

CHAPTER 5

Minority Protection, Rights, and Supermajoritarianism

The only practical decision rule for legislatures that fully respects political equality is majority rule, as argued in the previous chapter. However, there are other values that we need to take into account besides political equality, notably the protection of minorities and the respect for rights. Thus it is commonly argued that there is a trade-off between political equality (maximized by majority rule) and minority protection (better provided by systems with external checks and balances, which require more than a simple majority to enact legislation). This chapter argues that this trade-off does not exist and that actually majority rule provides most protection to minorities. Furthermore it does so precisely because of the instability inherent in majority rule.

As we have seen, majority rule is the only legislative decision rule that completely satisfies political equality. May (1952) shows that majority rule is the only positively responsive, decisive, binary voting rule that satisfies anonymity (voters are treated the same regardless of their names) and neutrality (alternatives are not discriminated between on the basis of their names). If we use a system other than majority rule, then we lose either anonymity or neutrality. That is to say, either some voters must be privileged over others, or some alternative must be privileged over others. With supermajority voting, the status quo is privileged—if there is no alternative for which a supermajority votes, the status quo is maintained. Following Rae's (1975) argument, given that the status quo is more desirable to some voters than to others, some voters are effectively privileged. It is certainly the case that supermajority rules can privilege (protect, if you prefer) some voters. Unfortunately, it is not possible to privilege every group over every other group. If supermajority rules create a privileged group, there must be a corresponding under-privileged group.

Nevertheless, supermajoritarian decision rules are widespread, both explicitly and implicitly. For example, in the United States explicitly supermajoritarian rules exist in the form of the 60 percent cloture requirement to end a filibuster in the Senate, the two-thirds requirement to override a

presidential veto, and the need for a supermajority to amend the Constitution (see Krehbiel 1998). Implicitly, the existence of two legislative chambers with different bases of representation is supermajoritarian, in that more than 50 percent of the popular support is likely to be needed to ensure a majority in both chambers, a fact recognized long ago by Condorcet (1787/1986). The committee system has a similar effect, to the extent that committees are able to act as gatekeepers, able to hold up consideration of legislation. For similar reasons, presidentialism is effectively supermajoritarian, to the extent that the consent of both the president and legislature is required to pass and implement laws. Outcomes decided by judicial review also rest on a supermajoritarian basis, in that constitutional amendments require a supermajority. The number of democracies with simple majority-rule legislatures with few external checks is actually quite small, limited mostly to the small countries of Europe.

Such supermajoritarian decision-making rules have been justified in terms of the need to protect minorities from “the tyranny of the majority.” In the United States, this argument is associated with James Madison (quite inappropriately, I will argue) and John C. Calhoun. Buchanan and Tullock (1962) provide a formalization of this line of thought, arguing that the unanimity rule maximizes the protection of individual rights and economic efficiency, and that supermajoritarian rules are a second-best approximation to unanimity. Guinier (1994) also argues that supermajoritarian voting can protect minorities. It is notable that the idea of minority protection is often conflated with the idea of rights protection, as though the two are synonymous. The two concepts, however, are logically quite distinct. The protection of rights from the regular political process may serve to protect minorities from overbearing majorities, or it may serve to entrench established oppressions. (Consider the relationship between states’ rights and segregation in the United States.) Nevertheless any democratic regime that privileges certain rights over the decisions of the regular political process is necessarily supermajoritarian, in the sense that a simple majority is unable to make a binding decision, as will be argued in section 6.

In contrast to the argument that supermajoritarianism protects minorities, this chapter shows formally that as we move from majority rule toward unanimity, the ability of minorities to defend themselves by overturning unfavorable outcomes is diminished. Therefore majority rule offers most protection. The proof assumes that people do not know how they will fare under the status quo in the future, and in particular whether their interests are more likely to be threatened by government action or by some other force or event that requires government action to protect against. In cases where we are exceptionally sure that the sta-

tus quo is just and protective of all minorities (perhaps juries or the fundamental rights required for democracy to function), it can be argued that supermajoritarian decision-making rules may provide more protection, although even here the argument is not obvious.¹ However, in the case of “continuing politics,” such as regular legislation and policy-making, it will be argued that we cannot know what the status quo will be in the future, and that therefore our argument that majority rule provides most protection for minorities applies.

