

# Social Science Information

<http://ssi.sagepub.com>

---

## **The arbitrariness of supermajority rules**

Melissa Schwartzberg

*Social Science Information* 2010; 49; 61

DOI: 10.1177/0539018409354474

The online version of this article can be found at:  
<http://ssi.sagepub.com/cgi/content/abstract/49/1/61>

---

Published by:



<http://www.sagepublications.com>

On behalf of:

Maison des Sciences de l'Homme

**Additional services and information for *Social Science Information* can be found at:**

**Email Alerts:** <http://ssi.sagepub.com/cgi/alerts>

**Subscriptions:** <http://ssi.sagepub.com/subscriptions>

**Reprints:** <http://www.sagepub.com/journalsReprints.nav>

**Permissions:** <http://www.sagepub.co.uk/journalsPermissions.nav>

**Citations** <http://ssi.sagepub.com/cgi/content/refs/49/1/61>

Melissa Schwartzberg

## The arbitrariness of supermajority rules

**Abstract.** *There may be good general grounds for the adoption of supermajoritarian thresholds, but no such general arguments can justify the selection of a specific threshold. Although the benefits of supermajority rules, especially in the context of constitutional-amendment procedures, may outweigh the costs of their ex ante indeterminacy, the technically unjustifiable nature of specific thresholds means that those who are disadvantaged under such rules can be given no rational or reasonable explanation for their defeat other than the de facto power of coordination on a threshold. Political theory has a potential remedy in cases in which good reasons are not available, and in which bad reasons (such as the desire to ensure a veto for a powerful minority) might be brought to bear: randomization. If the benefits of supermajority rules are worth the costs of arbitrariness, we may wish to randomize the choice of threshold, though the move to do so may have its own negative consequences.*

**Key words.** *Amendment – Indeterminacy – Supermajority rules*

**Résumé.** *Il y a de bonnes raisons en faveur de l'adoption des règles de majorité qualifiée, mais aucun argument général ne peut justifier le choix d'un seuil de majorité précis. Les bénéfices attendus des règles de majorité qualifiée sont sans doute supérieurs, notamment pour les procédures de révision constitutionnelles, aux inconvénients de leur indétermination ex ante. Toutefois le caractère injustifiable, sur le plan technique, d'un seuil spécifique de majorité qualifiée signifie, pour ceux qui ensuite s'en trouvent désavantagés, qu'il n'y a aucune explication rationnelle ou raisonnable de leur défaite, si ce n'est le fait que le seuil incriminé a, de facto, bénéficié de la convergence des attentes des constituants. La théorie politique a une solution pour les situations où aucune bonne raison n'est disponible et où les mauvaises raisons (telles que le désir de garantir un droit de veto à une minorité puissante) sont supportables: le tirage au sort. Si les bienfaits des règles de majorité qualifiée sont supérieurs aux coûts du caractère arbitraire de leur fixation, nous pouvons souhaiter la randomisation du choix de leur seuil, même si cette méthode a aussi des conséquences négatives.*

**Mots-clés.** *Indétermination – Réforme constitutionnelle – Règle de majorité qualifiée – Tirage au sort*

There are two key arguments on behalf of the use of supermajority rules for constitutional amendment. The first is that institutional changes ought to receive widespread support before adoption. The second and related argument is that the difficulty of securing such support will induce institutional stability. Such stability is ostensibly attractive because of the 'security of expectations' such conservatism affords and because, once the 'rules of the game' are entrenched, constitutionalism can enable the conditions for ordinary politics (Holmes, 1995, ch. 5). These arguments are compelling – so much so that the vast majority of constitutions have a supermajoritarian threshold for amendment.<sup>1</sup> It is even held that constitutionalism *depends* upon supermajorities for the purpose highlighted in the latter argument: only through supermajorities, it is sometimes argued, can constitutions do the work of securing the hierarchy of norms by which political life can be regulated. My aim here is not to critique these arguments. Instead, I wish to highlight a feature of supermajority rule for constitutional change that, if obvious, is not usually noted: the impossibility of justifying the selection of a particular threshold.

Supermajority thresholds governing constitutional amendment vary. The passage of a constitutional amendment most frequently requires as an initial step<sup>2</sup> a two-thirds vote of the legislative body (found in many countries, including Albania, Argentina, Brazil, Finland, Germany, India, Japan and Namibia); but thresholds vary, from three-fifths in some countries (such as France and Greece) to three-quarters (as in Bulgaria). In many constitutions (e.g. Lithuania and South Africa) supermajority thresholds vary depending upon which provision is subject to amendment, and in many countries the thresholds for proposal, passage and/or ratification differ. For instance, in countries such as Finland, the relative urgency of the amendment can expedite the process with a five-sixths vote, and in Canada, a unanimous vote of the provinces is required to amend the amendment procedure itself.

These thresholds typically emerge in constituent assemblies with little deliberation. They may reflect strategic efforts at granting or denying a particular political faction veto power, but more often the choice appears to have been made essentially at random, guided, perhaps, by reference to other salient constitutional thresholds. The dominance of the two-thirds threshold may reflect the influence of the American Constitution, for instance. Yet not only is the selection of the threshold lacking justification, particular supermajoritarian thresholds, by their very nature, cannot be supported by reasons. That is, while supermajority rules *in general* may be defended, specific supermajoritarian thresholds cannot. Whereas general reasons supporting majority rule have determinate threshold implications (50% plus one), as do reasons supporting unanimity rule (100%), defenses

of supermajority rule do not generate a recommendation for a specific decision rule. Although the fact that a constituent assembly was able to coordinate on a threshold does give existing thresholds some presumptive validity, the absence of reasons – and, further, the inability to provide such justifications for one threshold rather than another – renders the voting rule vulnerable to challenge on normative grounds. In cases in which a substantial majority supports a constitutional amendment but is stymied by the placement of the veto, its arbitrariness may have special bite.

The indeterminacy of the supermajority threshold has a structure akin to that of the ancient Stoic problem of the sorites paradox, or the ‘paradox of the heap’. This issue, familiar to philosophers as a prototypical example of vagueness, is the problem of ascertaining when, for instance, a set of grains becomes a heap: if 1, 2, 10, or 11 grains do not make a heap, where does a heap begin? Alternatively, if 10,000 grains surely constitute a heap, do 9999? Or 9998? The implication of the sorites paradox for supermajority rules is that the work we would like our supermajority thresholds to do – again, to induce institutional stability without rigidity or to ensure broad-based consensus without necessitating complete agreement – cannot be accomplished by a threshold of 52% or 53%, or 99% or 98%, but by some midpoint which is intrinsically indeterminate and contentious.

