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“We (the Supermajority of the People”: The Development of a Rationale for Written Higher Law in North American Constitutions

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The “Founding Fathers” who drafted the United States Constitution aimed to construct a republican government wherein both the people and their representatives would ordinarily make decisions by majority vote. However, the Constitution also mandates that certain kinds of decisions require a supermajority vote rather than a mere simple majority. In the era of prolific constitution-making in America (1776–1787), the important device of the supermajority was used to separate the ordinary statutory laws that legislative bodies would routinely pass, from the important laws that concerned fundamental questions of constitutional authority.¹

The Constitution of the United States contains at least seven instances where the supermajority concept was used. Article I, Section 3 requires that the chief justice of the Supreme Court preside over the process of impeaching the president or other officers of the United States and that two-thirds of the members of the Senate present concur. Section 5 states that approval by two-thirds of either house of Congress is required to expel a member. In Section 7, a two-thirds vote by the members of both the Senate and the House of Representatives is necessary to override a presidential veto of a bill. Article II, Section 1 makes a provision for the choosing of a president in case of a deadlock in the “electoral college” because no candidate has an absolute majority, for instance, if the vote is split fairly evenly between three candidates. The provision states that

¹ This study is based on my more comprehensive work, “‘We (the Heavy Majority of the People’: The Development of a Rationale for Written Higher Law in Constitutions of North America” (unpublished M.A. thesis, Emory University, 1988). I owe my most profound debt to my thesis advisor and friend, Professor John T. Juricek, without whom this paper would not have been possible.

a quorum in the House of Representatives, consisting of a member or members from two-thirds of the states, is necessary for a president to be chosen; it should be noted, however, that only a simple majority of votes by the representatives of those states is necessary to select a candidate. In Section 2, where the powers of the president are enumerated, the president is empowered to make treaties subject to the concurrence of two-thirds of the senators present. Article V, which provides for the revision of the Constitution, states that two-thirds of both houses of Congress or two-thirds of the legislatures of the various states may call a convention for proposing amendments, but that any amendment must be ratified by three-fourths of the legislatures or special state conventions. Finally, Article VII states that ratification by the conventions of nine out of the original thirteen states would be necessary for the establishment of the 1787 Constitution as the binding, fundamental law over the ratifying states.

The current debate between the "neo-republican gang of four" (J.G.A. Pocock, John Murrin, Lance Banning, and Drew McCoy) and the "neo-liberal band of three" (Joyce Appleby, Isaac Kramnick, and John Diggins) involves a heated dispute over whether the "Revolutionary understanding of politics embraced the classical concept of republican virtue."² Much of this controversy focuses on Gordon Wood's contention that Federalist rhetoric was far more revolutionary during the ratification struggle than it had been at Philadelphia, and that the "triumph of the Constitution" also marked the "end of classical politics." In other words, "A liberal paradigm was about to displace America's republican consensus" and "the common good was becoming inseparable from the individual pursuit of self-interest."³ This post-1787 change was caused, according to Wood, by the "disingenuous" rhetoric of the ratification struggle, which destroyed "whatever chance there was in America for the growth of an avowedly aristocratic conception of politics and thereby contributed to the creation of that encompassing liberal tradition that has mitigated and often obscured the real social antagonisms of American politics."⁴ Whether Wood's "declaration" of the end of classical politics (and the birth of a liberal society) during the ratification struggle is accurate remains open to question.

Discounting Lockean liberalism's influence on eighteenth-century America, Isaac Kramnick notes that seventeenth-century British writers like James Harrington and Algernon Sidney adapted the classical republican tradition of *res publica*, or commonweal, to a specifically English context.⁵ This concept was in turn transported to the English colonies in

² Jack N. Rakove, "Gordon S. Wood, the 'Republican Synthesis,' and the Path Not Taken," *The William and Mary Quarterly* 44 (July, 1987): 620.

³ John Murrin, "Gordon S. Wood and the Search for Liberal America," *The William and Mary Quarterly*, 44 (July, 1987): 598, 599.

⁴ Gordon Wood, *The Creation of the American Republic, 1776-1787* (Chapel Hill: The University of North Carolina Press, 1969), 562.

⁵ Isaac Kramnick, "Republican Revisionism Revisited," *The American Historical Review* 87 (June, 1982): 630.

America. The supermajority principle actually followed the identical route. It originated in Venice, one of the centers of classical republicanism, traveled its way to James Harrington in England, and thence to William Penn in North America, where it would be implemented into Penn's famous constitutions. This was ultimately to be carried forward into the U.S. Constitution of 1787, as an inheritance from classical republican Venice. As will be further expounded in this article, however, the supermajority principle is extremely significant as a concrete expression of Madison's commitment to protecting minority rights against tyrannical legislative majorities. This Federalist commitment to the rights of the minorities was a commitment to equal rights, according to Pauline Maier, who suggests that it "may be a more functionally important part of American democracy than even the right to vote or access to office."⁶ In this respect, the supermajority, though originally a product of republican Venice, attained a highly significant role in American democratic history.

In *The Age of the Democratic Revolution*, Robert Palmer asserts that the uniqueness of the U.S. Constitution was evinced in its novel view of the origin of government. Following the example of the Massachusetts constitution of 1780, it provided in advance for popular ratification, and thus "imputed the creation of government to the people." He also suggests that the American revolutionary "idea of limited government, the habit of thinking in terms of two levels of law, of an ordinary law checked by a higher constitutional law," came out of the "realities of colonial experience." He states that this idea of higher law embodying the people's will resulted from the circulation of "revolutionary principles of the American Revolution." These authoritative principles declared that the "people were the fountain of power," and that if popularly chosen conventions ratified their work, then "all disputes and doubts concerning [its] legitimacy" would be removed. These ideas became domesticated in America. The "mere mention of the word, 'convention,' in the final article of the proposed constitution was thought sufficient explanation of the process of popular endorsement." Palmer's important work points out this significant notion of two separate tiers of law; but it does not even mention the supermajority principle, much less explain how this phenomenon had emerged in North America.⁷

Daniel Boorstin in *The Americans: The National Experience* implicitly notes the importance of the supermajority. He argues persuasively that the "novel authority" of the Massachusetts constitutional convention derived largely from the novel method used to establish the electorate and ascertain its will. Traditional practice in ordinary elections had restricted the electorate to those free adult males who could meet a cer-

⁶ Pauline Maier, "A Pearl in a Gnarled Shell: Gordon S. Wood's *The Creation of the American Republic Reconsidered*," *The William and Mary Quarterly* 44 (July, 1987): 588.

⁷ Robert R. Palmer, *The Age of the Democratic Revolution: A Political History of Europe and America, 1760-1800*, 2 vols. (Princeton: Princeton University Press, 1959-64), 1:224, 234, 230, 231.

tain property qualification, and only a simple majority had been required for ratification of any decisions. This customary practice was altered in two ways for the Massachusetts constitution of 1780. Both the selection of delegates to the convention and the popular ratification of the final document were entrusted to an expanded electorate which included all free adult males. Still more significantly, ratification of the document was declared to require a two-thirds majority of those voting. This "wider authority" made the convention's work (John Adams's draft with a few changes) "a Higher Law in a new and more literal sense."⁸

In *The Creation of the American Republic*, Gordon Wood likewise observes the significance of the supermajority to this notion of constitutional law requiring a higher level of legitimation. The 1776 Delaware constitution, modeled after William Penn's colonial constitutions in Pennsylvania and Delaware, required a *five-sevenths* majority of the General Assembly to alter its form. Wood explains the importance of this particular choice of proportion:

Yet the distinction between the fundamental law of the constitution and ordinary statutory law was strong enough in 1776 to drive others into wrestling with devices to put their constitutions beyond the reach of mere legislative acts. The Delaware Constitution declared the Declaration of Rights and certain specified articles immune from any alteration, and, drawing upon William Penn's old charter of government, made the consent of five-sevenths of the Assembly and seven members of the [nine-member] legislative Council necessary for any amendment of the remainder of the Constitution.