The first section of this chapter reviews the literature on supermajoritarian decision making. The second illustrates how supermajoritarianism can produce perverse results. The third section formally analyzes the logic of supermajoritarian decision making. The fourth provides the proof that majority rule offers the greatest protection to minorities. The fifth considers the effect of uncertainty about the future on these considerations. Section 6 considers the relationship between minority protection, rights, and constitutionalism, while section 7 deals with the instability of majority rule resulting from cycling, and why this is essential to the protection of minorities.

1. Supermajority Rule and Democracy

The theory that checks and balances are needed to restrain majority rule (thus producing a system that is effectively supermajoritarian) is frequently ascribed to James Madison. However, as Rae (1975) and Kernell (2003) argue, ascribing such a view to Madison is problematic, given that Madison sought a strong national government, capable of decisive action and able to overcome the immobilism of the Articles of Confederation.² As we are all familiar with from Federalist 10, Madison identifies the problems of minority and majority tyranny. The republican principle (i.e., majority rule) protects against minority tyranny. However, the only solution to majority tyranny given in Federalist 10 is to have a large “extended republic” where a single cohesive majority would not exist, a solution completely compatible with majority rule.³ It is not until Federalist 51 that Madison advocates external checks and balances, in the context of a president elected independently of Congress. It is notable that Madison did not support an independently elected president at the Constitutional Convention until mid-July 1787, immediately after he had lost the argument about equal representation for the states in the Senate. Indeed, the original Virginia plan presented to the convention, authored primarily by Madison, was essentially a majority-rule parliamentary system with the executive chosen by the legislature. At the Constitutional Convention,

Madison argued against many of the constitutional features we now consider “checks and balances.”⁴ Furthermore Madison clearly opposed the principle of supermajoritarianism (arguing that it reversed the principle of free government and equaled minority rule), as the following section from *Federalist 58*⁵ demonstrates.

It has been said that more than a majority ought to be required for a quorum; and in particular cases, if not 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, the fundamental principle of free government would be reversed. It would no longer be 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 common weal, or, in particular emergencies, to extort unreasonable indulgences. (Hamilton, Madison, and Jay 1788/1961, 361)

Madison gives us, at best, an ambiguous justification for restraining majority rule with checks and balances; according to Rae (1975), it is John C. Calhoun (1842/1982, 1850/1943) who gives us an unequivocal theory. Society is made up of various classes of people, any of which may wish to intrude on the rights of others. A system of “concurrent majorities,” whereby the approval of a majority of each class is required for action, can prevent this from happening. Calhoun argues that various features of the U.S. Constitution (most notably equal representation for the states in the Senate) embody this principle. Indeed more recent scholars, such as Weingast (1998) and Aldrich (1995) have analyzed the way in which institutions such as North-South parity in the Senate and the norm of ticket balancing by the parties essentially provided the Southern states with a veto until the 1850s.

Dahl (1956) is critical of what he terms the “Madisonian” theory of democracy (essentially the view that checks and balances are required to restrain majority rule). Madison relies on majority rule to protect against minority tyranny. Dahl argues that in cases where positive government action is required to protect rights, restraining majority rule with checks and balances undermines this protection. (Ironically this echoes the argument made in the section from *Federalist 58* cited previously.) Furthermore Dahl argues that there is no empirical evidence that rights are

better protected by the American political system than by European constitutions with far fewer constitutional checks, and that institutions such as the filibuster, equal representation in the Senate, and judicial review have been used far more frequently to frustrate the extension of fundamental rights than to protect them, most notably in the case of civil rights in the South.

Buchanan and Tullock (1962) provide a different justification for supermajoritarianism. Given a predetermined allocation of rights and property,⁶ the decision-making rule that best protects this allocation is naturally unanimity. Furthermore unanimity is the only rule that guarantees that the outcome will be economically efficient in the sense of being Pareto superior (it is not possible to make anyone better off without making someone else worse off) to the status quo. If unanimity is impossible because of decision-making costs, supermajoritarian rules may be the second-best solution, in that they provide more protection than majority rule against costs imposed by society on individuals.

Rae (1975) critiques Buchanan and Tullock on several grounds. Unanimity only minimizes the costs society imposes on individuals if we make the strong assumption that an unwanted policy imposes a far greater cost on individuals than not getting a policy that is needed. Rae (1969) shows that if we assume these costs are equal, majority rule is optimal. Furthermore, Rae (1975) criticizes the concept of Pareto optimality as essentially locking in the status quo and being blind to distributional considerations.⁷ Most significant, Rae shows that universal consent is logically impossible when a decision (even if it is to take no action) has to be taken. If there is disagreement and a decision has to be taken, some decision has to be imposed against someone's will.