Though the work in philosophy on the sorites is voluminous, political theorists have not typically turned to the paradox in writing about collective choice. Richard Tuck has engaged in an important recent corrective to this lacuna, using the sorites to shed light on the problem of negligible contributions and collective action. Drawing on Tuck’s account of Hobbes’s solution to the sorites, we can examine the possibility of a coordinative approach to the matter of supermajoritarian thresholds. On Tuck’s reading of Hobbes, the sorites problem was the type of fundamental disagreement that could be resolved only by the dictate of a sovereign: there could be ‘no natural answer to the sorites – there simply has to be an abrupt commitment on our part to a particular number (or its equivalent), and we have to recognize that questioning that commitment opens up a slippery slope on which we will find no stopping place’ (Tuck, 2008: 73).

To take up this logic, following Russell Hardin, we might believe that the Hobbesian response in the constitutional context is simply to coordinate on a focal point and stick with it (Hardin, 1999: 11–18; see also Hardin, 1991).<sup>3</sup> Because of the costs associated with establishing a new convention, if the *existing* threshold serves its purpose – even if it is hypothetically possible that we could improve upon it – we should comply with it. Yet the problem for a democracy is that the capacity of a constitution to serve a coordinative purpose first requires the specification of a threshold by which we can *identify* the

convention on which we can coordinate. Further, the presence of multiple focal points may make such initial coordination difficult. Although, in some cases, a particular threshold may be highly salient (those governing a previous constitutional-amendment procedure, for instance), there may be multiple salient thresholds. For instance, if the United States were to choose a new amendment procedure, two thresholds would be highly salient: the two-thirds clause governing the proposal of amendments and the three-quarters threshold for ratification. If the deficiencies of Article V were part of what gave rise to the desire for a new constitution, as was the case with the unanimity clause of the Articles of Confederation, these preexisting thresholds may be off the table, thus eliminating potential focal points and introducing other, probably lower, possible thresholds. Finally, the fact that such conventions may generate inequalities may mean that those disadvantaged under a particular coordinative scheme may wish to re-coordinate, and thus the coordinative outcome may be unstable. In other words, the benefits of adhering to the *status quo* in cases in which the distributive implications are relatively minor (such as driving on the left or right side of the street) may be outweighed by the costs of persistent inequities in more important institutional contexts (such as amendment procedures).

Given the indeterminacy of arguments on behalf of supermajority rules in general, in the constitutional context, the choice of such rules must be made either arbitrarily or through the process of strategic interaction. Thus, if constitution framers wish to fix a threshold for amendment, either they must decide to choose in essence at random or they must bargain. One might argue, on the former possibility, that the decision is not wholly arbitrary or randomized. Again, although there may be multiple focal points, there is still a need to choose among them. Thus randomization may be the solution if the problem is one of choosing among multiple optima, or of choosing given incomplete preference ordering, if the aim is to select any supermajority rule within some range.<sup>4</sup>

If the decision is not to be made at random, it must emerge from strategic interaction. Although bargains are endemic to the constitution-making process, the consequences associated with bargaining over the threshold for constitutional change are far reaching. If we assume that the outcome of the bargain will reflect power asymmetries in the constitutional convention (Knight, 1992), this implies that the relatively powerful will be able not only to shape the substantive content of the constitution but also – especially but not exclusively in the context of supermajority rules – to control the conditions under which the bargain can be renegotiated through the amendment process.

While neither arbitrariness nor strategy is intrinsically problematic as a basis for constitutional choice, the intersection between: (1) arbitrariness or strategic behavior, (2) the importance of the decision, including from a distributive perspective, and (3) the fact that the potential remedy for either unforeseen or unjust outcomes is itself created by (1) leads to concerns about the use of supermajority rules. Although the benefits of supermajoritarian amendment procedures may outweigh the consequences associated with their *ex ante* indeterminacy, the technically unjustifiable nature of specific thresholds means that those who are disadvantaged by supermajoritarian constitutional-amendment rules can be given no rational or reasonable explanation for their defeat other than the *de facto* power of coordination on a threshold. As the example of a hypothetical proponent of the Equal Rights Amendment suggests, this becomes particularly problematic when a proposed amendment fails by a very narrow margin. Political theory has a potential remedy in cases in which good reasons are not available, and in which bad reasons (such as the desire to ensure a veto for a relatively powerful minority) might be brought to bear: randomization. In conclusion, I suggest that, if we believe the benefits of supermajority rules are worth the costs associated with arbitrariness, we may wish to randomize the threshold – but that the move to do so may have its own negative consequences.

### Varieties of indeterminacy

Like all constitutional provisions, a supermajoritarian threshold for constitutional amendment provisions is *ex ante* indeterminate: even if there is a rough sense of what provisions would be necessary for a ‘downstream authority’ to ratify the constitution (Elster, 2000: 113–15), these norms are only vague before the process of constitution-making gives them shape. So this sort of indeterminacy is unproblematic. Likewise, ‘legal indeterminacy’, in which the generality of laws leads to interpretive quandaries – a problem notably identified by Aristotle as consisting in ‘equity’ (1992, V.10, 1137b12–35) and by H. L. A. Hart as derivable from the ‘open-textured’ nature of language (Hart, 1994, ch. 7) – is not a major issue confronting supermajority rules. The threshold, once specified, is relatively easy to interpret. The type of indeterminacy to which supermajoritarian thresholds for amendment give rise is different, both because of the importance of amendment clauses in general<sup>5</sup> and because of the potential paradoxes of collective choice they generate. Such indeterminacy takes three forms: (1) individual or party preferences over the threshold are themselves

indeterminate, both intrinsically and because of uncertain technical beliefs; (2) potential arguments for supermajoritarian thresholds may support a range of thresholds, and thus the reasons for supermajority rule do not generate clear threshold recommendations; and (3) the collective choice over the threshold may be indeterminate because of standard aggregation problems. Supermajoritarian thresholds cannot be supported by distinctive good reasons, and thus by definition their selection must be arbitrary (or strategic, and thus likely morally if not politically arbitrary).

First, why are individual or factional preferences concerning the threshold themselves indeterminate? This is, as we have already seen, because of a problem akin to the sorites paradox. Without pushing the philosophical point too far, let me illustrate the problem confronting a person who knows she wants a supermajority amendment threshold, say, to make institutional change difficult but not excessively so (as she believes empowering a very small number of actors to veto would do). This is a problem of practical judgment or *phronesis*: what supermajority rule will accomplish this aim? As Tuck suggests, the critical problem is to determine when we have ‘enough’ (Tuck, 2008: 98) – in this context, a high enough threshold to slow down the rate of change. But we also need to ensure that we do not have too much and thereby disable the possibility of amendment. And we cannot know *ex ante*, unless we have a very clear map of the political landscape, what that threshold will be, and we surely do not know where that cut-off might be in the future.