Wood also notes Thomas Jefferson's second and third drafts of the Virginia constitution written earlier in 1776. Jefferson there proposed that a "bill" altering the constitution would be referred "to the people to be assembled in their respective counties and that the suffrages of two thirds of the counties be requisite to establish it." The constitution would only be alterable by the "personal consent of the people on summons to meet in their respective counties."⁹

However, it appears that Palmer, Boorstin, and Wood all fail to provide a satisfactory explanation either of the widespread use of the supermajority device during the American Revolution, or of the relationship of that device to the idea of higher law. Only Wood recognizes specific colonial precedents for the revolutionary generation's embrace of the supermajority, and he appears to consider them isolated precedents, not part of an evolutionary development. In fact, the enactment of "fundamental" law based on a supermajority vote began in America with William Penn's founding of Pennsylvania, and the practice persisted until the revolutionary era and the subsequent creation of the basic legislation for the new republic. Moreover, there had been a long history of experimentation with heavy majorities in Europe before Penn ever turned his attention to America.

⁸ Daniel Boorstin, *The Americans: The National Experience* (New York: Random House, 1965), 410.

⁹ Wood, *The Creation*, 308, 309.

THE SUPERMAJORITY PRINCIPLE IN THE SCHISM OF
THE MEDIEVAL PAPACY

The first significant invocation of the supermajority principle appears in the twelfth century immediately following the eruption of an eighteen-year schism, where the cardinals of the Catholic Church were split as to which of the two rival popes was the true "vicar of Christ." After the death of Pope Adrian IV in 1159, there was a double election that led to two would-be successors: Pope Alexander III and the Antipope Victor IV supported by Emperor Frederick I Barbarossa. This was part of a struggle for territorial power in Italy between Frederick and the papacy that lasted from 1154 to 1177.

Although earlier election decrees strongly denounced any uncanonically elected Roman pontiff as the "destroyer of all Christendom," they never provided for the possibility of a split among the electing cardinals as to the identity of the true pontiff-elect. Election was commonly determined through the process of "scrutiny" by the "weightier and sounder portion" (*maior et sanior pars*).¹⁰ Improvidently, however, the process of scrutiny did not account for the menacing possibility of a double election. Eventually, election by the majority of cardinals became the custom, but this was never officially sanctioned by the medieval church.¹¹

To weigh votes, rather than merely to count them, had long been characteristic of church practices, and the numerically larger number was not necessarily the "greater and sounder part." This practice of weighted voting was carried over from Roman times, where voting was done through artificial social units called "classes," each class accorded different weights. It should be noted that so long as the tradition of weighted voting continued, it acted to prevent or strongly inhibit the development of supermajority voting, for the latter normally assumes parity among qualified electors.¹²

Given the tradition of weighted voting, Cardinal Octavian's minority of votes did not necessarily prevent his ascension, and his advocates ac-

¹⁰ St. Benedict had proposed election by what was described in Gratian's *Decretum* as the "weightier and sounder portion" (*maior et sanior pars*). Common law provided that episcopal elections be decided by the cathedral clergy utilizing one of three methods: *electio quasi per inspirationem* (inspired unanimity), *electio per compromissum* (compromise) and scrutiny. Inspired unanimity and compromise were infrequently used. Geoffrey Barraclough, "The Making of a Bishop in the Middle Ages: The Part of the Pope in Law and Fact," *The Catholic Historical Review* 19 (Apr. 1933–Jan. 1934): 276.

¹¹ The verdict of a bare majority was regarded with suspicion. Actual cases where the candidate of the *sanior pars* was preferred to that of the numerically larger did exist. *Ibid.*, 277, 278.

¹² My contention is *not* that supermajority voting and weighted voting are mutually exclusive; only that throughout history, weighted voting strongly inhibited the development of supermajority voting.

As discussed below, the U.S. Constitution requires a supermajority vote of consent for certain actions taken by the House of Representatives. This is clearly a mingling of weighted and supermajority voting from the perspective of the states. But this peculiar usage of the supermajority was a rather late and novel development, being crucial in facilitating the Great Compromise. See below, in my discussion of the Virginia and New Jersey plans. See also footnote 70.

knowledgeed him as Pope Victor IV. Cardinal Roland Bandinelli, however, with the larger (but disputed) number of votes, had taken the name Pope Alexander III. Historians have never been able to determine exactly what number of votes each candidate received at the Sacred College. Roland had obtained the majority of the votes but his opponent claimed that he and his adherents formed the *sanior pars*, that their votes actually constituted a majority—if only the votes were weighed properly. As opinion turned against Victor, it also turned against the arguments used on his behalf. In particular, the practice of weighted voting was decisively discredited.

This schism in the church persisted between Alexander III and Victor IV and his successors until July 1177, when Emperor Frederick I Barbarossa, who supported Victor, finally promised to recognize Alexander III at Venice. Alexander thereby convoked a great council at the Lateran in March 1179 to heal this schism and prevent future ones.¹³ To solve the problem of ambiguity in papal elections, the Third Lateran Council devoted the first of its twenty-seven “constitutions” to the question of papal elections. Alexander III intended this constitution to amend, not replace existing legislation, in other words, Nicholas II’s decrees of 1059. It provided that in case of disputed election, even though a minority of cardinals might elect a candidate of their own, two-thirds of the cardinals could make a binding choice. And, strongly differing from Roman law, the new constitution provided that a candidate with less than two-thirds of the vote could not be validly elected.¹⁴

Thus Alexander’s decrees discarded the long practice of weighted voting by using the method of supermajority voting. Weighted voting assumed a disparity among electors, but supermajority assumed the opposite: that a parity existed among all electors. Under the new system, no third of the electors, no matter how influential, could make a decision; but any two-thirds of them could make a decision. Weighted voting often led to private tallies and unreported results because of the varied “weights” accorded to each vote. Weighted voting therefore could create as many wrangles over proper weighting as there were electors. Supermajority voting, on the other hand, eliminated all of that: all electors would have exactly one vote and their decision would depend only on simple arithmetic. This could be reported without much fear of contradiction and further wrangles. There were definite drawbacks to the new system, but the supermajority was designed to assure that a particular crucial decision, the selection of a pope, would always be settled definitively; that is, it would always be settled to the satisfaction of the great numerical majority of participants. Generally speaking, the superma-

¹³ This assembly ranks as the eleventh ecumenical council in the Roman Catholic church.

¹⁴ Josepho Alberigo et al., eds., *Conciliorum Oecumenicorum Decreta* (Bologna: Istituto per le scienze religiose, 1972), 211. Also found in Emil Friedberg, *Corpus Iuris Canonici: Decretalium Collectiones* (2 vols.; Leipzig, 1879; reprint, Graz: Akademische Druck- U. Verlagsanstalt, 1955), 2:51.

jority was always attractive as a compromise: it was an intermediate step between majority rule and unanimity.

Innovation usually appeared in the papacy before being extended to the rest of the episcopate. The supermajority principle was incorporated into canon law as applied to other episcopal elections and other matters, such as creating and dividing provinces, admitting of postulants to religious orders, and "changing of the grounds" (or meeting place) of the council.¹⁵

MEDIEVAL VENICE

The first known use of the supermajority device outside the church was in medieval Venice. Supermajority measures were used for amendment-making, elections, criminal indictments, and quorums—all precedents for similar provisions in the U.S. Constitution. As with the church, the supermajority device was first used in Venice for the election of important officers, such as the Doge. It was soon put to other uses. The most important innovation was for the amendment of unusually important "constitutional" documents. The most widely imitated Venetian innovation, however, was the quorum. It is likely that some of these Venetian institutions employing the supermajority device preceded the papal decree of 1179, but the popular use of the two-thirds majority *per se* was most likely inspired by the church instead of the Venetian government.¹⁶

INTERREGNUM ENGLAND

In England during the Interregnum of the Puritan Revolution, the new constitution, the *Instrument of Government*, like most political procedures in England, contained no supermajority provisions, committing all processes to be determined by a "major part." Within another year, however, an act declaring the government of the "Commonwealth of England, Scotland, and Ireland, and the dominions thereto belonging" instituted a slight, but for our purposes significant, modification. This act, which might be interpreted as an amendment to the *Instrument of Government*, required for the election of the Lord Protector the approbation of at least eleven members of the Council (with a quorum of at least thirteen present). The number of people on this Council was not to exceed twenty-one nor be less than thirteen. Thus, the quorum of thirteen constituted

¹⁵ Léo Moulin, "Sanior et Maior Pars: Note sur l'évolution des techniques électorales dans les Ordres religieux du VI^e au XIII^e siècle," *Revue historique de droit français et étranger* 4e sér. 36 (1958): 389–90.