From a rather different political perspective, Guinier (1994) also argues that supermajoritarian voting may protect minority rights. This is somewhat ironic given that supermajoritarian rules, such as the filibuster in the Senate, have been historically employed to obstruct civil rights legislation. While Guinier is certainly correct to point out that supermajoritarian decision rules are widespread, it is not clear that the exclusion of minorities Guinier seeks to remedy results from majority rule, as much as from certain winner-take-all institutions such as single-member district elections. (Guinier is supportive of proportional representation.) Miller (1996) provides a social choice theoretic analysis of Guinier's claims.

Although it is tangential to our concerns here, there is some literature on the effect of supermajoritarian rules on economic outcomes. As noted, Buchanan and Tullock (1962) argue that only unanimity guarantees economic efficiency. Barry (1965/1990), however, argues that the use of the "offensive veto" may lead to economic inefficiency—groups with

veto power may try to use that veto to extort privileges, which may lead to worthwhile projects not being undertaken. Moe (1989) argues that supermajoritarian institutions in Congress lead to inefficient bureaucracies, in that bureaucratic structures are designed not to maximize the performance of an agency but to lock in the gains of the winning coalition and prevent future congressional majorities and administrations from being able to change the goals of the agency. Similarly, Scharpf (1988) argues that the supermajoritarian nature of German cooperative federalism produces inefficient policy.

2. Pathologies of Supermajority Rule

Using some simple examples, we can illustrate some of the problems that supermajoritarian rules can produce. Such rules can lead to the complete exclusion of minorities, to immobilism where the status quo is impossible to challenge, to situations where ideologically concentrated minorities are advantaged over more dispersed majorities, and even to situations where points at the very extremes are strategically defended by blocking coalitions.

Consider the situation depicted in figure 5.1. There are eight voters with simple spatial utility functions (they each prefer outcomes closer to their ideal point). Three have ideal points at position a, three at position b, and two at position c. Under majority rule five votes are required to defeat a proposal, and thus there is no core (a proposal or set of proposals that cannot be defeated). For any proposal it is possible to find a counterproposal that at least five voters prefer. However, the voters at positions a, b, c have equal bargaining power in determining the outcome. When we move from majority rule to supermajority rule, this changes. If we adopt a supermajoritarian quota of six to pass a proposal, the solid line between positions a and b becomes the core. It is impossible to find a counterproposal that six voters prefer to a point on the line between a and b. As a result, the voters at c lose all bargaining power and influence over the outcome. If we increase the quota from six to seven, then any point in the triangle abc will be a core point. We may characterize this situation as a “tyranny of the status quo.” As long as the status quo is within abc, it cannot be changed. Whoever had influence when the status quo came to pass has their way. Thus we can show that it is at least possible that adopting supermajoritarian rules may severely harm the interests of minorities, compared to their position under majority rule.

Of course, supermajoritarian rules can advantage certain minorities. A very high quota will definitely advantage minorities that are fa-