Part of the problem, then, is informational or epistemic. Even if we follow contemporary epistemic responses to issues of vagueness and assume there is some optimal threshold, we still cannot know where precisely it lies.<sup>6</sup> Thus, to follow Herbert Simon’s logic, we may just wish to satisfice (Simon, 1957; Tuck, 2008: 97): if we think a two-thirds threshold will do, we may just want to adopt it (after all, we have ample evidence that other constitutions have endured with such a threshold). However, let us say that we think, all things considered, that relatively easy amendment is desirable, though we want to ensure that it does not become majoritarian, perhaps because we fear that in that case shifting electoral majorities will revise the constitution to suit their political preferences. We think that ease of amendment reflects certain democratic values – innovation or fallibility, for instance (Schwartzberg, 2007) – and helps to ward off the entrenchment of distributive advantages. The question, then, is to find the lowest threshold that will prevent strictly partisan efforts at amendment, for instance, but still slow down the rate of change. This, a strictly technical problem, gives rise to indeterminacy: We do not know what threshold will enable us to attain the goal. Three-fifths might be preferable, but would 59% be sufficient? Or 58%?

So individual-level preferences may be indeterminate, because we may be unable to order them within a range and because we know our technical beliefs are imperfect. The second sort of indeterminacy derives from the inability to give theoretical support for particular thresholds. The lack of shared justifications for the adoption of constitutional provisions is not necessarily problematic. Cass Sunstein has recently defended the utility of ‘incompletely theorized agreements’, in which people ‘agree that a certain practice is constitutional or is not constitutional, even when the theories that underlie their judgment sharply diverge’ (Sunstein, 2001: 50). Yet whereas majority rule or unanimity rule may emerge as such a ‘“focal point” around which diverse people can bracket their debates’ (p. 53), without theoretical support, supermajority rule cannot. Why is this?

First, let us consider majority rule: it is quite possible that it can emerge as a consensus threshold without shared theoretical support. One group can support majority rule on the grounds that it makes constitutional change relatively easy, enabling the constitution to keep pace with circumstantial change. Another group supports majority rule because, as a minority, they hope to be able to gain power in the future and alter the terms of social cooperation to benefit themselves. A third supports majority rule because they believe that this is the one rule that ensures that each vote counts equally. That they all have different reasons – good or bad, self-interested or concerned for the common good – for preferring majority rule is unproblematic. The decision is sufficient to coordinate them regardless of their various rationales. This is in part because this single decision is sufficient to resolve the matter: the choice of threshold is *contained* in the vote for majority rule, meaning that, by choosing majority rule, they know then that the threshold will be 51%.

Now, let us turn to unanimity rule. Again, the relevant groups have different reasons for preferring it. One thinks that the medieval rule of *quod omnes tangit ab omnibus approbari debet* (what touches all ought to be approved by all) is apt (Burns, 1988: 449; Post, 1964): everyone affected by a matter as consequential as constitutional change ought to have the right of consent. Another believes strongly that a high level of institutional conservatism ensures the ‘security of expectations’ necessary for economic growth, and so forth. Again, the vote for unanimity rule implies a 100% vote threshold; the choice of unanimity is indeterminate in that respect.

As such, in the case of both majority rule and unanimity, the absence of agreement about the theoretical basis for the threshold does not lead to difficulties. Consider now, however, the adoption of a supermajoritarian threshold. As in the case of majority rule and unanimity, each faction has a different reason for supporting supermajority rule. One group believes that

it will make constitutional change difficult but not insurmountably so. A second group thinks that institutional changes ought to be supported by a broad consensus, though not necessarily everyone, given the risk of individual fallibility or self-interest. A third group argues that amendments supported by a supermajority have a higher probability of being morally correct under a particular Condorcetian scheme. So they decide to adopt a supermajority rule. The problem is: which threshold? How do they choose? Each of these reasons gives rise to a different account of the optimal supermajoritarian threshold. The first thinks a three-fourths threshold would be necessary to induce institutional stability, because she believes that lower thresholds do not signal a sufficient public commitment to conservatism. The second thinks that a two-thirds would be sufficient to ensure a degree of bipartisan support for amendments but that three-fourths would constitute insurmountable entrenchment. A third thinks that a lower threshold, of 60%, would capture the Condorcetian features of supermajority rule without inducing the risk that a presumptively incompetent minority would veto the correct choice. Each justification gives rise to a different view of the optimal supermajoritarian threshold, and thus reaching an untheorized agreement over the supermajority threshold is difficult if not impossible.

Given preferences for different thresholds, the third form of indeterminacy is an obvious consequence. If we confront disagreement about the choice of a threshold, aggregating preferences, particularly if we also permit majoritarian or unanimity options to be ranked along with supermajoritarian preferences, may lead to familiar paradoxes, potentially including cycling. One group might prefer unanimity to a 60% or majoritarian threshold, thinking that constitutional change would be too easy with the lower threshold, and prefer a three-fourths threshold to unanimity. A second group might prefer a three-fifths threshold and a majoritarian threshold over a three-fourths or unanimity rule because, although they wish to reduce the risk of strictly partisan amendments, they think that granting a narrow minority veto power is more likely to increase partisanship. A third might prefer majority rule to any supermajoritarian threshold, perhaps because they fear, on Condorcetian grounds, that empowering a minority is likely to lead to inferior outcomes, though they are willing to accept that supermajority rules might be able to help under certain conditions to achieve Condorcetian aims (Nitzan & Paroush, 1984; Ben-Yashar & Nitzan, 1997; Fey, 2003). To make matters even more challenging, a compromise solution of 67% may not emerge, in part because assessing with precision the beginning and the end of the range acceptable to the members may be highly complicated. Again, if 67% seems right, does 66%? Or 68%? Putting together, at the extreme, the Condorcet paradox of voting and the sorites combines two of the most difficult

issues in collective choice, which means that, as a practical matter, it may be impossible to coordinate on a threshold.

### **Arbitrariness and reason-giving**

The absence of shared or public reasons for supermajority rule may have a more pernicious consequence, one familiar from the perspective of normative political theory: the risk of arbitrary outcomes, and especially of arbitrary and inequitable outcomes. Although there is a substantial literature on the obligation of reason-giving in democratic decision-making, arbitrariness in political decision-making, even in the constitution-making context, is not necessarily problematic.<sup>7</sup> Indeed, when numerical decisions need to be made – for instance, the total number of representatives or constitutional court justices, or the days that must pass between proposing a piece of legislation and a vote – the choice will almost certainly be made, in essence, at random. Although in many cases this may be inconsequential, two problems can emerge. First, the apparent randomness or triviality of the matter could enable proponents to ‘smuggle in’ strategic advantages, though evidence of this behavior is slight. Second, and more plausibly, the arbitrarily chosen threshold could lead to systematic distributive inequalities, capable of being remedied only through the pathological threshold (or constitutional revolution). The American founding has a number of examples of the way in which apparently arbitrary choices generate path-dependent inequalities down the line. A few illustrations should suffice.

