990) ("If it were, every judicial resolution of a constitutional challenge to a [legislative] enactment would be impermissible.").
266. See id. art. L § 8.
268. See id.
In the conflict at issue in *Fairfield*, there is no explicit constitutional provision binding the General Assembly to a certain method or procedure for determining what constitutes "two-thirds of that house" for purposes of veto overrides. Increased judicial intervention in the legislative process, however, will lead to uncertainty and instability as to actions of the political departments of government. 269 The judicial branch should not question the determination of the General Assembly as to whether a veto was overridden by the requisite constitutional supermajority. 270 Justice Scalia, in his concurrence in *United States v. Munoz-Flores*, 271 stated that "[m]utual regard between the coordinate branches, and the interest of certainty, both demand that official representations regarding matters of internal process be accepted at face value." 272 Given the inherent intrusiveness and disrespect for a coequal branch of government involved in the judiciary reviewing and dictating the legislative procedure to be used in the General Assembly, the issue in *Fairfield* likely presents a nonjusticiable political question. 273 Furthermore, the South Carolina Supreme Court has previously declared a statute that allowed the General Assembly to direct circuit judges to work within the executive branch to be invalid as an intrusion on, and limitation of, the judicial branch’s authority. 274 For the court to, then, direct the requisite procedures of the General Assembly may, arguably, indicate a new willingness to raise the banner of separation of powers when its own authority is compromised, but disregard it when the matter involves the authority of another branch. Such a paradoxical result, without more, rejects the cooperative role the three branches must assume in enforcing and delineating the proper and requisite separation and balance of powers. 275 More appropriately, as the Supreme Court

269. See id. at 220–21 ("We, like the United States Supreme Court in *Field v. Clark*, are persuaded that uncertainty and instability would result if every person were free to 'hunt through the journals of a legislature to determine whether a statute, properly certified by the speaker of the house and the president of the senate, and approved by the governor, is a statute or not,' and the internal proceedings of the legislature when passing a bill were to be subject to judicial challenge." (quoting *Field v. Clark*, 143 U.S. 649, 677 (1892)); *Segars-Andrews v. Judicial Merit Selection Comm’n*, 387 S.C. 109, 122, 691 S.E.2d 453, 460 (2010) (noting the importance placed on "attributing finality to the action of the political departments" (quoting *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939) (internal quotation marks omitted))).

270. See *Birmingham-Jefferson*, 912 So. 2d at 221.


272. Id. at 410.

273. See *Birmingham-Jefferson*, 912 So. 2d at 221 (holding that judicial review of a legislature’s determination "express[es] a lack of the respect due that coordinate branch of government," making the question nonjusticiable).


275. See id. at 87–88, 261 S.E.2d at 306 (citing 16 AM. JUR. 2D *Constitutional Law* § 271 (2012) (Part VII.C.2.a. "Impermissibility of imposition of nonjudicial functions on the judiciary") (noting that when a branch acts beyond the scope of its powers, as would be permitted by the statute at issue, such action goes against the constitutional mandate of separation of powers).
of Alabama noted, "just as [the] court will declare legislative usurpation of the judicial power violative of the separation-of-powers provision of [the] Constitution ... so it must decline to exercise the judicial power when to do so would infringe upon the exercise of the legislative power." 276 Having expressly declined to overturn an action of the General Assembly in Culbertson, 277 despite an explicit constitutional provision seemingly providing it with the authority to do so, the court, arguably, has no more authority in the context of veto overrides to declare an act of the General Assembly void merely because in the exercise of that power a purportedly unambiguous constitutional provision has been violated.

iv. Summary

Based on an application of the political question doctrine, the South Carolina Constitution contains no explicit, unambiguous, or identifiable textual limitation on the General Assembly’s authority with regard to its veto override procedures such as to permit judicial review. Moreover, given the ambiguity implicit in the rule established in Fairfield, 278 there appears to be a lack of judicially discoverable and manageable standards for resolving the dispute. Finally, for the court to affirmatively declare and mandate a specific veto override procedure to be followed by the General Assembly arguably demonstrates a lack of the respect due a coordinate branch of government.

IV. IMPACT AND EFFECTS OF THE FAIRFIELD FORMULA

A. "Stability of Existing Laws" 279

Is the court’s holding merely prospective in application or is it to apply retrospectively as well? If the court’s ruling was intended to apply prospectively, and simply as a guide to legislators with regard to future override votes, existing laws would not be subject to challenge based solely on the manner in which they were enacted, in particular the number of votes by which a gubernatorial veto of the legislation was overridden. However, if the court’s holding was intended to apply retrospectively, a multitude of existing, and currently enforceable, laws may now be subject to challenge. Chief Justice Toal

276. *Birmingham-Jefferson*, 912 So. 2d at 212 (internal citations omitted).

277. See Culbertson v. Blatt, 194 S.C. 105, 107–09, 9 S.E.2d 218, 218–19 (1940) (declining to review the General Assembly’s election of defendants to the Board of Trustees of the University of South Carolina, wherein defendants were each later elected to separate public offices allegedly in violation of the South Carolina Constitution).