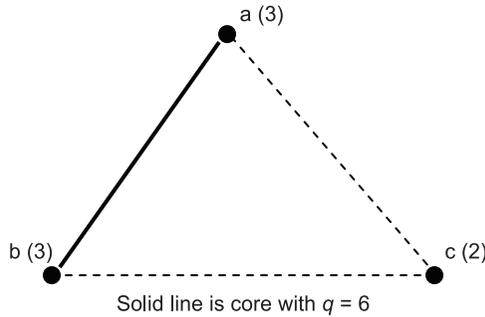


Fig. 5.1. Configuration of eight voters

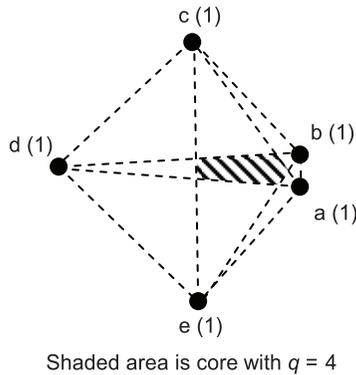


Fig. 5.2. Configuration of five voters

avorable toward the status quo. Furthermore, supermajoritarian rules may advantage ideologically concentrated minorities. Consider figure 5.2. Here there are five voters, at positions a, b, c, d, and e. Under majority rule ($q = 3$) there is no core. In terms of bargaining power, the voters at a and b might have an advantage, in that they can join with any other voter to form a majority, but they are not able to impose their will on the others. However, if we increase the quota to 4, then the shaded area becomes the core. The influence of one minority (the two voters at positions a and b) has increased, but at the expense of the smaller minority positions (c, d, and e). Thus we would expect supermajoritarian rules to benefit minorities who are large and concentrated enough to form blocking coalitions at the expense of smaller and less concentrated minorities.

Figure 5.3 (based on Laing and Slotznick 1987) illustrates an even more problematic situation that can arise under supermajoritarian rules.

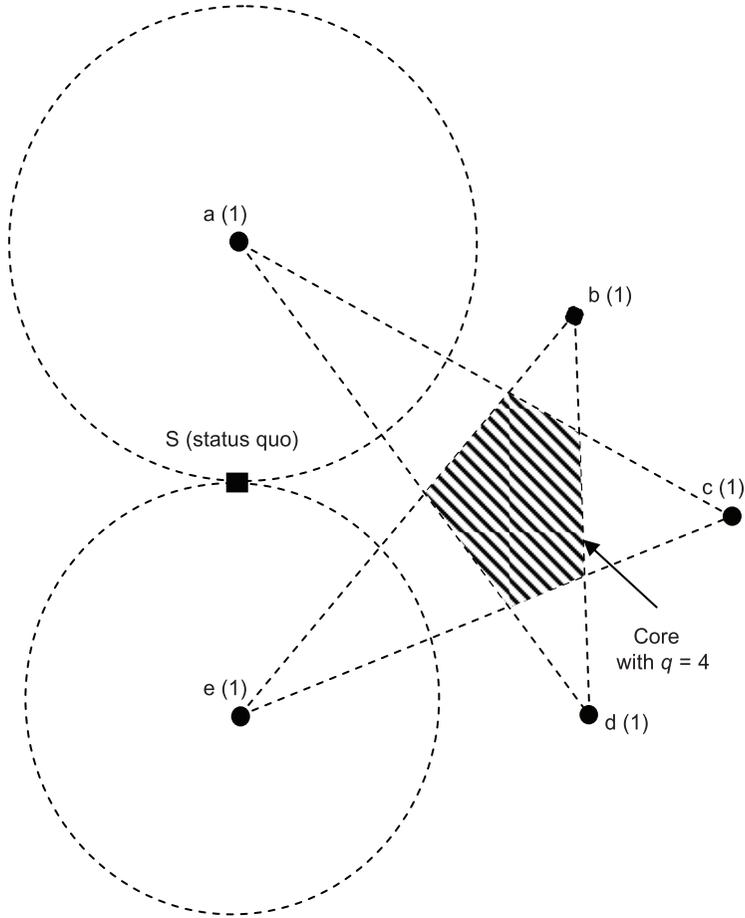


Fig. 5.3. Configuration of five voters with $q = 4$ and status quo point S

Here status quo point S may be impossible to overturn with a voting quota of four, even though it is not in the core.⁸ If we have a supermajoritarian rule with a quota of four, then the shaded area in the figure is the core. If a point in the core is the status quo, it will be impossible to overturn it. However, if we start from status quo point S, it may be that we never get to the core. This is because voters a and e form a blocking coalition. There are points that four voters would prefer to point S. However, there is no point in the core that either voter a or e prefers to the status quo, as can be seen from the fact that the iso-utility curves of a and e do not intersect the core. As a result it may be strategically rational for

a and e to block any attempt to move from the status quo. Although there are points that they prefer to the status quo, if these are adopted, this may lead to the adoption in the next round or later of core points that voters a and e do not prefer to the status quo S. In an experimental setting, Laing and Slotznick (1987) confirm the existence of this phenomenon. The situation here may appear familiar. A blocking coalition defends a status quo that some of its members might like to change, because it fears that if it allows change, this will open the floodgates to further changes that it views as undesirable.