*The number of senators.* The question of whether the states should have equal suffrage in the Senate was, of course, vexed; indeed, it nearly derailed the Convention. Having finally resolved the matter in favor of the small states, though, the framers could scarcely muster the energy to discuss the number of senators each state should have. The issue had arisen early in the debates over senatorial representation (31 May 1787) because of the argument that the choice of the total number of senators would affect decisions about the mode of appointment and their geographic distribution. James Madison himself invoked the Roman tribunes, who ‘lost their influence and power, in proportion as their number was augmented’ (Farrand, 1966, hereafter cited in the following form: *Records*, I, 151) and was quickly rebuked from a historical perspective by John Dickenson. But the matter was tabled in order to focus on the issue of the mode of appointment. The question was not resolved until 23 July, when Gouverneur Morris and Rufus King ‘moved that the representation in the second branch consist of members of each

State, who shall vote per capita' (*Records*, II, 94). Morris proposed to 'fill the *blank* with *three*', so as to enable the Senate to be a 'pretty numerous body'. Nathaniel Gorham preferred two because of the view that this would be a more manageable number for decision purposes. George Mason also thought three would make the branch too numerous. The vote for filling with 'three' went eight against one (*Records*, II, 85);<sup>8</sup> and the question of filling it with 'two' was agreed to *nemine contradicente*.

*The three-fifths compromise.* Rather than addressing the heinous moral implications of the decision to have slaves count as 'three-fifths' of a citizen for representation purposes, the 'unprincipled' nature of the compromise occupied much of the debate. Proposed initially on 11 June 1787, the matter was taken up in early July. On 11 July, James Wilson raised the following objection: 'he did not see on what principle the admission of blacks in the proportion of three fifths could be explained. Are they admitted as Citizens? Then why are they admitted on an equality with White Citizens? Are they admitted as property? Then why is not other property admitted into the computation? These were difficulties however which he thought must be overruled by the necessity of compromise' (*Records*, I, 587; Rakove, 1997: 73). The quantitative nature of the resolution made the manipulation of the proportion of 'citizenship' an acceptable, though apparently arbitrary, decision.

*The ratification threshold.* Notes from the convention indicate disagreement about the threshold for ratification: thresholds of seven (a simple majority) (*Records*, II, 468), eight (*Records*, II, 469), nine (*Records*, II, 469), ten (*Records*, II, 468–9) and thirteen (unanimity) (*Records*, II, 469) states were all proposed during the convention. Even more complicated schemes were advanced. Gouverneur Morris had argued that the threshold number of states should vary depending upon whether or not they were contiguous; if so, a smaller number would be necessary, and if not, a larger number (*Records*, II, 468). The arguments offered for a nine-state threshold for the Federal Convention typically were on the grounds of convention, that it had salience as a preexisting norm, not for tactical or theoretical reasons. Mason had argued that nine was an 'idea ... familiar to the people' from the Articles of Confederation, and should be adopted on that score alone (*Records*, II, 477); likewise, Edmund Randolph had argued that nine was also a 'respectable majority of the whole' (*Records*, II, 469). Madison pointed out in defense of a ten-state threshold that, if the number were fewer than ten, and if that number were comprised primarily of small states, a minority of the population could be adequate to ratify the constitution; this argument failed to persuade the other members.

The consequences of these decisions about ‘numbers’ were, in every case, significant. The equal suffrage of states in the Senate still generates considerable discontent on the grounds that it gives citizens of less populous states far more voting power than those in more populous states. This inequality ensures redistribution from large to small states and gives racial minorities a voice in the Senate that is disproportionately weak (because small states are typically less urban and have fewer non-white residents (Levinson, 2006: 49–62, citing Baker & Dinkin, 1997: 54). The three-fifths clause constituted a key feature of what William Lloyd Garrison famously termed the ‘covenant with death’, the legacy of which scarcely requires description. Finally, the ratification threshold, as a ‘downstream’ constraint on the constitutional framing, conditioned much of what could be considered an acceptable compromise: thus the constitutional project and its successes and failures took shape in no small part because of the threshold.

Again, the arbitrariness itself may be unproblematic: the substantive nature of the outcomes (e.g. the three-fifths compromise) may be appalling, but the *arbitrariness* governing the selection of the ‘number’ (again, except insofar as it applies to the dignity of human beings) is not the issue. The presence of two vs three senators per state is of little concern to us today. However, the implications of these choices are far from trivial. When arbitrariness intersects with highly salient distributive inequalities and, most critically, with the self-corrective nature of the norm, the problem is especially grave. That is, the ability to revisit the decision to rectify inequalities or unforeseen consequences (the latter is especially important when decisions are made essentially at random) is itself constrained by the choice of threshold. In other words, arbitrariness in terms of the amendment threshold is problematic insofar as the amendment clause itself is the basis for remedying the distributive inequalities *it itself generates*. The amendment clause secures the constitutional bargain, and its distribution of advantages and burdens across the society. To the extent that these distributions can be revisited or inequalities remedied, such efforts require the use of the amendment clause itself, and insofar as the threshold it provides has no rational or reasonable basis, those who lose under its strictures may perceive it as unjust.

Although here I cannot possibly do justice to the substantial literature on reason-giving, one critical point is worth noting. Even if arbitrariness is not intrinsically problematic, we might well believe that, in circumstances under which a proposed norm will produce or reify inequalities, those supporting such a rule are under a special obligation to give reasons to those potentially disadvantaged. Though supermajority rule does not necessarily disadvantage *particular* groups, each decision it governs prescribes unequal voting power. The bias toward the minority – the lower number of votes necessary

to veto the majority decision – means that each vote in the minority counts for more than each vote in the majority.

Though it is true that it is impossible to know *ex ante* who will be in the unsuccessful majority on proposed amendments and thus the threshold is *prima facie* neutral, the fact that such a rule might affect any one of us down the line does not mitigate the need for justification. Indeed, it means that all of us require reasons for the potential veto of amendments we support, backed by a majority; such justifications may reduce the chance that our confidence in the amendment process and in the constitution as a whole will be shaken by the minority's action to block the proposal. The problem may be especially egregious if the existing bargain and thus the *status quo* distribution of political power is relatively inegalitarian. Those who are confronting the long-term limitation of their potential to redistribute the gains of the constitutional bargain because of mandated institutional stability are perhaps especially inclined to challenge the legitimacy of the constitution, in the absence of persuasive reasons for a particular threshold.

