



We the People

THE CITIZEN AND THE CONSTITUTION

Directed by the Center for Civic Education

Strengthening Democracy in America

Issue Brief

Topic 6—Majority Rule, Minority Rights, and Democracy

No free government nor the blessings of liberty, can be preserved to any people, but by a ... frequent recurrence to fundamental principles.—George Mason, Virginia Declaration of Rights, 1776

All ... will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect and to violate would be oppression.—Thomas Jefferson, 1803

I believe that America, the world's strongest democracy, ought not to be afraid of democracy, but we are.—Lee Hamilton, 2018

- 1. Strengthening Democracy in America video excerpt**—View several scholars as they discuss the topics of majority rule, supermajorities, minority rights, and democracy by clicking on the links in Section 5a below.
- 2. The context**—Majority rule in a democracy is a practical process for making decisions that at least a majority to be affected by them are likely to see as legitimate. The implementation of the principle of majority rule in a democracy maximizes the right to self-determination, embodies the right to political equality, and reflects the principle of popular sovereignty.

There are two limitations that must be imposed upon this decision-making process.

- Majority rule in a democracy cannot lead to decisions that destroy the conditions necessary for democracy's continued existence or, as some have said, democracy is not a suicide pact.
- Majority rule cannot deprive individuals and the minority of certain fundamental rights that reflect the purposes for which the democratic society exists, that is, for example, preservation of the rights to life, liberty, and the pursuit of happiness.

Protection of minority rights—Majority rule always bears the risk of harming individuals and groups not in the majority. In some instances, mutually beneficial compromises might be reached that alleviate the objections of those in the minority. In other instances, the harm to the minority might be seen as ranging from tolerable to unbearable and lead to commensurate consequences.

To limit the potentially damaging effects of majority rule, all advanced democracies set aside certain rights of individuals and minorities that are exempt from the rule of majorities. These rights are typically enshrined in constitutions and statutory laws as lists of protections of fundamental rights of individuals and groups from deprivation by the majority. They include protections such as the rights to freedom of belief, freedom of expression, privacy, equal protection, and due process of law, and to cultural and linguistic diversity and identity. To have any vitality, these laws must be accompanied by pervasive and supportive democratic norms such as tolerance and support for the right to the expression of ideas with which one might strongly disagree.

Protections of democracy—Limitations on majority rule to protect the existence of democracy typically include strong support for political rights such as those to freedom of expression, association, and assembly; political equality; and the rights to vote and hold public office.

Framer's fear of majority rule—In 1787, the Framers' fear of majority rule led them, in the words of Robert Dahl, to include “undemocratic aspects that were more or less deliberately built into the Constitution [that] overestimated the dangers of popular majorities” and “underestimated the strength of the developing democratic commitment among Americans.”

Fear of majority rule led the Framers to include numerous impediments to it in the U.S. Constitution. Others impediments to majority rule can be found in rules and procedures established by Congress such as the filibuster in the United States Senate, certain rules in the U.S. House of Representatives, and in the power of judicial review established by the Supreme Court in the case of *Marbury v. Madison*.

Constitutional checks on majority rule—The system of separated governmental institutions with shared powers created by the Framers includes many “veto points” where a minority can check the power of a majority in order to protect its interests or attain some other goal that might or might not serve the interests of the majority or the common good.

These “veto” or “choke” points in our political process enable a minority to prevail in many instances. Although they sometimes might be in accord with such democratic principles as self-determination, political equality, and majority rule, they might reflect a priority being placed upon other democratic principles. For example, in order to expand perceptions of the legitimacy of a decision and foster stability, a supermajority reflecting a broad consensus instead of a simple majority might be required to decide upon an issue of profound and far-reaching consequences such as the impeachment of a democratically elected public official.

In this regard, Robert Dahl has said that “in adopting or rejecting majority rule, the people in democratic countries have not necessarily violated the democratic process or the values that

justify it. For under different conditions, the democratic process may properly be carried out under different rules for making collective decisions.”

The following are some of the most obvious veto points in our constitutional system where rule by a simple majority is replaced by other decision-making rules that might be justified by referring to other democratic principles, values, or interests.