3. Analyzing Supermajority Rule

Supermajoritarian rule can have some problematic effects, as we have seen. This section will show why supermajority rule is inherently less democratic than majority rule in that it uses less of the information we have about the preferences of society. When we move from majority to supermajority rule, we effectively throw away the preference information we have about pairs of alternatives wherever a supermajority does not prefer either alternative to the other. In place of using preference information to decide between the two alternatives, we have to decide on some other ground. Usually, the alternative that is the status quo prevails. Thus the decision rule is biased in favor of one of the alternatives, or in the language of May's theorem, is not neutral. We have replaced a democratic decision with an imposed one, a decision based on preferences with a decision based on precedent.

Of course, as we move from majority to supermajority rule, we reduce the instability in outcomes associated with majority rule. This is precisely because we are deciding between fewer pairs of alternatives using society's preferences. Instability under majority rule results from the fact that social preferences may involve cycles (a is preferred to b is preferred to c is preferred to a). As we stop relying on preferences and rely more on which alternative is the status quo, the probability of such cycles diminishes. However, in the next section, I will show that it is precisely this instability that offers protection to minorities under majority rule.

We will analyze majority rule and supermajoritarian decision rules using the graph-theoretic framework from Miller (1980). Consider figure 5.4(a). A line from point 1 to point 2 means that alternative 1 is majority-rule preferred to alternative 2. Let us assume that there are an odd number of voters and that the preferences of all voters over possible alternatives are a linear ordering. That is, if 1 and 2 are alternatives, then every voter has a preference over 1 and 2, and every voter's preferences

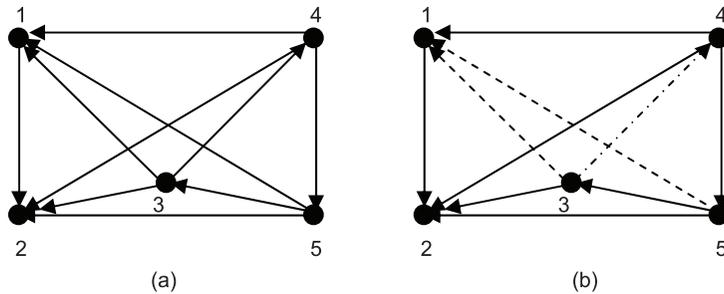


Fig. 5.4. Society's preferences over alternatives under majority and supermajority rule

are transitive (if a voter prefers 1 to 2, and 2 to 3, then the voter prefers 1 to 3). Then Miller (1980) shows that society's preferences under majority rule can be expressed as a tournament (technically, a complete asymmetric directed graph). That is to say, if we take any two alternatives, then society strictly prefers one to the other, and thus all points in the graph are connected. However, although individual preferences are transitive, society's preferences are not—alternatives 3, 4, and 5 form a cycle.

Let us consider what happens when we go from majority to supermajoritarian rule, by raising the voting quota required for one alternative to beat another from 50 percent + 1 to some higher value. As the voting quota is raised, some of society's preference relations are erased. If the voting quota is q , and the proportion of the population that prefers alternative 3 to 4 is greater than 50 percent, but less than q , then the decision rule no longer gives a social preference between alternatives 3 and 4. Thus we go from the situation depicted in figure 5.4(a), where the decision rule ranks all pairs of alternatives, to that in figure 5.4(b), where the dotted line represents preference relations that have been erased. As we further increase the voting quota q , preference relations cannot be replaced. If q people do not prefer alternative 3 to 4, or 4 to 3, then a higher quota q^* clearly cannot prefer 3 to 4 or vice versa.

However, as Rae (1975) argues, it may well be necessary to make a decision between two alternatives, even though our decision rule does not rank them. In this case some other criterion, outside of the population's preferences, has to be used. Generally in the case of supermajoritarian systems, the status quo is privileged. The alternative that is the status quo is maintained unless some other alternative is preferred by quota q of the population. This, of course, violates neutrality and privileges people who favor the status quo.

Similarly, we can see why increasing the voting quota reduces the in-

stability associated with majority rule. Saari (1997) shows that as we increase the voting quota, then the set of alternatives that are not defeated by any other alternative (the core) must expand monotonically. That is, the core under voting quota q^* must be a subset of the core under quota q^{**} , if $q^{**} \geq q^*$. Considering figure 5.4, we can see why this must be the case. As we raise the quota from q^* to q^{**} , we erase the lines representing the preference relations between any two alternatives where the majority in favor of one over the other is less than q^{**} , but greater than q^* . However, no new social preference relations are added—if the social preference between two alternatives is undefined under quota q^* , it will still be undefined under the higher quota q^{**} . As a result, the set of alternatives that are undefeated will not shrink as some social preference relations are deleted, and it may expand.