¹⁶ Léo Moulin states that the three-fourths majority, not the common two-thirds as in Pope Alexander's decrees, was used in Italian communes before the Third Lateran Council of 1179. *Ibid.*, 388. Moulin also mentions that Wretschko cites a case of an abbe of a cloister Saint-Miche à Lucques, who was elected in 915 by a two-thirds vote, though it is not certain that this degree of support was made a requirement for election. *Ibid.*, 386. See also, Robert Finlay, *Politics in Renaissance Venice* (New Brunswick: Rutgers University Press, 1980), 39–40; W. Carew Hazlitt, *The Venetian Republic: Its Rise, Its Growth, and Its Fall*, 421–1797, 2 vols. (London: Adam and Charles Black, 1900), 1:475, 479–80, 2:439–40, 499.

a supermajority quorum. All other questions would be decided by a simple majority vote.¹⁷

Election of the principal official was the passageway through which the principle of supermajority voting had moved from Italy to Great Britain. It is noteworthy that it was only during the single brief period when Britain experimented with a written constitution that the country also experimented with the supermajority device.

JAMES HARRINGTON

Invocations of the supermajority principle appear in the works of James Harrington (1611–1677), the seventeenth-century English theorist of republican government, who recommended the partial application of Aristotelian principles to English society. Harrington's influence on the political constitution-making in North America was unquestionably great. His major work was *The Commonwealth of Oceana* (1656), a profusely detailed vision of an ideal republic. Hoping to help shape a new order in England, Harrington dedicated the book to Oliver Cromwell. The Protector, however, obstructed its publication until his sister interceded on Harrington's behalf. Although *Oceana* was published, not one of its proposals was implemented during the Interregnum.¹⁸

For this study the significance of Harrington's great work is that it appears to have served as the conduit that brought the supermajority principle from the Mediterranean world to England, and eventually to North America. In *Oceana* Harrington decrees that a two-thirds majority vote of the congregation of elders is needed to appoint a parish pastor, and a two-thirds vote of the "suffrages at the academy" to appoint a university poet laureate. He also designates a two-thirds quorum for the provincial council "in time of health." (In "time of sickness" he requires only "one part in three.") In *The Art of Lawgiving* (1659), Harrington's later work, a more stringent three-fourths vote is needed for the appointment of a parish minister. Harrington also revises the "healthy" quorum for the provincial council from two-thirds to one-half in *The Art of Lawgiving*.¹⁹

It is remarkable that although Harrington employs the supermajority principle in these several ways, he neglects to provide any rationale. Pre-

¹⁷ Samuel Rawson Gardiner, ed., *The Constitutional Documents of the Puritan Revolution, 1625–1660*, 3d edition revised (Oxford: Clarendon Press, 1889), 405–417 (The Instrument of Government, 16 December 1653); 427–447 (The Constitutional Bill of the First Parliament of the Protectorate).

¹⁸ Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W.W. Norton & Co., 1988), 85. Morgan doubts that Harrington's *Commonwealth of Oceana* had a wide readership due to its inordinate amount of detail. He argues that its analysis of England's society and politics was carried to the public in simpler form in a variety of briefer tracts, including many by Harrington himself.

¹⁹ J.G.A. Pocock, ed., *The Political Works of James Harrington*, (Cambridge University Press, 1977), 217, 680, 354, 318, 337, 678.

sumably use of the greater than ordinary majority would be appropriate in cases of more than ordinary importance.

Harrington may have learned of the use of the supermajority principle from his mentor, the famous apostate Catholic historian, Dr. William Chillingworth (1602–1644), whose influence may be seen in Harrington's views on religious liberty. Harrington had a thorough command of Latin, Greek, and Italian; he may have learned of the double election of 1159 and the subsequent decrees on papal election procedures through his teacher. It is, however, very likely that Harrington learned of the supermajority as a result of a visit to Italy. Harrington admired, in particular, the Venetian constitution. He modeled the ideas of rotation in office, and of the Senate itself, after their Venetian precursors. He named his republican model "Oceana," a city surrounded by water, just as Venice is surrounded by water.²⁰

Within a century of his death, Harrington's writings had already exercised profound influence on the governments of the proprietary colonies of Carolina, New Jersey, and Pennsylvania. He enjoyed among American political revolutionaries a reputation second only to that of John Locke, and his abiding significance remains an impressive testimonial to the continuity of the Anglo-American political tradition. More important for our purposes, Harrington also exerted a strong influence on William Penn and on his province of Pennsylvania.

WILLIAM PENN AND COLONIAL PENNSYLVANIA

Jack R. Pole, in his *Political Representation in England and the Origins of the American Republic*, shows that William Penn "aspired to found a Harringtonian commonwealth," noting that Penn's constitution resembles that of Oceana. This connection with William Penn had also been noted in H.F. Russell Smith's book, *Harrington and his Oceana*, in which Smith proved Harrington's significant effect on government-forming in America, showing particularly how he had inspired Pennsylvania's early constitutions.²¹

The supermajority concept was often used in Penn's drafts of the *Fundamental Constitutions* and the subsequent *Charter of Liberties*. In the *Charter of Liberties* of 1683, he mandated the use of a two-thirds quorum (a direct link to Oceana's Assembly), and a two-thirds vote by consent for the Provincial Council (the upper house), for "all cases or matters of

²⁰ H. F. Russell Smith, *Harrington and his Oceana: A Study of a 17th Century Utopia and its Influence in America* (Cambridge: Cambridge University Press, 1914), 3, 6. [James Harrington], *Works: The Oceana and other Works with an Account of his Life by John Toland*, ed. John Toland (London, 1771; reprint, Germany: Scientia Verlag Aalen, 1963), xi. *The Political Writings of James Harrington: Representative Selections*, ed. Charles Blitzer (New York: The Liberal Arts Press, 1955), xvi, xvii, xiii, xxxviii.

²¹ Jack R. Pole, *Political Representation in England and the Origins of the American Republic* (New York: St. Martin's Press, 1966), 77.

moment."²² A few of these "matters of moment" listed are the "agreeing upon Bills to be passed into Laws," "Exorting Courts of Justice," "having Judgment upon criminals Impeached," and "choice of Officers."²³ "Cases and matters of lesser moment" could be settled by a one-third quorum of the Provincial Council, and determined by a majority vote of that quorum. Penn's inclusion of the task of choosing officers as a "matter of moment" follows Harrington's tradition of supermajority use in the decision of appointing candidates for the prominent positions of parish priest and poet-laureate. This tradition would be continued through Penn into the Federal Constitution of 1787, where as noted above a two-thirds quorum of the House of Representatives would be necessary for choosing the president in certain cases.

William Penn was granted "free full and absolute power" but was directed by the English government to govern with the "advise assent and approbation of the Freemen of the said Countreyes or the greater part of them or of their Delegates or Deputies."²⁴ He was also instructed to draft a provision for amendment-making, requiring consent of the "greater part" of the freemen. A "greater part" necessarily entails at least a "majority" of votes. It is of interest to note that while Penn was the sole, purely theoretical, "confirmer" for his *Charter and Frame of Government* of 1683, he mandated that no fewer than six-sevenths of "freemen" would need to agree on any subsequent amendments for them to be ratified.

Unfortunately, the surviving documents do not reveal why Penn picked the majorities of "six-sevenths" for alteration and a "two-thirds" quorum and "two-thirds" vote of consent to enact certain laws. Perhaps he wanted to protect the powerful governing rights that royalty had granted him. Or perhaps, for the case of altering laws, he wanted to enact "fundamental law" (in an ideological sense) but desired this to be of greater "fundamentality" than ordinary statutory law, which could be altered with relative ease. Well learned as he was in the Bible, and having almost certainly read the works of James Harrington, he probably believed that only God's law was genuinely "unalterable."²⁵ Thus, by settling upon the concept of a supermajority, he may well have been seeking a middle ground between ordinary earthly law and God's heavenly law, rather as though he were groping for a "higher law" that would nevertheless still be human law.²⁶

²² Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and other Organic Laws of the States, Territories, and Colonies now or heretofore forming the United States of America*, 7 vols. (Washington, D.C.: Government Printing Office, 1909), 5:3048.

²³ The impeachment provision is reminiscent of the five-sevenths majority required for acts concerning criminal indictments in medieval Venice. Sir William, William Penn's father, was impeached in 1668. *The Papers of William Penn*, ed. Richard S. and Mary Maples Dunn, 5 vols. (Philadelphia: University of Pennsylvania Press, 1981-87), 2:31.

²⁴ *Ibid.*, 2:65 (William Blathwayt's draft of the Charter, the only extant draft version of the Pennsylvania Charter).