- **Presidential veto**—The president, one person, can veto a bill passed by a majority of the 535 elected representatives of the people. A supermajority of two-thirds of both houses of Congress is required to override the veto. Since the requirement for a supermajority puts the minority in a position to veto the majority, this means that the president combined with a minority of Congress can halt legislation supported by two-thirds of its members.
- **Bicameral system**—Each house of Congress can refuse to pass legislation passed by the other house. This means that a bill passed by the House of Representatives which is based on proportional representation consistent with the principles of political equality and majority rule can be stopped by the Senate in which currently 80 Senators from 40 states, representing a minority of the population, can overrule the 20 Senators from 10 states with a majority of the population.
- **Supreme Court**—The Supreme Court’s power of judicial review enables it by a vote of 5–4 to declare acts by Congress, the executive branch, and state legislatures and executives to be in violation of the Constitution and therefore “null and void.” In regards to Congress, this means that five unelected justices, serving for life and not directly answerable to the people, can veto a decision made by as many as 535 representatives elected by the people to serve in Congress and approved by a president. Giving the Court this power has been widely supported when it deals with its responsibilities specified in Article 3 and when it acts to protect fundamental political rights against unfair actions by national, state, and local governmental institutions. However, questions arise regarding the Court’s ability to override majority rule in Congress in regard to matters of public policy. Some believe these matters are better dealt with by Congress and state legislatures than the Court which may be acting as an “unelected legislature.”
- **Federalism**—The federal system created by the Constitution and reinforced by the Tenth Amendment is an important principle of American constitutionalism. It places decision-making authority in certain areas in the hands of state and local government and removes it from control by national majorities. This is widely accepted and supported as a means of sharing power, accommodating the diversity of American society, and checking the power of the national government. However, the exemption of certain decision making from control by a national majority is an exception to the principles of political equality and majority rule, and calls for justification upon the basis of other democratic principles and values such as the right to self-determination in a large and diverse society.

- **Requirement for supermajorities**—A supermajority refers to any number of votes required to make a decision above the fifty percent plus one that constitutes a simple majority. Since the requirement for a supermajority makes it more difficult to reach a decision than might be made by a simple majority, it tends to favor the status quo that might be favored by a minority. Such rules usually call for supermajorities to be three-fifths or two-thirds of a total vote. The requirement for a supermajority places minorities in the position to be able to halt a decision favored by a majority. Nevertheless, supermajorities have been required for certain types of issues since at least the times of the ancient Romans.

The requirement for a supermajority is typically justified by the claim that decisions in some areas have such serious consequences or might be so explosive that they should express the will and judgment of a larger number of voters than fifty percent plus one. An example might be a change in a constitution that significantly affects an entire nation which might require a two-thirds vote, or a jury trial where a person's life might be at stake and a unanimous vote might be required for conviction.

The U.S. Constitution includes a number of provisions requiring supermajorities. These include an impeachment conviction of the president, overriding presidential vetoes in both houses of Congress, approval of treaties by the Senate, and approval of amendments to the Constitution, and the calling of a new constitutional convention.

Checks on majority rule created by Congress—The Constitution gives the House and Senate the authority to make their own rules setting forth, among other things, the procedures they will follow when drafting proposed legislation. The following are some of the most prominent impediments to majority rule that have been established by Congress.

- **Filibuster in the Senate**—The Senate rules allow one or more senators to speak for as long as they wish on any topic they chose. They can only be stopped if a supermajority of three-fifths (sixty) of the one hundred senators votes to stop the debate. This means that the will of a majority can be stopped by forty-one senators constituting a minority of the Senate. The filibuster is sometimes referred to as a means to protect minority rights. Others feel that filibuster has been used a tool for obstruction.
- **Other rules in the House and Senate**—There are numerous “veto” or “choke” points in the complex decision-making processes in both the House and Senate where one person or a minority can halt the progress of legislation that might prevail if brought to a majority vote. For example, each of the various authorizing committees and subcommittees in the House of Representatives and the Senate has principal responsibility for drafting legislation in its area of jurisdiction such as education, immigration reform, national defense, or the environment. However, sometimes legislation proposed in one committee that has principal responsibility in its area also overlaps the responsibility of another committee. In such instances a majority of one

committee can favor a bill, but the chairman and/or majority of the second committee can halt its progress.

There are also “restrictive rules” sometimes used by both parties that limit the right of the minority to debate bills on the floor of the House or exclude them altogether. There are also rules that prohibit the minority party from attempting to amend a bill. These are sometimes called “gag rules.”

Supermajorities and the democratic process and values—The complex system of government created by the Framers was not intended to always provide for majority rule. We do not have what is called a “majoritarian” government such as Great Britain and numerous other democracies. The noted scholar Robert Dahl has claimed that the Framers would have created a more majoritarian government if they had met again several decades after they had created the Constitution. For example, although opposed to majority rule in 1787, in 1833 James Madison wrote, “the general question must be between a republican Government in which the majority rule the minority, and a government in which a lesser number or the least number rule...no government...can be perfect ... The abuses of all other governments have led to the preference for republican government as the best of all governments, because the least imperfect (and) the vital principle of republican government is the *lex majoris partis*, the will of the majority.”

Nevertheless, all advanced democracies set aside rule by a simple majority and require supermajorities in certain types of situations, such as amending or replacing a constitution or removal of high-level officials from public office. In such instances the setting aside of democratic principles such as self-determination, political equality, and majority rule are justified by competing principles, values, and interests.

Dahl has taken the position that those claiming that certain circumstances might require exceptions to majority rule should bear the burden of justifying such decisions by explicitly identifying the competing principles and values and explaining why they should prevail. He has also said that the maintenance of democratic principles, processes, and values would be enhanced if decisions regarding when a supermajority should be required were to be made by majority vote.