Thus we can see that the effect of going from majority rule to more supermajoritarian quota rules is to ignore more and more preference information and to rely more and more on precedent—whichever alternative is established as the status quo prevails. Naturally, this makes the status quo more stable, at the cost of the outcome being less democratic. However, as I will show in the next section, it is precisely this instability—the ability to overturn undesirable outcomes if necessary—that guarantees protection to minorities.

4. Supermajority Rule and the Protection of Minorities

It has frequently been argued that supermajoritarian decision rules (both explicit and implicit) safeguard minorities. However, we have seen that such processes essentially discard preference information when the majority is less than quota q , and they impose the status quo in these cases. To argue that replacing marginal democratic outcomes with a priori outcomes protects minorities requires some strong assumptions. First, we must believe that minorities are more at threat from a change in the status quo than from a failure to change the status quo, either in response to an existing injustice or some new threat. Second, we must be able to say what the status quo is and will be. In other words, we require certainty (or at least a high degree of confidence) about what the status quo will actually be in the future. The next section will argue that this assumption of certainty is unrealistic over the time span of constitutional arrangements. This section will show that if we do not have prior knowledge of our interests, majority rule provides most protection to the worst-off minority.

Suppose we are choosing a voting system not knowing our interests

or what the status quo will be, a situation somewhat akin to Rawls's (1971/1999) "veil of ignorance." We wish to choose the system that guarantees us the best outcome in the case that we turn out to be the worst-off minority. The worst outcome we could find ourselves in would be to be faced with a very unfavorable outcome that we are unable to overturn by joining with a coalition of other voters. Considering different voting quotas, we can show that the higher the quota, the lower the utility floor we are guaranteed, and thus that the system that guarantees us the highest utility floor is majority rule.

PROPOSITION 1: *Given a voting rule with quota q , let $m_i(q)$ be the utility associated with the least preferred position for agent i that, if enacted, no coalition including i could overturn given sincere voting. Then $m_i(q) \geq m_i(q+1)$. (Proof in appendix)*

The intuition behind the proof is straightforward. Let us define the i Core (the core for voter i) as the set of alternatives that voter i cannot overturn by joining with a coalition of other voters of size q or greater and replacing it with another alternative. The worst thing that can happen to voter i is the outcome in the i Core that is least favorable to voter i . As the quota q increases from q^* to q^{**} , the size of the i Core monotonically increases, as some social preference relations are deleted and none are added, so some alternatives that voter i previously could have overturned become invulnerable. As the i Core under quota q^* must be a subset of the i Core under quota q^{**} ($q^{**} > q^*$), the worst outcome for voter i in the i Core under quota q^{**} must be at least as bad as the worst outcome under quota q^* , and possibly worse. Thus a higher quota exposes voter i to potentially worse outcomes that cannot be overturned through a coalition with other voters. Majority rule is the decision with the lowest voting quota that does not result in indeterminate outcomes. (A quota of less than 50 percent can result in situations where alternative 1 is socially preferred to alternative 2 and alternative 2 is socially preferred to alternative 1.) Thus majority rule offers maximum protection against the imposition of an outcome that a voter is unable to bargain to overturn.

Simple majority rule gives us the most protection against having unfavorable outcomes imposed on us. Indeed, provided that preferences are distributed in at least two dimensions and do not meet some very stringent symmetry conditions (Black and Newing 1951/1998; Plott 1967; McKelvey 1976, 1979; Schofield 1978), each agent can find a coalition to overturn any outcome except their own ideal point. The problem is that any other agent can do the same. Whether this forces agents to engage in reasonable negotiation or whether this leads to chaos is a behavioral question, which will be addressed in subsequent chapters. Nevertheless,

majority rule offers greater protection against an imposed outcome than any other system, and therefore the system that offers most protection for minority rights is, ironically, majority rule.

5. Supermajority Rule and Uncertainty

To argue that it is prudent to privilege the status quo over an alternative that is majority preferred, it is necessary to be able to say what the status quo is. Furthermore, the greater the degree of uncertainty about the status quo, the more reasonable it is to use the assumption of ignorance as a device for arguing about justice. I will argue here that over the time frames relevant to constitutional choice, the status quo may be quite indeterminate.