²⁵ "This senate, in regard that the legislator of Israel was infallible, and the laws given by God such as were not fit to be altered by men, is much different in the exercise of their power from all other senates. . . ." *The Political Works of James Harrington*, 176.

²⁶ The 1696 *Frame of Government* made significant changes in the supermajority provi-

THE SUPERMAJORITY PRINCIPLE IN THE CONTINENTAL
CONGRESS AND ARTICLES OF CONFEDERATION

The Articles of Confederation, which were agreed to by Congress on 15 November 1777 and finally ratified by Maryland (the last state so to do) on 1 March 1781, contain important provisions that require the consent of a supermajority of nine states out of the thirteen. Article IX, a very important provision, was a modified version of a similar section in the Dickinson draft of the plan; it required the consenting votes of nine states to legislate on vital matters.²⁷ Merrill Jensen has described this modification of the Dickinson plan as designed to protect the interest of the larger states.²⁸

The second draft of the Articles contained minor alterations from the first draft, the most significant of which is that the assent of nine states would be required to "appoint a Commander in Chief of the army or navy."²⁹ This provision was retained in the final version. The Articles also contained a provision (Article X) similar to those of the Pennsylvania

sions of its predecessor. The Council needed a two-thirds quorum but only a majority consent for "matters of moment" (the previous frames required a two-thirds consent). A new provision stated that elections of representatives for the Council and Assembly and "all Questions to be determined by them" would be decided by majority vote, another piece of evidence showing that the colonists were shying away from supermajorities toward simple majorities. The 1696 *Frame*, however, broadened the requirement of the two-thirds quorum in the Assembly to "all cases" (earlier frames had specified this quorum only for "matters of moment"). The 1701 *Charter of Privileges* suffered a still more dramatic reduction in the detailed provisions, including election and impeachment, which utilized the supermajority principle. Thorpe, *The Federal and State Constitutions*, 5:3074, 3075, 3078.

²⁷ Merrill Jensen et al., eds., *The Documentary History of the Ratification of the Constitution*, vols. 1-3, 8-9 & 13-16 to date (Madison: State Historical Society of Wisconsin, 1976-1990), 1:89 ("Act of Confederation of the United States of America, 15 November 1777").

Jack N. Rakove mentions that six draft proposals of the confederation were prepared in 1775 and 1776. Three are generally unknown to scholars. See Jack N. Rakove, *The Beginnings of National Politics: An Interpretive History of the Continental Congress* (Baltimore: Johns Hopkins University Press, 1979), 136-38. One known draft by Benjamin Franklin was presented to Congress on 21 July 1775 but was never formally considered. It required a two-thirds quorum for an executive council that would consist of twelve people. See Worthington Chauncey Ford, ed., *The Journals of the Continental Congress, 1774-1789*, 34 vols. (Washington: Government Printing Office, 1904-1937), 2:197 ("Franklin's Articles of Confederation," Article IX, July 21, 1775). Silas Deane, a delegate from Connecticut, prepared a second plan, which contained no mention of a supermajority. Paul H. Smith et al., eds., *Letters of Delegates to Congress, 1774-1789*, 20 vols. to date (Washington: Library of Congress, 1976-1993), 2:418-420. A third plan entitled "Proposals for a Confederation of the United Colonies" was published in the *Pennsylvania Evening Post*, 5 March 1776. This plan is strikingly similar to Deane's plan, proposing that state representation in Congress be based on population and that a two-thirds quorum be present for decisions to be valid.

²⁸ Merrill Jensen, *The Articles of Confederation: an Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781* (Madison: University of Wisconsin Press, 1940), 144. See Samuel Adams to James Warren, 30 June 1777, in Harry A. Cushing, ed., *The Writings of Samuel Adams*, 3 vols. (New York: Knickerbocker Press, 1907), 3: 380. Article IX states: "The United States in Congress assembled, shall never engage in war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties and alliances . . . nor appoint a commander in chief of the army or navy, unless nine states assent to the same." Jensen, *Documentary History*, 1:89.

²⁹ Ford, *Journals of the Continental Congress*, 5:685 (Article XIV of second draft, 20 Aug. 1776).

and Delaware constitutions of 1701 and 1776, which required that if counties neglected to choose representatives, then an assembly would only be quorate if two-thirds of its members were present.³⁰

As early as 1774, a number of thinkers were concerned that votes representing the will of a majority of states might nevertheless speak for only a minority of the people of the United States. This issue was a major concern during the debates of the Federal Convention. Spokesmen for the larger colonies insisted that representation should be apportioned on what was called, in eighteenth-century usage, an "equal basis," taking into account disparities in population and wealth. Delegates from the smaller colonies, already evincing what J.R. Pole has described as their "corporate self-consciousness," argued "that a little Colony had its All at Stake as well as a great one," and therefore deserved an equal vote in Congress.³¹

Benjamin Franklin, president of the Pennsylvania convention in 1776, proclaimed in an essay that the representatives of the state of Pennsylvania had considered the plan of confederation and rejected it. Franklin protested the equal voting of small states and large states:

2d Because it is, in the Nature of things, just and equal, that the respective States of the Confederacy should be represented in Congress, and have Votes there in proportion to their Importance, arising from their Numbers of People, and the Share and degree of Strength they afford to the United Body. And therefore the xviith Article which gives one Vote to the smallest State and no more to the largest when the Difference between them may be as 10 to 1, or greater, is unjust, and injurious to the larger States, since all of them are by other Articles obliged to Contribute in proportion to their respective abilities.³²

This controversy over representation was voiced in the debates over the Articles, with John Adams giving support to voting by proportional representation, a form of weighted voting. Adams felt that the small states' fears of combination of large states against small ones were unfounded, because he thought sectional interests would most likely prevail in any event.

The requirement of the assent of nine states for certain decisions under the Articles of Confederation—the incorporation of a supermajority—was considered a concession to the larger states, which despised the thought that a mere majority of small states, constituting a small fraction of the total population, could jointly enact unfavorable laws.³³ As with the medieval papacy, the Continental Congress embraced the super-

³⁰ Jensen, *Documentary History*, 1:92.

³¹ Notes of debate (6 Sept. 1774) kept by John Adams and James Duane in Smith, *Letters of Delegates to Congress*, 1:27–31; Pole, *Political Representation*, 344–48; quoted in Rakove, *The Beginnings of National Politics*, 140.

³² Leonard W. Labaree et al., eds., *The Papers of Benjamin Franklin*, 29 vols. to date (New Haven: Yale University Press, 1959–1993), 22:572 (Protest against the First Draft of the Articles of Confederation), quoted in Ford, *Journals of the Continental Congress*, 5:555.

³³ Jensen, *The Articles*, 144.

majority as a compromise device designed to avert schism, a schism of the states. The nine-state vote requirement was also a less disruptive alternative to decision by unanimous consent, which would effectively have given each state a veto, than weighted voting would have been.

The "Treaty of Confederation"³⁴ was more like an alliance of sovereign states than a true union. Consequently, certain provisions required a supermajority of states, rather than merely a supermajority of individual delegates, to be accepted. The delegates to the Second Continental Congress had even been chosen by the governments of the separate states.

Many of the troubles and proposed solutions in the Continental Congress resembled those of the medieval church. The medieval church councils were partly "diplomatic" assemblies, comprising quasi-independent leaders of areas very different in power, prestige, wealth, and population. Likewise, the states in the Confederation varied in these many aspects, and therefore each lobbied for a greater voice in the future administration of government, as revealed in the debates over the Articles. Hence with the Continental Congress, we come back to the old problem of weighted voting. But here weighted voting had little to do with position or prestige: the large states wanted proportional representation—weighted voting for each state based on its population.

Because the small states were victorious in their push for equal voting among states, the supermajority vote requirement of nine states, instead of unanimity, was instituted in the Articles as a concession to the large states. In adopting a written frame of government that could be described as a treaty, the Continental Congress was groping its way toward a written law that would be in some sense "fundamental." The states, in devising their revolutionary constitutions, were taking a different and ultimately far more rewarding path toward the same objective.