The lack of reasons supporting the supermajoritarian amendment threshold – at least in the Federal Convention, if not in the ratification debates – highlights this point. The inclusion of an amendment procedure itself was given justification largely on the grounds of three varieties of fallibilism: epistemological (the likelihood of human error); circumstantial (the limitations of human foresight); and progressive (the possibility of advancement in human knowledge) (Schwartzberg, 2007: 117–28). But the threshold by which amendment was to occur received very little discussion. Although there was disagreement about the relative role of the national and state legislatures, it did not extend to the threshold, which was not even an object of discussion once proposed by the Committee of Detail. The lone concern raised was the risk that two-thirds of the states would call a convention that would have a majority-voting rule, and the consequence of this objection was the inclusion of a role for the states in the ratification of amendments (*Records*, II, 557–8). The initial phrasing – ‘no amendments shall be binding until consented to by the several States’ – was revised by Wilson to insert ‘two-thirds of’ before ‘several States’, but this was voted down five to six. Wilson then inserted ‘three-fourths of’, which was agreed to *nem. con.* (*Records*, II, 558–9). Given that nine was approved as the ratification threshold some 10 days prior, it is surprising that the two-thirds amendment threshold was voted down while the three-quarters threshold was approved unopposed. This would, following Madison's critique of the proposed ten-state ratification threshold, empower the small states to veto further changes, so it is possible that the nine-state outcome constituted a strategic concession to the small states; since there is no record of argument or bargaining, inferring the motivation is problematic.

In the case of the American Constitution, then, we at least have no record of discussion or argument or even bargaining. Further, there is not even any evidence that a supermajority rule was considered the only alternative. Given the failure of the Articles of Confederation, a unanimity rule would have been impossible, but – except for the concerns of the slave states, which might have been addressed through the sunset-clause entrenchment of the slave trade through 1808 (Schwartzberg, 2007: 129–39) – there is no evidence that majority rule was off the table. The clearest defense of the supermajority rule is from Madison, and even that is equivocal and generic: ‘The mode preferred by the Convention ... guards equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults’ (*Federalist* 43; in Rossiter 1961: 278). Indeed, in the context of critiquing the Articles of Confederation, Alexander Hamilton himself provided the basis for opposition to supermajority rules:

The necessity of unanimity in public bodies, or of something approaching 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 the 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 ... If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. (*Federalist* 22; in Rossiter, 1961: 147–8)

One might agree that supermajority rule was not the necessary outcome of the debate, concurring that it is both undertheorized and even arbitrarily chosen. Nonetheless, given the social fact of agreement over the threshold at this point, one might ask why it might provoke normative concerns. Should we not simply recognize that it is the coordinative outcome, and that to re-coordinate would be overwhelmingly difficult, and thus accept even inegalitarian outcomes as a necessary evil? Why the lack of a systematic justification for the supermajoritarian amendment threshold remains a problem even in spite of the fact that it seems to receive widespread acquiescence, if not support, can be seen in the example of the Equal Rights Amendment.

### **The Equal Rights Amendment and arbitrariness**

Consider the possible perspective of a proponent of the Equal Rights Amendment. A brief history of the ERA demonstrates the extent to which its failure – if indeed it has failed and is not simply still pending ratification (Held, Herndon & Stager, 1997: 113–36) – is in essence strictly an artifact of the threshold. Congress passed the amendment by considerably more than the

required two-thirds majority. Six states ratified it within 48 hours, an additional twenty-two followed within 9 months, eight in 1973, three in 1974, and two in 1975 and 1977. Even after the time limit was extended from 22 March 1979 to 30 June 1982, however, the amendment remained three short of approval. In total, *seven votes* stood in the way of the passage of the ERA: three in the Nevada senate, two in the North Carolina senate, two in the Florida senate (Steiner, 1985: 99).<sup>9</sup> In contrast, because of the absence of a time limit governing the proposal of the Madison Amendment, a.k.a. the Congressional Pay Amendment, 203 years passed before the thirty-eighth state ratified it on 7 May 1992 (Held, Herndon & Stager, 1997: 116–18).

Our hypothetical ERA supporter seeks a justification for the fact that three states – more charitably, thirteen states – stand in the way of the thirty-five states that have ratified the amendment. A simple procedural justification – i.e. ‘this is what the Constitution requires’ – does not do much work in the presence of opposition. Those who stand to lose from constitutional provisions – whether they are gun owners who want to see their putative rights to carry a concealed weapon expressly protected or our hypothetical supporter of the ERA – deserve some explanation for the defeat. The procedural explanation will not suffice here: The response will surely be, ‘Why is *this* the threshold, rather than another? Why thirty-eight rather than thirty-five states?’ The answer – that this is the threshold upon which the framers coordinated, and it binds us for that reason alone – is, in turn, likely to be unsatisfying, particularly if the framers themselves provided no reasons to which we could turn.

The ERA supporter is left with no justification, save, perhaps, whatever procedural validity is conferred by the ratification process. Since the emergence of the amendment clause seems to be a fairly straightforward coordinative account, it may be tempting to extrapolate from this to the view that these thresholds ought to be explained and even justified in terms of coordination. That is, one could argue that, since we need a decision rule, any threshold that is capable of generating agreement in the constitutional setting ought to suffice. But this cannot explain how one ought to decide in cases in which there are multiple focal points – for instance, as above, if there had been real disagreement between a two-thirds and a three-quarters threshold – and how one can justify constitutional provisions in the presence of dissent. For the ERA supporter, the fact that the framers not only assented to the three-quarters threshold, but did so *nem. con.*, means that they agreed to empower a minority of states and secure the distributive inequalities of the constitutional bargain *arbitrarily*. Indeed, the fact that the ERA pertains to the constitutional equality of citizens and the right of membership makes the circumstance all the more egregious from her perspective. Patrick Henry, speaking in the Virginia ratifying convention, could not have been more

prescient from the perspective of the ERA proponent: 'A bare majority in these four small states may hinder the adoption of amendments; so that we may fairly and justly conclude that one twentieth part of the American people may prevent the removal of the most grievous inconveniences and oppression, by refusing to accede to amendments. A trifling minority may reject the most salutary amendments' (Elliot, 1836, III: 50).

It may be true that three states separate the ERA from passage, but of course there are many such laws that fail by narrow margins. The necessity of a decision rule means that close calls will happen. One might argue that the failure of such a proposed amendment is unproblematic, perhaps via appeal to an argument provided by Joseph Raz (Raz, 2001): the Constitution sets the terms of social cooperation and the mechanism by which institutional change, including constitutional change, occurs. On Raz's account, the criterion for the legitimacy of the constitutional change (assuming it is within the boundaries of morality) can be assessed strictly in terms of social practice. The activities that gave rise to the Constitution – the legality of the constitution-making process, the intentions of the framers, or the nature of the bargains struck – no longer serve as sources of legitimation once constitutional traditions are established. The fact that the procedure was *ex ante* indeterminate and without theoretical justification is irrelevant: It now constitutes a social fact for the community governed by the Constitution, period. Although factors such as the expertise of the framers, the fact of coordination and the symbolic status of framers affect the extent to which a constitution acquires legitimate authority, none suffices to sustain it in the long run; only social practice can do that. This is probably the most rigorous way in which to argue that the legitimacy of supermajority rules, or any other norm, depends upon their status as established conventions.