278. See Bd. of Trs. of the Sch. Dist. of Fairfield Cnty. v. State, 395 S.C. 276, 284, 718 S.E.2d 210, 214 (2011); Petition for Rehearing, *supra* note 23, at 7 (discussing potential “absurd results” under the Fairfield formula).

wrote in her dissent of the need for ensuring the "stability of existing laws."280 One might infer from such a statement that she believed that the majority’s holding was intended to apply retrospectively.281 Moreover, the Board acknowledged concerns in its brief that the outcome it sought may affect the validity of numerous other laws enacted in the same fashion as Act 308, subsequently inviting the court to "craft a decree and opinion that [would] promote the general welfare and preserve stability in the law."282

If the court’s holding in Fairfield is indeed to be applied retrospectively, one must consider what laws may now be subject to challenge as having been enacted in a manner contrary to the Fairfield formula. While the pervasiveness of the General Assembly’s “long-held precedent”283 of overriding vetoes with less than an affirmative vote of two-thirds of a quorum was a matter of factual dispute among the parties,284 as well as among the Justices,285 one need not search back farther than the 117th session of the General Assembly286 to find more than twenty examples of existing laws that now may be constitutionally infirm under the Fairfield formula.287 While predominantly local in character, many of these existing laws deal with matters ranging from the establishment, elimination, or consolidation of public bodies288 to the authorization of bonds.289 Under the court’s ruling, for example, if a law creating or altering a board or commission is deemed invalid, the contracts it entered into or the bonds that it issued may then be deemed suspect.290 While most laws implicated by the

280. Id.
281. See id. Chief Justice Toal stated that she would uphold the legislative override of a gubernatorial veto partly “in the interest of promoting the stability of existing laws.” Id.
282. See Final Brief for Plaintiff at 18 n.4, Fairfield, 395 S.C. 276, 718 S.E.2d 210 (No. 27035).
284. See Final Joint Brief, supra note 43, at 15 & n.4.
286. 2007 to 2008.
287. See, e.g., 2010 S.C. Acts 315 (authorizing the Board of Trustees of the Kershaw County School District to issue up to $2.5 million in general obligation bonds, passed by overriding a gubernatorial veto by a vote of 2-to-0 in the House, [2010] 5 S.C. HOUSE J. 5510); 2007 S.C. Acts 130 (increasing the membership and composition of the Charleston County Aviation Authority, passed by overriding a gubernatorial veto by a vote of 12-to-0 in the House, [2007] 4 S.C. HOUSE J. 3905 (currently the subject of pending litigation)).
289. See, e.g., 2010 S.C. Acts 2891 (authorizing the Board of Trustees of the Fort Mill School District Number 4 to issue up to $2 million in general obligation bonds, passed by overriding a gubernatorial veto by a vote of 6-to-1 in the House, [2010] 3 S.C. HOUSE J. 2948).
290. See Seanna Adcox, SC high court: Vetoes are statewide business, THE STATE, Aug. 30, 2011 (according to then-State Senate President Pro Tempore Glenn McConnell, the court’s opinion in Fairfield “throws a shadow of doubt on” existing laws, suggesting that “[i]f this is no good, those are no good” (internal quotation marks omitted)) (published online and no longer available) (on file with author).
court’s decision originated as local legislation, this fact does not necessarily limit the scope of the ruling’s impact, but rather potentially opens a floodgate of constitutional challenges to, for instance, both the validity of a statutorily created public body and the authority with which it conducts business.291

Chief Justice Toal may have been expressing her concerns for “the stability of existing laws” in light of the theoretical underpinnings of the enrolled bill doctrine.292 Though argued extensively to the court,293 the majority opinion failed to address or discuss the doctrine. While a reading of State ex rel. Hoover v. Town Council of Chester294 shows that Fairfield likely falls within the constitutional prerequisites exception,295 it is now uncertain whether the enrolled bill doctrine will be altered by the logical extension of the Fairfield formula and rationale to votes on initial passage of legislation.

B. Potential Application to Votes for Initial Passage

Finally, the Fairfield formula may well apply not only to veto overrides, but to all actions of the General Assembly.296 The only two variables in the Fairfield formula are: first, the required percentage or threshold; and second, the actual number of votes cast.297 The court acknowledged that, “absent a constitutional [mandate] to the contrary, the legislature acts . . . through majority vote.”298 As the constitution states that a majority of each house constitutes a quorum to transact business,299 “[a] quorum, therefore, possesses the power of the whole body in all matters of business wherein the action of a larger