THE SUPERMAJORITY PRINCIPLE IN THE CONSTITUTION OF REVOLUTIONARY MASSACHUSETTS

The conflict of weighted versus equal voting was not as evident in the establishment of the state constitutions as it was in the Articles of Confederation. Not even in New England, where one might have expected disputes over how much voting weight the various towns would have in the legislatures, did the issue emerge. If early precedents for the American revolutionary states were relevant, it was those of places like Venice—autonomous, relatively small, independent city-states—rather than those of large "diplomatic" confederations. Like Venice, the states frequently used the supermajority for elections, impeachment, amendment-making

³⁴ Boorstin, *The Americans*, 413. The phrase was that of Governor Nicholas Cooke of Rhode Island.

and quorums.³⁵ For the states, the main purpose served by the supermajority was not prevention of schism or dissolution, but the establishment of popular, republican government. This aim was fully realized with the Massachusetts constitution of 1780.³⁶

This struggle to obtain a "fully developed convention" began on 4 April 1777, when the Massachusetts House of Representatives responded positively to an appeal by three-fourths of the Massachusetts towns to create a new constitution. It resolved that on the next election day the towns would be vested with the power of forming a constitution, to be approved by two-thirds of the people who were present and entitled to vote at the various separate town meetings.³⁷ It is striking that the original document required only that a majority approve, but subsequently this was crossed out and replaced with "two thirds." The amended resolution of 5 May 1777 states that a proposed constitution would be adopted

³⁵ For example, the constitutional documents of Maryland 1776 (A Declaration of Rights &c., Article XXX), South Carolina 1778 (Article XXIII) and New York 1777 (Article XXXIII) all contained provisions requiring a supermajority vote for impeachment. See Thorpe, *The Federal and State Constitutions*, 3:1689, 6:3253, 5:2635. The constitutional documents of Pennsylvania 1776 (Plan or Frame of Government for the Commonwealth or State of Pennsylvania, Section 47), Delaware 1776 (Article 30), Maryland 1776 (The Constitution, or Form of Government &c., Article LIX), Vermont 1777 (Chapter II, Section XLIV) and 1786 (Chapter II, Section XL) (calling a constitutional convention), Massachusetts 1780 (Chapter VI, Article X; Articles of Amendment, Article IX), and New Hampshire 1784 all required a supermajority for actions related to proposing amendments to the state constitutions. *Ibid.*, 5:3091–92, 1:568, 3:1701, 6:3748, 6:3760–61, 3:1911, 1913, 4:2470. The constitutions of Pennsylvania 1776 (Plan or Frame of Government for the Commonwealth or State of Pennsylvania, Sections 10, 12) and Vermont 1777 (Chapter II, Section XI, XLIV) and 1786 (Chapter II, Sections IX, XL) used the supermajority for quorums. *Ibid.*, 5:3085, 6:3743, 3748, 6:3755, 3760–61. And the 1777 and 1786 Vermont constitutions required that in order to call a constitutional convention, there must be agreement of two-thirds of the "whole number" of the Council of Censors elected. Though this is not explicitly a two-thirds quorum requirement, it is obvious that in order for two-thirds of the Council to agree, at least two-thirds of the members must convene.

The states gradually shied away from supermajority quorums. Presumably, experience had shown that a supermajority quorum created more problems than it solved, for failure to meet it prevented not only dubious actions but any official deliberation. Requiring a two-thirds vote from a quorum made up of a simple majority had much the same effect as requiring a majority vote from a two-thirds quorum; in either case at least a third of the total number of legislators had to concur before a measure could be enacted. Yet in the former case, unlike the latter, the attendance threshold for legislative debate was low enough to be met regularly. If these are indeed alternative ways of achieving the same result, the only useful purpose of the supermajority quorum was to allow a minority to prevent any action at all, as was the case in revolutionary Pennsylvania; for a discussion on quorum manipulation in Pennsylvania, see J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (New York: Octagon Books, 1971), 131, 134, 135, 165, 166.

³⁶ Julian P. Boyd et al., eds., *The Papers of Thomas Jefferson*, 28 vols. to date (Princeton: Princeton University Press, 1950–1994), 1:341, 345, 349, 352, 354, 359, 362, 364. The two-thirds veto-override provision was Jefferson's innovation, which was later adopted by the New York 1777 constitution and finally by the United States Constitution. See Thomas Jefferson, *Notes on the State of Virginia* (Boston: Lilly and Wait, 1832), 232.

³⁷ Oscar and Mary Handlin, eds., *The Popular Sources of Political Authority: Documents on the Massachusetts Constitution of 1780* (Cambridge: Belknap Press, Harvard University Press, 1966), 172.

if it were approved by at least two-thirds of free adult males: the regular property qualifications for voters were waived in this special case. This document also provided that the constitution could be amended by two-thirds of the inhabitants.³⁸

March 1778 marked the first time in American history that a constitution had been voted on in a referendum open to all adult male citizens. However, the proposed Massachusetts constitution of 1778 was rejected by a five-to-one majority. One particular provision in the repudiated document should be noted. Article XX required a vote of two-thirds of the members of the Court (the Governor and the Senate) to impeach a government official. This impeachment provision was certainly not the first of its kind, nor did it appear in the Massachusetts constitution that was finally adopted: but it definitely influenced the decision of the Federal Convention to use the supermajority for federal impeachments.³⁹

After the defeat of the 1778 constitution, arrangements were made to form another new constitution. A new constitutional convention was assembled on 1 September 1779 and worked until March of the following year before submitting the final draft to the towns. The arrangement was that town meetings would consider the constitution, and if two-thirds of the voters favored specific amendments, then the reconvened convention would incorporate the alterations and submit the amended document for popular ratification.⁴⁰

On 16 June 1780 the Convention proclaimed the people's acceptance of the constitution. It declared, as directed by the subcommittee that tallied the votes, that every article had carried by a two-thirds vote, even though in fact at least two articles had fallen somewhat short.⁴¹ The alleged two-thirds ratification by all free adult white males made this constitution, according to Daniel Boorstin, a "Higher Law in a new and more literal sense."⁴² Edmund Morgan holds that the significance of the Massachusetts constitutional convention, in addition to the establishment of popular ratification, was that it embodied the sovereignty of the whole people in the entire government, and not simply the legislature.⁴³

John Adams, the major author of the Massachusetts constitution of 1780, was strongly influenced by the works of James Harrington,⁴⁴ though his draft did not contain any of the supermajority provisions that

³⁸ Ibid., 175.

³⁹ Ibid., 86.

⁴⁰ Proceedings of the Convention, 2 March 1780, in Handlin, *Popular Sources*, 432.

⁴¹ Allan Nevins, *The American States During and After the Revolution, 1775-1789* (New York: The Macmillan Company, 1927), 181. For a full analysis of the method of ratification, tallying votes, and adoption, see Samuel Eliot Morison, "The Struggle over the Adoption of the Constitution of Massachusetts, 1780," *Proceedings of the Massachusetts Historical Society* 50 (1916-17): 353-412.

⁴² Boorstin, *The Americans*, 410.

⁴³ Edmund Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: W.W. Norton & Co., 1988), 261.

⁴⁴ In Adams's *Defence of the Constitutions of Government of the United States of America* (1778), Adams included a chapter on Harrington and another on Harrington's contemporary Algernon Sidney.

had formed such an important part of Harrington's scheme for ideal laws. Other men in the convention were also apparently familiar with the works of Harrington. The opening words of the Massachusetts constitution describe the state as a "Commonwealth," suggesting kinship with Harrington's "Oceana." Surprisingly, the convention even considered adoption of Harrington's proper name for the state: "on a motion made and seconded, that the word 'Massachusetts' be expunged, and that the word 'Oceana' be substituted, the same was put and passed in the negative."⁴⁵ Above all, the Massachusetts constitution of 1780 enacted Harrington's ideal: a government "of laws, and not of men."⁴⁶

For purposes of this essay, the most significant provisions of the Massachusetts constitution were those that instituted the supermajority for adoption and amendment. William Penn's constitution provided precedent for the latter, but the requirement of a supermajority simply to adopt a constitution was wholly novel. The supermajority required for adoption by the ratifying town conventions established a connection between overwhelming approval by the people and "higher law," from which it was but a short step to holding that a written constitution so ratified was "higher law" *because* it had been adopted by a supermajority of people.