Yet Raz is at pains to note that this does not force us into simple *de facto*ism: we can critically assess our conventions from a normative perspective.<sup>10</sup> When we engage in constitutional interpretation, we are not required to try to capture the framers' original intent (for the legitimacy of the constitution does not depend upon authorship) or to act from a strictly 'conserving' perspective. We can 'give weight to other moral considerations', and, in particular, we can use 'merit reasons' to make the constitution the best it can be. However, these reasons may be 'incommensurate'. In cases in which the law (and morality) is indeterminate, and possible reasons underlying an interpretive decision are incommensurable, judges should rely on formal legal reasoning as a 'distancing device' rather than using irrelevant, dispositional or partisan reasons to make the choice. In Raz's words: 'It is important for institutions acting for the public not to take decisions the explanations for which are the nonrational dispositions or tastes of the people who hold

office in them' (Raz, 2001: 190). Further, such moves should be 'publicly visible' so that people can know that reasons, rather than irrelevant considerations, were brought to bear. Although Raz is somewhat opaque on the point, we may infer that to do otherwise, to draw upon 'bad' reasons to solve problems of indeterminacy, would weaken the stability of the norms *qua* social practice, leading to challenges from those who would have wished these ambiguities to be resolved differently.

Let us return to the perspective of the ERA proponent, who is looking for a justification of the supermajoritarian threshold. That the norm is an established convention will not satisfy her; she is asking why this convention was created, and what sorts of reasons we might have for adhering to it other than the simple fact that it exists. She is willing to accept that the framers had no rational basis for the adoption of the supermajoritarian threshold, because the legitimacy of norms does not depend upon their origins. But she does believe that she deserves a reason from some source. Otherwise, she believes herself to be in the position analogous to a citizen who is about to lose in a Supreme Court decision because of partisan considerations, log-rolling or a coin toss. The problem is that there is no distancing device available. Whereas the court can appeal to precedent or doctrine as a means of assuring citizens confronted with indeterminacy that good reasons exist for their decisions, there is no such distancing device capable of legitimizing the supermajoritarian threshold. We have no seemingly impartial or rational justifications available to us to offer the ERA proponent except for the (arbitrary) choice of the framers or the fact of established social practice, both of which are the objects of the ERA proponent's criticism in the first place.

### **The choice of threshold and 'fair procedures'**

One might suggest that, *pace* Raz, we do have a solution available to us from 'original authority': we could hold that these norms derive their authority not merely from the social fact that they *are* norms in a democracy but from their origins in fair procedures. The political or moral authority with which the framers were vested might have once done the work, but from the perspective of contemporary normative political theory, we might think that an inclusive democratic procedure would be optimal. But this, of course, simply pushes the question back a level. What would this 'inclusive democratic procedure' look like? The ratification threshold was not determined by appeal to reasons, and, in part because of the paradoxes we have already explored, determining the threshold for constitutional decision-making is likely to be difficult. Without engaging in the voluminous debate

over substantive vs proceduralist accounts of democratic legitimacy, let us briefly consider what the choice of such a threshold under ostensibly fair procedures would look like.

The famous social-contract response to this question holds that majority or supermajority rule requires a prior unanimous decision by which each agrees to be bound by the decision of a part of the whole.<sup>11</sup> This, of course, presupposes that unanimity is the default mechanism: it is the one in which each must agree to institutional decisions affecting all. As the late Brian Barry pointed out in response to Buchanan & Tullock in *Political argument*, the belief that the status quo would enjoy unanimous support is implausible, possible only where, as Knut Wicksell pointed out, the initial distribution of income and property was accepted as fair by all concerned (Barry, 1965: 313; Buchanan & Tullock, 1962; Wicksell, 1958: 108). Of course, in general, the absence of action, if thwarted by unanimity rules, can affect members of a society as much as the activity of choosing. That is, unless we assume that society is completely stagnant, *not* altering institutional arrangements may have a greater effect than deliberately engaging in change.<sup>12</sup>

However, from the perspective of our hypothetical 'loser' on a matter pertaining to constitutional change, the difference is that unanimity need not be an arbitrary threshold. There are good reasons, rooted in consent theory, for such a norm. Further, since each actor constitutes a veto player, the risk that the threshold will be aimed at empowering one particular group is substantially mitigated, although it may well lock in the status quo distributive scheme. So our loser under a unanimous-decision rule may be deeply frustrated – as were actors under the Articles of Confederation – but this could not be on account of procedural arbitrariness. Similarly, the constitutional-amendment proponent who is outvoted under a simple-majority decision rule may be disappointed but would have little room for objection: If she cannot even convince a bare majority of her fellow citizens that such fundamental change is warranted, the amendment ought not to be adopted. In fact, Barry held that the default decision rule, rather than unanimity, ought to be majority rule, because it was the only threshold that will 'ensure that more are satisfied by the result than are frustrated' (Barry, 1965: 312).

So, from a proceduralist perspective, the legitimation problem of supermajoritarian thresholds, particularly for constitutional amendments, is distinctive. It is a function of the necessarily arbitrary nature of the threshold, compounded by the fact that the threshold itself regulates the remedy for its own deficiencies. In other words, the proponent of the ERA has no alternative – outside of constitutional revolution – than to use the thirty-eight-state threshold to try to weaken it. Although major efforts at amending Article V did not emerge in the wake of the ERA, except for efforts at extending the deadline

for ratification, it is surely possible that the defeat of proposed amendments receiving widespread support could generate instability. The critical question is whether the potential normative problems associated with the arbitrarily imposed losses generated by supermajority thresholds are outweighed by their benefits.

### **Supermajorities, tradeoffs and randomization**

Do the putative benefits of supermajority rule – to wit, institutional stability and the need for broad-based consensus for institutional change – outweigh the costs of arbitrariness in the amendment procedure? It is worth noting that the arbitrariness can be mitigated through widespread participation in the constitution-making process. A norm, however irrationally chosen, that has been adopted through an inclusive procedure does have some *prima facie* validity in a democratic process. However, this may beg the question of the threshold by which the norm was adopted: the social-contract theorists, as we have suggested, would demand unanimity, but, as Barry suggested, there are good reasons (particularly in the context of a preexisting society) for majority rule to regulate these decisions. Yet we may believe that the incentive of a majority to lock in its advantages through creating norms designed to encumber those who would seek to challenge it would be far from ideal, and so this may be a condition under which we might want to use supermajority rules.