- 3. Issue**—Majority rule in a democratic political system maximizes the right to self-determination, can foster political equality, and supports popular sovereignty giving meaning to the democratic goal of a government of, by, and for the people. Decisions made according to majority rule are more likely to be seen as legitimate so long as they don’t unreasonably and unfairly deprive individuals and minorities of their fundamental rights. Under such conditions, majority rule can contribute to political stability. In contrast, decisions consistently made by minorities contrary to the will of the majority are more likely to be seen as lacking legitimacy, and lead to responses ranging from alienation and withdrawal from the political process to outright rebellion.

Critics of the current constitutional structure and operation of the national government claim that it has become dysfunctional due to such factors as the following.

- Extreme polarization has resulted in the division of society into hostile tribe-like, uncompromising groups who see each other as enemies. They are often unwilling to adhere to democratic norms of negotiation, compromise, and conciliation in the decision-making process, resulting in a paralysis of the traditional means of democratic decision making.
 - The lack of capacity of our constitutional system, dependent upon open and civil debate, negotiation, and compromise, to function under current circumstances. This is due to a significant degree to the number of veto points built into the system of separated powers and checks and balances that can be used by individuals and minorities to thwart the will of the majority.
 - The existence of a growing and persistent gap between the policy preferences reflected in the actions of the national government and those of the people at large that fosters an alienation from the system and diminished perceptions of its responsiveness to the will of the people and its legitimacy.
4. **Alternative policies**—The following are alternative policies that have been proposed to expand the use of majority rule in the decision-making processes in Congress, the executive branch, and the Supreme Court. Refer to “first principles” in determining the advantages and disadvantages of each policy and in taking whatever position on them you wish to choose.
- **Argument for the status quo**—Some claim that the system is working as the Framers intended. They did not want to create a majoritarian democracy due to their fear of the emergence of a tyrannical executive or a tyranny of a majority. This is the fundamental reason for the complex system they created of separated and shared powers and checks and balances. They wanted to make it difficult for the government to make decisions, believing that would enhance the time taken to deliberate, hear all sides, negotiate, compromise, and arrive at wise decisions that protected individual rights and promoted the common good. If anything is needed, some claim, it is to make the existing system work better by adhering to not only the formal requirements of the Constitution, but also to the democratic norms required to make the system work as intended.
 - **Argument for those proposing changes in the system**
 - **Congress**
 - Revise procedural rules in the House and Senate to facilitate majority rule
 - Eliminate or limit the filibuster
 - Implement regular order consistently
 - Override presidential vetoes by majority vote
 - Reduce the number of issues requiring a supermajority
 - Require a bill to be subject to a vote on the floor in the House or the Senate if a majority of the entire membership of either of these houses supports it
 - Limit the use of restrictive rules that curtail floor debate and amendment options

- Establish proportional representation in the Senate
 - **Executive**
 - Eliminate or limit veto power
 - Limit the scope of signing papers and executive orders to place such legislative action back in Congress
 - **Supreme Court**
 - Enable Congress to override Supreme Court decisions by a majority vote
5. **Online resources**—The following is a short list of some online resources that might be useful in gaining more understanding of the topics covered in this issue brief. Reviewers are encouraged to find more resources and to forward any they find useful to the Center at quigley@civiced.org. (Please also send any suggestions for improving this issue brief to the same address.)
- a. **Strengthening Democracy in America video series.** View highly informed perceptions of the intent of the Framers regarding majority rule, minority rights, and democracy. Watch these videos for additional information:
- Video 2, Section 5, with William Galston, Senior Fellow, Brookings Institution
 - Video 3, Section 8, with The Honorable Lee Hamilton
 - Video 4, Section 3, 4, and 7, with Norman Ornstein, Resident Scholar, American Enterprise Institute
- b. **Other online resources**
- Majority rule/minority rights: <http://democracyweb.org/majority-rule-principles>
 - American system of majority rule: <https://fee.org/articles/the-american-system-of-majority-rule/>
 - The majority does not rule in U.S. democracy: <https://www.socialeurope.eu/us-democracy>
 - Supermajority rule: good or bad?: <http://articles.latimes.com/2009/mar/22/opinion/oe-goldberg22>
 - Congressional Research Service (CRIS) Supermajority votes in the Senate: <https://www.everycrsreport.com/reports/98-779.html>
 - Why supermajority no longer works in the Senate: https://www.washingtonpost.com/opinions/why-supermajority-no-longer-works-in-the-senate/2011/11/04/gIQAT8cdnM_story.html?utm_term=.79c3cfd45f64
 - Supermajority voting rules: <http://web.mit.edu/rholden/www/papers/Supermajority.pdf>
 - Executive orders, etc.: <http://www.llsdc.org/executive-orders-and-other-presidential-documents>
 - Press Release. Congressman Jim Sensenbrenner (R-Wisconsin) introduction of the *Voting Rights Amendment Act of 2017 (VRAA)*: <https://sensenbrenner.house.gov/press-releases-statements?ID=2BA9CA56-689B-47CD-B43C-FEB8EE1864E9>