DEBATE OVER THE SUPERMAJORITY PRINCIPLE IN THE CONSTITUTIONAL CONVENTION AND RATIFICATION STRUGGLE

The Virginia and New Jersey Plans

The struggle between the large and small states continued through the debates in the Federal Constitutional Convention and the ratification process. When the Constitutional Convention met in May 1787, Edmund Randolph proposed a plan of government called the Virginia plan, one often dubbed the "large state plan." It called for the establishment of a national government consisting of an executive branch, a judiciary, and a bicameral legislature. This plan favored the large states, because greater emphasis was added to the "national" aspects of the would-be republic, and its power to enforce its will over states would be augmented. The Virginia plan provided that state voting rights in the national legislature

⁴⁵ *Journal of the Convention for framing a Constitution of Government for the State of Massachusetts Bay, from . . . September 1, 1779, to . . . June 16, 1780* (Boston: Published by order of the Legislature, 1832), 43, quoted in *The Works of John Adams, Second President of the United States: With A Life of the Author, Notes and Illustrations, by his grandson, Charles Francis Adams*, 10 vols. (Boston: Charles C. Little and James Brown, 1856), 4:23n.

⁴⁶ Adams had asserted that the "very definition of republic is 'empire of laws, and not of men,'" directly quoting Harrington. *The Works of John Adams*, 4:194. See "Prerogative of Popular Government" in Pocock, *Political Works*, 401. Further proof of Harrington's influence on John Adams is given in Smith, Harrington, 187 and Pole, *Political Representation*, 12. The Harringtonian phrase, "a government of laws and not of men," was imbedded in American speech by the men who framed the Massachusetts State Constitution of 1780. Handlin, *The Popular Sources of Political Authority*, 448.

would be proportioned to the "Quotas of contribution" or to the number of free inhabitants, "as the one or the other rule may seem best in different cases."⁴⁷ Adoption of the proposal would have practically eliminated the "supermajority" features of the Articles of Confederation, except possibly for admission of new states which required the consent of a number of voices in the national legislature "less than the whole." This type of proportional voting is a form of weighted voting, each state accorded a different "weight," thus diminishing the practicability of using the supermajority device. The large states (Massachusetts, Pennsylvania, Virginia, North Carolina, South Carolina, and Georgia—the "landed" states) voted for representation by population, because they knew they would have greater voice in a population-based plan.

In contrast, the Paterson or New Jersey plan, which was drawn up by Attorney General William Paterson of New Jersey, furthered the interests of the small states. It sought merely to revise the Articles of Confederation (the stated original purpose of the convention) so "as to render the federal Constitution, adequate to the exigenc[i]es of Government, and the preservation of the Union."⁴⁸ This proposal would retain the existing unicameral congress and the rule of equal voting by states, but it would establish executive and judicial branches, bind state courts to annul state laws contrary to the revised Articles of Union, and vest Congress with broad but enumerated powers to collect import duties and other taxes and to regulate interstate and foreign commerce. Most significantly, the third proposition of the draft gives Congress the power to make requisitions, provided that none of the "powers hereby vested in the United States in Congress, shall be exercised without the consent of at least [blank] States, and in that proportion if the number of Confederated States should hereafter be increased or diminished."⁴⁹ The phrase "at least [blank] States" surely points to a supermajority of states.

The "small state" plan kept the essential features of the Articles of Confederation, including voting by state and including the requirement of a supermajority for certain issues. This partially explains why Alexander Hamilton (dissenting from the rest of the delegation of New York) and a few others regarded the supermajority with a suspicious eye, as would be evident in the debates over the U.S. Constitution. Fully aware of the numerous political stalemates, which were often blamed on the small states, under the Articles of Confederation, Hamilton was not to be easily persuaded into accepting equal voting by states and its accompanying "concession"—decision by supermajority vote, instead of unanimity. The small to middling states (Connecticut, New York, New Jersey, Delaware, Maryland, New Hampshire), cognizant of the large states' insistence on voting by population, most desired the supermajority because they

⁴⁷ Max Farrand, ed., *The Records of the Federal Convention of 1787*, 3 vols. (New Haven: Yale University Press, 1911), 1:20 (29 June 1787).

⁴⁸ *Ibid.*, 1:242 (15 June 1787).

⁴⁹ *Ibid.*, 1:243–44 (15 June 1787).

viewed it as a protection against a numerical majority that would be drawn mainly from the larger states.

Both plans were returned to the Committee of the Whole, where, after five days of debates, Paterson's was rejected and Randolph's revised resolutions were adopted for consideration in the formal convention. For nearly a month, little progress was made in the debates, primarily because of the controversial issue of proportional versus equal representation in Congress. Two of the delegates of the "small" states, John Lansing, Jr. and Robert Yates of New York, walked out. Finally, on 16 July, the "Great Compromise" achieved equal state representation in the Senate and population-based representation in the House.

The debate over large versus small state voting, however, was not as simple as it seemed. During the Constitutional Convention, some small states considered themselves "large states" because of their future expectation of rapid population growth. Many northerners had insisted on equality in the Senate, because they feared that the South inevitably would come to have a majority of the U.S. population. Georgia and the Carolinas (as Gunning Bedford noted) should by present population have been "small" states, but they identified themselves as "large" states at the Convention. Gouverneur Morris of Pennsylvania admonished that "N.C. [,] S.C. and Georgia only will in a little time have a majority of people in America." According to Staughton Lynd, this would explain why the southern states ultimately relinquished their original demand (as written in the Pinckney plan) that commercial laws be passed by a two-thirds congressional majority.⁵⁰

The Debates among the Delegates over the Supermajority

Detailed analysis of the debates reveals astonishingly intense sentiments for and against the use of the supermajority in the provisions of presidential impeachment, congressional expulsion, veto override, choosing of a president by the House of Representatives, treaty-ratifying, amendment-making, ratification of the Constitution by the individual states, and numerous other rejected proposals. Space permits only a brief synopsis of the major arguments of the leading proponents and opponents of the principle.

James Madison was one of the most ardent advocates of an "active" use of the device of the supermajority. In his ideal constitution, either house would be able to propose all types of bills and two-thirds of the members would constitute a quorum to pass those bills. Two-thirds of the senators would be necessary to ratify all treaties, except for treaties

⁵⁰ Staughton Lynd, "The Abolitionist Critique of the United States Constitution," in *The Antislavery Vanguard: New Essays on the Abolitionists*, ed. Martin Duberman (Princeton: Princeton University Press, 1965), 230-23. For discussion on similar proposals by southern states during the ratification debates, see n. 69 below. The Charles Pinckney plan may be found in Jensen, *Documentary History*, 1:247.

of alliance which the president could conclude by himself, and treaties of peace which could be ratified by a simple majority. A two-thirds majority in the Senate could conclude treaties of peace without the president's approval.⁵¹ Madison also supported the idea that a two-thirds vote of both houses would be able to override a veto of one department, and a three-fourths vote would be able to override the vetoes of both branches (the executive and judiciary).

It is particularly interesting that Madison's plan for a supermajority quorum met with such fierce opposition from the Pennsylvania delegates, Gouverneur Morris and James Wilson, that it was finally rejected for most provisions. Morris and Wilson knew from experience that a supermajority quorum could create more problems than it solved, for failure to meet it prevented not only dubious actions, but any official deliberation at all.⁵²

James Madison was probably influenced by the works of James Harrington. He was certainly one of the most prepared and best-read of all the delegates of the Federal Convention, and the arguments he brought forth during the debates show a familiarity with political experience and thought. He even showed his familiarity with Harrington's works by citing him in one section of his notes.⁵³ This may partially explain Madison's affinity with the supermajority.

Surprisingly, Madison's collaborator for the famous political columns of the *Federalist Papers*, Alexander Hamilton, generally opposed the use of the supermajority. In *Federalist* 22 Hamilton criticized the equal vote of small states and large states under the Articles of Confederation and argued that even requiring a vote of nine states out of thirteen did not guarantee majority rule. He asserted that it was possible for nine states to constitute a minority of the population. (He listed New Hampshire, Rhode Island, New Jersey, Delaware, Georgia, South Carolina, Maryland, New York and Connecticut.) Hamilton went on to criticize the supermajority idea as undemocratic and dangerous, and observed that those who favored heavy majorities were motivated by a yearning for security:

... what at first sight may seem a remedy, is in reality a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number. Congress from the non-attendance of a few States have been frequently in the situation of a Polish Diet, where a single veto has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode Island, has several times been able to oppose an [e]ntire bar to its operations. This is one of those refinements which in practice has an effect, the reverse of what is

⁵¹ Jensen, *Documentary History*, 1:207, 208.

⁵² See n. 35 above on the state constitutions' departure from using supermajority quorums.