Because of the problems of fallibility associated with unanimity rule – the risk that one malicious or erroneous actor will inhibit socially beneficial institutional change – the capacity to ensure that constitutional norms have broad-based support might well constitute a good reason for the adoption of a supermajority rule. The problem, of course, is to determine the threshold. Given the risk that supermajoritarian thresholds may be manipulated to enable an already powerful minority to preserve a veto – the worst-case scenario of supermajority rules – it seems that here the absence of clear threshold alternatives ought to be acknowledged, if not embraced. To do so, we may want to resort to randomization of our supermajoritarian thresholds.

Peter Stone has recently argued that, in cases where we want to ensure that *bad* reasons are not brought to bear and in which no *good* reasons are available, lotteries are an optimal solution (Stone, 2009). This general structure – the potential for bad reasons, and the absence of good reasons – is the case for supermajority rules; but are lotteries thus optimal? If we believe that supermajority rules are warranted for constitutional amendments but we fear that their intrinsic indeterminacy will enable strategic actors to utilize a

particular threshold to lock in advantages (the ‘bad reasons’ for the choice), we might want to choose our supermajority rules at random.

It is possible that we could reduce the range of alternatives to standard fractions – three-fifths, two-thirds, three-quarters – rather than to percentages so as to reduce the *appearance* of irrationality in our constitution, but we might then want to choose among those via lot. We could then use different sorts of heuristics – e.g. increase the threshold as the norm becomes more ‘foundational’ – to guide us, as many contemporary constitutions do. However, it is worth noting that even apparently neutral and universally accepted norms, such as the human dignity clause of the German Basic Law, may have distributive consequences once interpreted by a constitutional court. Notably, the Federal Constitutional Court has held that dignity attaches to the fetus, thus justifying restrictive abortion laws (Abortion II, 88 BVerfGE, 252; Schwartzberg, 2007: 187–9). Thus we should ensure that amendment might be feasible as a means of checking the interpretive decisions of a constitutional court. This will entail drawing an upper bound on the supermajoritarian threshold for amendment, but this may return us to the sorites problem.

Will randomization of the threshold during the constitution-making process help to resolve the issue confronting the proponent of the ERA? She still lacks a good reason for the choice of the threshold. She does know, however, that the choice of threshold was not aimed at empowering, say, the Eagle Forum to exert a veto on proposed amendments (not wholly implausible if, under a new constitutional convention, civil-society groups were invited to participate or were represented). As such, randomization may actually entail the sort of distancing device Raz proposes in the case of legal indeterminacy. The failure is attributed to the ‘luck of the draw’ at the constitutional framing rather than to deliberate efforts at marginalization. Psychologically, it may be easier to accept ‘bad luck’ than to feel that one has been deliberately thwarted, and so perhaps the defeat of the ERA will not lead the proponent to challenge the Constitution’s legitimacy.<sup>13</sup> But for the ERA proponent, and for the citizens as a whole, the fact that the critical institutions governing our political and social lives were chosen at random may generate more profound discomfort.

To the extent that we want our constitutional norms, especially those with considerable distributive implications and those that are reflexive, such as amendment clauses,<sup>14</sup> to be supported by reasons, randomization will be a poor strategy. But we must also then consider our support for supermajority rules, and whether the benefits they ostensibly provide might be able to be provided in other ways. For instance, time-delaying mechanisms and sequential ratification procedures across states may ensure a degree of institutional stability even without supermajority rules, and the use of popular

deliberative bodies along with participation of state and federal legislators to engage in constitutional change may ensure broad-based support for proposed amendments even if simple-majority rule governs each institution. Further, other special mechanisms of representation to ensure that affected minorities are protected against majoritarian encroachments are available to us, as Lani Guinier and the late Iris Marion Young, among others, have explored (Young, 1990, ch. 6; Guinier, 1994, especially chs 4 and 5). So supermajority rule may not be our only recourse if reason-giving is a paramount concern.

Indeterminacy, then, is an inescapable feature of supermajority rules. It may not induce us to restrict the use of these norms, but it should lead us to consider the implications of their pathologies and paradoxes. Instead of relying upon focal points or other constitutions to generate amendment procedures, the absence of good reasons to help us choose among these thresholds should be acknowledged. We do have institutions, such as sortition, designed to help us in cases in which bad incentives loom, but first we must recognize that supermajoritarian thresholds, particularly in the case of amendment procedures, are noteworthy among those cases.

*Melissa Schwartzberg* is Associate Professor of political science at Columbia University. She is the author of *Democracy and legal change* (Cambridge: Cambridge University Press, 2007), and is currently writing a book entitled *Counting the many: supermajority rule and its alternatives*. Author's address: Melissa Schwartzberg, Associate Professor of Political Science, Columbia University, 420 West 118th St, IAB 718, New York, NY 10027, USA. [email: ms3125@columbia.edu]

## Notes

I would like to thank Jack Knight, Jeffrey Lenowitz, Bernard Manin, and Annie Stilz for their comments.

1. It is worth noting a few important exceptions to this rule: Denmark (parliamentary majority and a majority decision of a referendum which has received the support of 40% of the electorate, plus a royal assent); Sweden (with two majority votes of parliament separated by an election, and a referendum with a quorum requirement of over half of those who voted in the election); Iceland (with two majority votes of parliament separated by an election and a referendum if the status of the Church is altered); Australia (with the involvement of 'each State and Territory'); Ireland (with a referendum); and Switzerland (via referendum, with the Federal Parliament's power to declare a proposal invalid according to unity of form/subject matter or international law, or to contrast it with a counterproposal).

2. A ratification process typically follows an initial successful vote by the legislative body.

3. The *locus classicus* of the discussion of focal points (Schelling, 1960); see also Lewis (1969) for the analysis of the emergence and analytical significance of conventions.

4. For an important and nuanced discussion of indeterminacy, failures of rationality (particularly of 'hyper-rationality') and the circumstances of randomization, see Elster (1989).

5. The salience of amendment is highlighted in the essays contained in Levinson (1995).

6. Again, the philosophical literature is considerable, but see in particular Williamson (1994, 2000) and Sorensen (1988, 2001).
7. I am grateful to Jeffrey Lenowitz for this point.
8. The journal has the vote as 9–1, with Maryland casting a negative vote.
9. For a systematic and rigorous account of the political factors contributing to the defeat of the ERA, see Mansbridge (1986).
10. ‘Given the impact that constitutional decisions ... have on people’s lives, they are justified only if they are morally justified’ (Raz, 2001: 178).
11. See, for instance, Hobbes (1985, XVIII: 115); Locke (1988, II, 98: 332–3); Grotius (2005, II, v, §17); Pufendorf (1792, VII, ii, §7); Rousseau (2004, I, v, §3). See also Manin (1986) and Schwartzberg (2008).
12. Douglas Rae (1975) offers a similar critique of the unanimity requirement in Buchanan & Tullock (1962): there is no reason to presuppose ongoing support for the *status quo*, and so there is a substantial risk that unanimity will lead to disutility. See also Shapiro (2003: 16–19).
13. See Elster (1989) for a discussion of the psychological effects of the use of the lottery.
14. Suber (1990) offers a sustained and elegant account of reflexivity in the context of amendment clauses.