The analysis here builds on the work of Brunel-Petron (1998)⁹ concerning the theory of rights. Brunel-Petron argues that we have to consider rights as claims on outcomes. The mapping, however, between the law and the rights we possess in practice is problematic. This mapping may change over time, in particular in response to changes in technology and social mores. Thus although the law may not change, if there is a significant change in technology or mores, this law may represent a very different outcome. This argument is similar to that made by Rae (1975) with regard to “utility drift”: Even though law stays the same, the outcome changes because the subjects of that law change their behavior in ways that harm each other.¹⁰

This idea can be applied to our consideration of the status quo. Indeed between the set of possible status quo positions and the set of possible payoffs, there are several mappings. Supermajoritarian rule privileges the status quo by making it hard to change the law. The status quo that is protected, however, is not an outcome or payoff, but rather a set of legal formalisms. If the way in which these legal formalisms are translated into outcomes or payoffs changes, then the substantive status quo will change, although the formal status quo is untouched. Figure 5.5 illustrates the mappings from the set of possible laws to the set of possible payoffs.

First the written law produced by legislation has to be translated into government action or policy. The interpretation of law by the executive and the courts can, of course, change over time, which will substantively change policy. This kind of slippage is particularly significant in supermajoritarian systems. Under simple majority rule, it is relatively easy for the legislature to “correct” changes in interpretation by the executive or judiciary by simply passing new legislation. If the decision rule is supermajoritarian, however, the executive and judiciary may

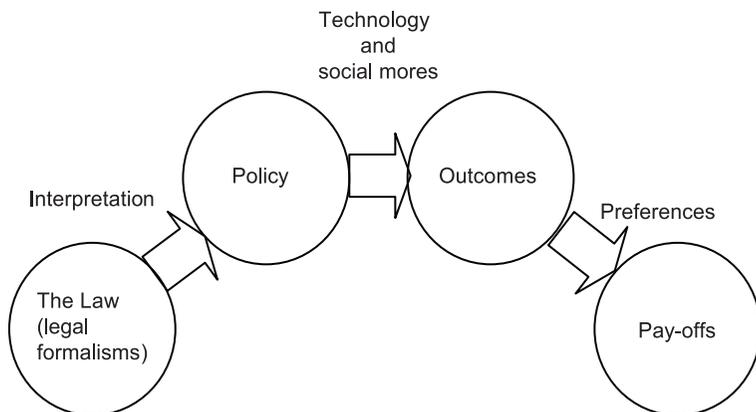


Fig. 5.5. Mappings from the law to final payoffs

have far more discretion. As such, supermajoritarian rule may amount in practice to a form of concealed guardianship, if the interpretation is performed by an unelected body. Indeed Dahl (1956) criticizes the U.S. Supreme Court in this role. Moe and Howell (1999) argue that supermajoritarian rules effectively empower the U.S. president because he has some unilateral power to determine how laws are implemented. Likewise it can be argued that the power of the European Commission (the executive of the European Union) is enhanced by the fact that the Council of Ministers proceeds on the basis of unanimity or qualified majority voting and thus has a hard time overturning commission rulings.

Even if government policy remains constant over time, the outcomes that this policy represents may change because of changes in technology, behavior, social mores, or the environment in general. For example, slow government response may be tolerable or even desirable in normal conditions, but disastrous in time of national emergency. (This is why Federalist 22 is so hostile to supermajoritarianism.) Technology may also affect the effective consequences of laws. The right to keep weapons may have very different consequences depending on the development of military technology. The development of efficient computers has surely changed the impact of data privacy laws (or lack thereof). Similarly, social mores change the consequences of laws. A law banning public nudity would have no effect if nobody wished to behave in this way, or if nobody minded. Neither would the lack of such a law.

In addition to the direct effect on the relationship between policy and outcomes that a change in technology, behavior, or mores may have, there may be indirect effects mediated through economic processes. Changes in

technology change production functions. As a result, demand for factors of production changes, as does their relative value. The factors that are crucial to people's livelihood and welfare, and the relationship between them, also change. A type of economic regulation that appeared equitable may no longer be so. In an agrarian society, we would not expect people to even conceptualize the need for organized labor. It is only with the advent of an industrial society that disputes over the right to organize or not to be organized become salient, as industrial labor is now a key factor of production. Similarly, in a postindustrial economy, intellectual capital may become the crucial factor of production. Laws concerning intellectual property that seemed reasonable when employees were expected to work for a firm for life may be extremely problematic in a society where frequent job shifts are commonplace. Suddenly, the distribution of intellectual property rights between employer and employee becomes a crucial concern.