⁵³ William T. Hutchinson et al., eds., *The Papers of James Madison*, 17 vols. to date (Chicago: University of Chicago Press; Charlottesville: University Press of Virginia, 1962-1991), 10:276.

expected from it in theory. The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to *security*. But its real operation is to embarrass the administration, to destroy the energy of government, and to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junto, to the regular deliberations and decisions of a respectable majority.⁵⁴

Hamilton went on to criticize the use of the supermajority in the new Constitution:

When the concurrence of a large number is required by the Constitution to the doing of any national act, we are apt to rest satisfied that all is safe, because nothing improper will be likely *to be done*; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doing what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand in particular periods.⁵⁵

Hamilton was especially concerned about the treaty clause, pointing out that it might make it very difficult for the U.S. to extricate itself from a war if an ally moved to prevent it. It would be relatively easy, he argued, for a hypothetical ally to "tie up the hands of government from making peace, where two thirds of all the votes were requisite to that object, than where a simple majority would suffice."⁵⁶

It has long been debated whether Hamilton or Madison wrote *Federalist* 58. The final paragraph of this essay is sufficient to lay this issue to rest:

It has been said that more than a majority ought to have been required for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule; the power would be transferred to the minority. Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences. Lastly it would facilitate and foster the baneful practice of secessions; a practice which has shewn itself even in states where a majority only is required; a practice subversive of all the principles of order and regular government; a practice which leads more directly to public convulsion, and the ruin of popular governments, than any other which has yet been displayed among us.⁵⁷

This argument is practically identical to the argument that Hamilton sets forth in *Federalist* 22. On the other hand, Madison championed the use

⁵⁴ Jacob E. Cooke, ed., *The Federalist* (Middletown, Connecticut: Wesleyan University Press, 1961), 139–40 (no. 22).

⁵⁵ *Ibid.*, 140 (no. 22).

⁵⁶ *Ibid.*, 142 (no. 22).

⁵⁷ *Ibid.*, 396 (no. 58).

of the supermajority in numerous debates over constitutional provisions, notably his defense of the amendment process in *Federalist* 43.⁵⁸ The conclusion must be that it was Hamilton, not Madison, who wrote *Federalist* 58.

Hamilton's general point that decision by a supermajority amounts to minority rule is dubious, as he seems to have gradually realized. Does the ability of a minority to prevent action actually constitute a *transfer* of power to the minority? A minority may have the power to negative laws but it cannot, by itself, enact them. Hamilton also appears to be self-contradictory, given his earlier argument that the president should have the power of absolute veto of all laws.⁵⁹ He was willing to give one man an absolute negative, whereas he was reluctant to do the same with a minority of the members of Congress.

Hamilton's objection to the principle of the supermajority gradually weakened, as is evident in an analysis of *Federalist* 22, 58 and 75. In *Federalist* 22 he has nothing good to say about the supermajority; it is "poison." In *Federalist* 58 he gives much the same argument, but he adds that the supermajority does have certain "advantages": as an additional shield to particular interests and as a brake on hasty and partial action. Retreating further from his rigid stance opposing the supermajority, Hamilton in *Federalist* 75 praises the treaty clause, which requires the vote of two-thirds of the senators present, as "one of the best digested and most unexceptionable parts of the plan." He also refers to the "advantages" of the two-thirds majority, echoing *Federalist* 58. Now, however, he seems to consider that the advantages outweigh the disadvantages. He does restate his general point on minority rule, but in a rather perfunctory manner, and he now says this tendency is "indirect."⁶⁰

Even more interestingly, Hamilton supported decision by supermajority in the special case of amendment-making, one that was used in the final draft of the Constitution.⁶¹ Hamilton's mistrust of the frequent use of the supermajority was confirmed by the Pennsylvania delegates, Gouverneur Morris and James Wilson. As noted above, these delegates had unequaled experience with heavy majorities embodied in the laws, and were opposed to the supermajority because of the adverse effects of the two-thirds quorum requirement. In the Pennsylvania legislature, it had given discontented assemblymen an incentive to avoid assembly meetings in order to hinder deliberations they opposed. Morris and Wilson both argued against use of a supermajority for expulsion of a congressman, for treaty ratification, and for overriding a veto.⁶² It is therefore remarkable that both Morris and

⁵⁸ The authorship of *Federalist* 58 has been disputed for a century and a half and most people have incorrectly attributed the work to James Madison. See Cooke, 642, on *Federalist* 58, and *The Papers of James Madison*, 10:261.

⁵⁹ Farrand, *Records*, 1:103 (4 June 1787).

⁶⁰ Cooke, *The Federalist*, 507 (no. 75).

⁶¹ Harold C. Syrett et al., eds., *The Papers of Alexander Hamilton*, 27 vols. (New York: Columbia University Press, 1961–1981), 4:245.

⁶² It is worth noting that those who opposed use of a supermajority for overriding presidential vetoes had to be prepared to sacrifice the presidential veto as an effective consti-

Wilson joined Hamilton to support decision by supermajority in the special case of amendment-making. They did this even though they knew that all efforts to amend the Pennsylvania constitution of 1776 had failed due to the six-sevenths majority requirement, though a majority of Pennsylvanians seemed to favor amendment.⁶³

James Madison fiercely supported the Constitution in the Virginia ratifying convention, where he had to face people who argued against this special amendment provision in Article V. Patrick Henry, for example, argued that the proportion of "three-fourths" was too great, because possession of the necessary intelligence and integrity in that concentration was "approaching to miraculous." He believed it very feasible that the "most unworthy characters may get into power, and prevent the introduction of amendments," and that the proportion of "three fourths" to ratify amendments would allow a "trifling minority [i.e., a bare majority of four small states] to reject the most salutary amendments" meant for the benefit of the (simple) majority.⁶⁴ In favor of simple majority rule for amendments, Henry read the third clause of the Virginia Bill of Rights and claimed that a supermajority was antithetical to the democratic spirit.⁶⁵

James Madison directed his energies against Patrick Henry's earlier fulminations about the danger of minority dissent with his "tyranny of the majority" argument (made famous in the *Federalist Papers*):

Since the general civilization of mankind, I believe there are more instances of the abridgment of the freedom of the people, by gradual and silent encroachments of those in power, than by violent and sudden usurpations: but, on a candid examination of history, we shall find that turbulence, violence, and abuse of power, by the majority trampling on the rights of the minority have produced factions and commotions, which, in republics, have more frequently than any other cause, produced despotism.⁶⁶

tutional check. If a presidential veto could be overridden by the same bare majority that had initially passed a bill, such a veto could delay but seldom change the outcome. Perhaps for this reason Wilson had second thoughts about the matter, and later in 1790 supported the requirement of a two-thirds majority of both houses as "reasonable." *The Works of James Wilson*, ed. Robert Green McCloskey, 2 vols. (Cambridge: Belknap Press of Harvard University Press, 1967), 1:323 ("Comparison of the Constitution of the United States, With that of Great Britain").

See Farrand, *Records*; expulsion, 1:98 (4 June 1787); treaty ratification, 2:538 (7 Sept. 1787); veto-override, 1:100 (4 June 1787), 2:585 (12 Sept. 1787).

⁶³ *Ibid.*, amendment, 2:630 (15 Sept. 1787), adoption, 2:477 (31 Aug. 1787), 2:42-44 (18 July 1787).

In the Pennsylvania ratification debates, Wilson mentioned the possibility that a minority in the legislature, by absenting itself, might break up the house and therefore prevent the execution of the will of the majority. See Jensen, *Documentary History*, 2:403 (The Pennsylvania Convention, 28 November 1787, Convention Debates), and Jonathan Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, 5 vols. (Washington: Jonathan Elliot, 1836-45), 2:413.

⁶⁴ Elliot, *Debates*, 3:76 (5 June 1788).

⁶⁵ *Ibid.*, 3:77 (5 June 1788).

⁶⁶ *Ibid.*, 3:109 (16 June 1788).

Madison remarked that a requisite *unanimity*, and not a supermajority for decision-making, allows the "most trifling minority" to subvert the will of the majority. He cited the state of Rhode Island, whose refractory dissent prevented reforms and essential taxes under the "pernicious" Articles of Confederation. He observed how easy it would be for foreign influence to exert itself over a small minority, perilous if certain decisions required *unanimous* consent.⁶⁷ But the supermajority requirement for most issues, to Madison, was essential to protecting minority rights.