## References

- Aristotle, *Nicomachean ethics*, transl. by David Ross. Oxford: Oxford University Press, 1992.
- Baker, L. A. & Dinkin, S. H. (1997) ‘The Senate: an institution whose time has gone?’, *Journal of law and politics* 13(winter): 21–95.
- Barry, B. (1965) *Political argument*. London: Routledge and Kegan Paul.
- Ben-Yashar, R. C. & Nitzan, S. I. (1997) ‘The optimal decision rule for fixed-size committees in dichotomous choice situations’, *International economic review* 38(1): 175–86.
- Buchanan, J. & Tullock, G. (1962) *The calculus of consent: logical foundations of constitutional democracy*. Ann Arbor: University of Michigan Press.
- Burns, J. H., ed. (1988) *The Cambridge history of medieval political thought c. 350–c. 1450*. Cambridge: Cambridge University Press.
- Elliot, J. (1836) *Debates in the several state conventions on the adoption of the Federal Constitution*, vol. 3. Washington, DC: printed for the editor.
- Elster, J. (1989) *Solomonic judgements*. Cambridge: Cambridge University Press.
- Elster, J. (2000) *Ulysses unbound*. Cambridge: Cambridge University Press.
- Farrand, M., ed. (1966) *Records of the Federal Convention of 1787*. New Haven, CT: Yale University Press. (revised edn, 3 vols)
- Fey, M. (2003) ‘A note on the Condorcet Jury Theorem with supermajority voting rules’, *Social choice and welfare* 20(1): 27–32.
- Grotius, H. (2005) *The rights of war and peace*, ed. and with an introduction by Richard Tuck, from the edition by Jean Barbeyrac. Indianapolis, IN: Liberty Fund.
- Guinier, L. (1994) *The tyranny of the majority: fundamental fairness in representative democracy*. New York: Free Press.
- Hardin, R. (1991) ‘Hobbesian political order’, *Political theory* 19(2): 156–80.
- Hardin, R. (1999) *Liberalism, constitutionalism, and democracy*. Oxford: Oxford University Press.
- Hart, H. L. A. (1994) *The concept of law*. Oxford: Oxford University Press.
- Held, A., Herndon, S. L. & Stager, D. M. (1997) ‘The Equal Rights Amendment: why the ERA remains legally viable and properly before the states’, *William & Mary journal of women and the law* 3(1): 113–36.

- Hobbes, T. (1985) *Leviathan*, ed. by C. B. Macpherson. London: Penguin.
- Holmes, S. (1995) *Passions and constraint*. Chicago, IL: University of Chicago Press.
- Knight, J. (1992) *Institutions and social conflict*. Cambridge: Cambridge University Press.
- Levinson, S. (1995) *Responding to imperfection*. Princeton, NJ: Princeton University Press.
- Levinson, S. (2006) *Our undemocratic constitution*. New York: Oxford University Press.
- Lewis, D. (1969) *Convention*. Cambridge, MA: Harvard University Press.
- Locke, J. (1988) *Two treatises of government*, ed. by Peter Laslett. Cambridge: Cambridge University Press.
- Manin, B. (1986) 'On legitimacy and political deliberation', *Political theory* 15(3): 338–68.
- Mansbridge, J. (1986) *Why we lost the ERA*. Chicago, IL: University of Chicago Press.
- Nitzan, S. & Paroush, J. (1984) 'Are qualified majority rules special?', *Public choice* 42(3): 257–72.
- Post, G. (1964) *Studies in medieval legal thought: public law and the state, 1100–1322*. Princeton, NJ: Princeton University Press.
- Pufendorf, S. (1792) *Of the law of nature and of nations*, trans. by B. Kennett. London: printed by S. Aris for J. Walthoe, R. Wilkin, J. Bonwicke, S. Birt, T. Ward & T. Osborne.
- Rae, D. (1975) 'The limits of consensual decision', *American political science review* 69: 1270–94.
- Rakove, J. (1997) *Original meanings: politics and ideas in the making of the Constitution*. New York: Vintage Books.
- Raz, J. (2001) 'On the authority and interpretation of constitutions: some preliminaries', in L. Alexander (ed.) *Constitutionalism: philosophical foundations*, pp. 152–93. Cambridge: Cambridge University Press.
- Rossiter, C., ed. (1961) *The Federalist papers*. New York: Penguin Books.
- Rousseau, J.-J. (2004) *The social contract and other later political writings*, ed. and trans. by V. Gourevitch. Cambridge: Cambridge University Press.
- Schelling, T. C. (1960) *The strategy of conflict*. Cambridge, MA: Harvard University Press.
- Schwartzberg, M. (2007) *Democracy and legal change*. New York: Cambridge University Press.
- Schwartzberg, M. (2008) 'Voting the general will: Rousseau on decision rules', *Political theory* 36(3): 403–23.
- Shapiro, I. (2003) *The state of democratic theory*. Princeton, NJ: Princeton University Press.
- Simon, H. A. (1957). *Models of man: social and rational*. New York: Wiley.
- Sorensen, R. (1988) *Blindspots*. Oxford: Clarendon Press.
- Sorensen, R. (2001) *Vagueness and contradiction*. New York: Oxford University Press.
- Steiner, G. Y. (1985) *Constitutional inequality: the political fortunes of the Equal Rights Amendment*. Washington, DC: Brookings Institution.
- Stone, P. (2009) 'The logic of random selection', *Political theory* 37(3): 375–97.
- Suber, P. (1990) *The paradox of self-amendment: a study of logic, law, omnipotence, and change*. New York: Peter Lang Publishing.
- Sunstein, C. (2001) *Designing democracy: what constitutions do*. New York: Oxford University Press.
- Tuck, R. (2008) *Free riding*. Cambridge, MA: Harvard University Press.
- Wicksell, K. (1958) 'A new principle of just taxation,' in R. A. Musgrave and A. T. Peacock (eds) *Classics in the theory of public finance*. London: Macmillan.
- Williamson, T. (1994) *Vagueness*. London: Routledge.
- Williamson, T. (2000) *Knowledge and its limits*. Oxford: Oxford University Press.
- Young, I. M. (1990) *Justice and the politics of difference*. Princeton, NJ: Princeton University Press.