291. See id.
292. See, e.g., Med. Soc’y of S.C. v. Med. Univ. of S.C., 334 S.C. 270, 278, 513 S.E.2d 352, 356–57 (1999) (citing Beaufort Cnty. v. Jasper Cnty., 220 S.C. 469, 487, 68 S.E.2d 421, 430 (1951); State v. Moorer, 152 S.C. 455, 467, 150 S.E. 269, 273 (1929)) (“The enrolled bill rule provides that an Act ratified by the presiding officers of the General Assembly, approved by the Governor, and enrolled in the Office of the Secretary of State is conclusively presumed to have been properly passed. Such an Act is not subject to impeachment by evidence outside the Act as enrolled to show it was not passed in compliance with the law.”); Field v. Clark, 143 U.S. 649, 677 (1892) (holding that the enrolled bill doctrine is a logical function of the need for certainty in the laws, especially “after the public have given faith to their validity” (quoting Weeks v. Smith, 18 A. 325, 327 (Me. 1889)) (internal quotation marks omitted)).
293. See Brief of Defendant State of S.C. at 15, 17, Bd. of Trs. of the Sch. Dist. of Fairfield Cnty. v. State, 395 S.C. 276, 718 S.E.2d 210 (2011) (No. 27035) (arguing that the enrolled bill rule should apply, making the veto override issue a nonjusticiability political question).
295. See id. at 317, 17 S.E. at 755 (stating that while the court may not “inquire into what the journals of the two houses may show as to the successive steps which may have been taken in the passage of the original bill,” the court still has the power “to inquire into those prerequisites fixed by the Constitution, and of which prerequisites the journals of the two houses are required to furnish the evidence”).
296. See Fairfield, 395 S.C. at 284, 718 S.E.2d at 214.
297. See id.
298. Id. at 279, 718 S.E.2d at 211.
proportion of the entire membership is not clearly and expressly required.”\textsuperscript{300} The court’s ruling in \textit{Fairfield} requires an affirmative vote of two-thirds of a minimum quorum for a valid veto override.\textsuperscript{301} By ignoring, and implicitly rejecting, the principle of acquiescence as an act of agreement in \textit{Fairfield}, would the same standard not apply to all actions of the General Assembly? By logical extension and a “plain reading”\textsuperscript{302} of the majority’s opinion, \textit{Fairfield} has likely established a participation quorum requirement for all actions of the General Assembly. The base threshold of the \textit{Fairfield} participation quorum is the affirmative vote of the requisite percentage—either a majority or two-thirds—of a minimum quorum. Anything less than the minimum number of required votes, under the court’s formula, will be constitutionally infirm.\textsuperscript{303} This analysis is reinforced by the court’s use of specific language from \textit{Morton} stating, “If the rule is the mere majority rule, then a majority of the quorum present and acting is intended . . . .”\textsuperscript{304}

V. CONCLUSION

Although the foregoing indicates several constitutional concerns with regard to \textit{Fairfield}, and while the wisdom or appropriateness of the court’s decision to intervene, or even the accuracy of the court’s decision, may be disputed, as noted by the United States Supreme Court in reviewing \textit{Smith}: “The conformity with the state Constitution of the proceedings in the enactment of the law is a question for the determination of the State court, and its judgment is final.”\textsuperscript{305} Nevertheless, when confronted with the floodgate of litigation likely, and already beginning, to ensue from its opinion in \textit{Fairfield}, the court may later find it appropriate to revisit the issue and possibly “‘retreat[]’ from the ‘province of the legislative branch’ and ‘return[]’” the issue presented in this case to “‘its proper forum’—the legislature.”\textsuperscript{306} At a minimum, the court could offer clarity and guidance on all of the issues it chose to ignore, such as the separation of powers doctrine, the political question doctrine, and the enrolled bill rule, as well as correct the inconsistencies in its existing jurisprudence. The court’s application of the plain meaning rule, as an absolute, seems to have absolved the majority from their responsibility to interpret the constitution so as to give effect to its

\textsuperscript{300} Smith v. Jennings, 67 S.C. 324, 328, 45 S.E. 821, 823 (1903).
\textsuperscript{301} See \textit{Fairfield}, 395 S.C. at 284, 718 S.E.2d at 214.
\textsuperscript{302} Id. at 279, 718 S.E.2d at 211.
\textsuperscript{303} See generally M. P. FOLLETT, THE SPEAKER OF THE HOUSE OF REPRESENTATIVES 179–200 (1896) (regarding the potential for obstruction under such a formula).
\textsuperscript{305} State ex rel. Coleman v. Lewis, 181 S.C. 10, 24, 186 S.E. 625, 631 (1936) (quoting Smith v. Jennings, 206 U.S. 276, 278 (1907)) (internal quotation marks omitted).
\textsuperscript{306} Birmingham-Jefferson Civic Ctr. Auth. v. City of Birmingham, 912 So. 2d 204, 213 (Ala. 2005) (quoting \textit{Ex Parte James}, 836 So. 2d 813, 819 (Ala. 2002)).
original intent and meaning. While both convenient and generally accurate, such a rule should not prevent an analysis of other constitutional issues or a review of other extrinsic sources for guidance in interpretation. Finally, the court’s failure to address the effects of its bright line rule and formula has resulted in significant uncertainty with regard to both existing laws and legislative procedure.

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