CONCLUSION: THE SUPERMAJORITY IN ADOPTION AND AMENDMENT-MAKING

Along with the cries for liberty and freedom, many American revolutionaries demanded security. It seems clear, as Hamilton indicated in *Federalist* 22, that those who suggested decision by supermajority were generally motivated by a yearning for security. It is perfectly clear that all of the proposed amendments relating to the supermajority, particularly the measure relating to Navigation Acts which was supported by Edmund Randolph and George Mason, were designed to prevent some evil feared to be imminent. Elbridge Gerry, one of the staunchest supporters of decision by supermajority, ultimately refused to sign his name to the U.S. Constitution and to be thus indelibly associated with the document.⁶⁸ One must not forget, however, that all the discussions and debates over the appropriate voting rules were carried out in the context of independence from Britain, the Revolutionary War, and the urgent need to create a stable national government that would avert "mobocracy." Use of the supermajority principle in the Constitution allayed some of these fears, and helped the Founding Fathers to risk their all under a "more perfect union."

The supermajority principle was restricted to decisions on matters related to the administering of internal government, such as impeachment, overriding of vetoes, and expulsion. In these provisions the supermajority was seen as a protective or defensive device, which would make intemperate action difficult and thereby would protect established interests. The small states in the Federal Convention and ratification struggle were opposed to the principle of voting by population, because they feared that a few heavily populated states would be able to pass potentially harmful measures. These small states wanted the supermajority, as a barrier to the possibility of the numerical majority developing into a tyranny in which they would have little voice. In the debates over the Articles of Confed-

⁶⁷ *Ibid.*, 3:556.

⁶⁸ Gerry favored the use of the supermajority in the quorum of the House for the election of the president, in Farrand, *Records*, 2:403 (7 Sept. 1787); veto-override, 1:99 (4 June 1787), 2:298 (15 Aug. 1787), 2:254 (10 Aug. 1787); treaty ratification, 2:548 (8 Sept. 1787); and amendment-making, 2:630 (15 Sept. 1787). While Gerry saw the device of the supermajority as a way of preventing minority rule, Morris and Wilson saw exactly the opposite: that use of the supermajority would increase the danger of minority rule. While Gerry was concerned over rule by a representation of a minority of the people, Morris and Wilson were worried about rule by a minority of all the people's representatives. See *ibid.*, 2:548 (8 Sept. 1787).

eration (under which voting in the Continental Congress was done by individual states), the large states also wanted the supermajority, because they were apprehensive that a simple majority of small states, constituting a small percentage of the total population, might acquire too much control over legislation. In the same manner, the well-known proposed amendment requiring a supermajority to pass Navigation Acts was created to protect southern slave-holding interests. This was never adopted into the Constitution, but was supported by Richard Henry Lee, Charles Pinckney, George Mason, Luther Martin, Edmund Randolph, and many other influential figures.⁶⁹

The same issue threatened to leave the Federal Convention of 1787 in a stalemate, until it was resolved with a more far-reaching compromise. The main conflicts under the Articles of Confederation and in the Federal Constitutional Convention pitted large states against small ones. The supermajority device offered something to both sides. It calmed the worries of the large states about "minority rule," that equal voting would allow small states with a minority of the population to wield control, and also relieved the fears of the small states about being bullied by large states. The "Great Compromise" was welcomed by both sides as a brake. The small states wanted the supermajority for the House of Representatives because to them, voting by population was an unfair form of "weighted voting." The large states wanted the supermajority in the Senate where each state was accorded equal weight. The supermajority acted as a check on both popular majorities (thus preventing what Madison would call a "tyranny of the majority") in the House of Representatives, and also domination by the small states in the Senate (as had happened in the Continental Congress under the Articles of Confederation). The supermajority compromise was indispensable for ending the stalemate.⁷⁰

⁶⁹ The supermajority requirement was advocated but rejected in numerous other instances. During the ratification debates, this requirement was proposed for allowing standing armies in times of peace, raising armies, and congressional enactment of commercial laws. See Jensen, *Documentary History*, 1:337, 339, 546. The delegates to the Federal Convention also considered and rejected uses of the supermajority with regard to the appointment of judges, admission of new states to the Union, repeal of laws, and vetoing state laws. See Farrand, *Records*, 2:173 (Committee of Detail IX); 2:299 (15 Aug. 1787); 2:390 (23 Aug. 1787).

The supermajority was most notably debated in proposals for Navigation Acts, which would regulate international trade and threaten southern slave-holding interests. See Paul Finkelman, "Slavery and the Constitutional Convention: Making a Covenant with Death," in *Beyond Confederation: Origins of the Constitution and American National Identity*, ed. Richard Beeman, Stephen Botein and Edward C. Carter II (Chapel Hill: University of North Carolina Press, 1987), 188–225; and Staughton Lynd, "The Abolitionist-Critique," 218–21.

The states proposed other amendments that included a supermajority requirement. To name a few, assent by a supermajority of the legislature was proposed for: federal disbursement of loans; declaration of war; alteration of the Constitution's amendment procedure; laying of direct taxes; treaties that affected contracts concerning territorial rights or claims; acts that affected fishing in the seas or the navigation of rivers; declaration that a state is in a state of rebellion; and introduction of foreign troops. See Elliot, *Debates*, 1:364, 372, 373; 2:512; 4:241, 243.

⁷⁰ It may be speculated that the large states were more concerned with the supermajority than the small states were, and got more out of the compromise. "Tyranny of the majority" was mainly a theoretical possibility, but historical examples of "minority rule" were common-

The primary motivation for advocating the supermajority in the above-mentioned cases was fear that something terrible might happen. This was also the main motivation behind Pope Alexander III's decree of its early use: "In order to avoid discord in the election of the Supreme Pontiff. . . ." One can see similar reasoning behind Article IX of the Articles of Confederation, which states, "The united states in congress assembled shall never engage in war, nor grant letters of marque and reprisal in time of peace. . . ." Whether to prevent another schism or a dissolution of the union, the supermajority was seen as a prophylactic. Many measures of this kind during the Federal Constitutional Convention were debated; some passed, but most did not. Madison probably recognized this particular function of the supermajority and used it to gain support of the Federal Constitution from small states. To reduce their fears, he supported the supermajority on many of these points. In these matters, the supermajority was used as a compromise device—to permit various strong actions, but only with much difficulty.

The supermajority was also used by the Framers as a way to "blend" or accommodate the opposing notions of separation of powers on the one hand, and checks and balances on the other. While the separation of powers tends to delegate a specific, limited set of functions to a designated branch of government which is granted sole control over that particular operation, the concept of checks and balances is based upon the idea that special actions should be determined by more than one branch. It seems that the supermajority provisions directing the processes of internal government (overriding of vetoes, treaty ratification, etc.) were designed to allow certain special acts to be handled by more than one branch of the government while nevertheless being ultimately controlled by one particular branch (usually the legislature). This interesting function of the supermajority can also be seen as a compromise of sorts.

But the supermajority idea transcended its earliest roles as a defense mechanism or a compromise device. In the key issues of adoption and amendment of the Constitution, the motive of the Framers was not primarily to protect states or other special interests. Debate over the ratification clause was not designed to assure that this provision would prevent something dreadful, as was so often the case with discussions of supermajorities, or even to accommodate rival interests. Instead, it was declared that adoption by supermajority would do something wonderfully positive: it would demonstrate popular consent to the Constitution.

The motive was to make permanently credible the claim that it was "We the People of the United States" who had created the Constitution as fundamental law. In this context the supermajority could be seen as a very special kind of representative body: a supermajority of qualified

place. Furthermore, it was easier to justify use of the supermajority in the Senate than in the House of Representatives, because only in the former do the states vote as equals. At any rate, it is noteworthy that the Constitution includes more instances, and more important uses, of the supermajority for the Senate than for the House of Representatives.

electors effectively “represented” the entire people in their decision about fundamental law. This was plausible and satisfying in 1787, and remains so today. Only the people could create written fundamental law and only they could change it, fulfilling their role, as Robert Palmer calls it, as the “constituent power.”⁷¹ Even those who were in general philosophically opposed to the use of the supermajority—notably Hamilton, Morris and Wilson—strongly supported it in the special cases of amendment-making and ratification. There was much debate about various less important uses for the supermajority, and many of these were finally rejected. But there was little debate about use of the supermajority for the initial adoption and amendment of the Constitution. These features won overwhelming support, and they remain as perhaps the most brilliantly successful provisions in the Constitution of the United States.

Higher law required a higher threshold of consent, the consent of “the people.” By instituting this new use of the principle of the supermajority, the Founding Fathers had stamped onto their Constitution the finishing touch that would, for centuries, keep that document unfinished and alive.

⁷¹ Palmer, *The Age*, 1, chapter 8.