Finally, even if outcomes remain constant over time, society's preferences over these outcomes may change. Thus the eventual payoffs to the various actors would be different, and our considerations of justice would have to adapt to this. One particular instance in which society's preferences may be exceptional is during a time of crisis. It is possible that legislation may be passed hastily under crisis conditions despite supermajoritarian rules, because all parties may want action of some type to be taken quickly. However, these hastily made decisions may prove extremely difficult to change when time allows more detailed consideration.

It is very difficult to argue that we can know what the status quo will be in the medium term, let alone that it will be a satisfactory outcome. Thus attempts to engineer specific outcomes using constitutional mechanisms appear hubristic. Furthermore, we have not yet considered one further change we would expect to occur over time: The agents themselves will change, as some die and others are born. Supermajoritarian rule privileges the status quo, and for this reason it privileges the choices of one generation over those of the succeeding one. In this sense supermajoritarian rule can be thought of as a mechanism by which a dominant group today protects itself against the majority of the next generation, bequeathing to their children a world that not only did they not create, but that they may not even be able to revise.

6. Minority Protection and the Constitutional Protection of Rights

The ideas of minority protection and the protection of rights are often conflated. This is not surprising, as the equivalence of the two ideas follows

naturally from the traditional justification of constitutional democracy. It is argued that minorities need to be protected from the “tyranny of the majority” and that the constitutional protection of rights accomplishes this. However, minority protection and rights protection are quite distinct concepts. Granting many constitutional rights may help minorities in some cases, but it may also harm them (the role of states’ rights in perpetuating segregation in the United States is an obvious example). Furthermore, the constitutional protection of rights implies supermajoritarianism—constitutional rights mean little or nothing if the constitution can be amended by a simple majority. Given that a constitution that can be amended by majority rule clearly cannot protect against majority tyranny, the only alternatives are for constitutional amendment to be supermajoritarian, or for the constitution to be regulated undemocratically by a minority. Thus our critique of supermajoritarianism as a device for rights protection can also be leveled at systems of constitutional rights.

We continue to use the same definition of rights as in the previous section. Rights are privileged claims over outcomes. How we define outcome sets is complex (see, for example, Pattanaik and Suzumura 1994; Sugden 1985; Hees 1998, 2003; Sen 1976; Nozick 1974), but this is not our concern here. Rather we are concerned with how the implementation of rights claims is arbitrated, and under what circumstances this trumps regular politics. When we say that rights are privileged claims, the word *privileged* can mean two distinct things. First, rights claims can be morally privileged. It is hard to dispute that certain claims should be morally privileged in a democratic system. As Dahl (1988) argues, certain rights are implicit in a democratic system, such as freedom of expression and organization. Other rights are essential to a functioning democracy, such as a minimal level of economic independence. If a democratic system fails to respect such rights, it essentially abolishes itself. However, there is a second sense in which a rights claim can be privileged. A claim can be privileged in the sense that it is held to overrule a regular political decision. This is the position typically taken by advocates of constitutionalism. Certain rights (typically speech, person, and property) are so fundamental that they should typically be constitutionally protected against majority rule.

Privileging constitutional rights, however, is problematic for a number of reasons. *First, constitutions cannot protect rights.* Put simply, constitutions cannot protect rights because constitutions cannot act. Having rights guaranteed in a constitution provides no guarantee that these rights will be respected in reality. Indeed, many totalitarian regimes, such as the former Soviet Union, had very impressive batteries of rights written into their constitutions. These, however, were only paper rights as the

enforcement of these rights was in the hands of the Communist Party, which also held political power. The German Weimar Republic also had an extremely elaborate system of checks and balances, but these failed to prevent the rise of Hitler. Indeed they may have even contributed to it by making it easy for antidemocratic parties (Nazis and Communists) to create gridlock while still in a minority. For rights to be protected in any substantive sense it is necessary for there to be a method of enforcement. In the terms of Nino (1996), we need a “constitution of power,” as well as a “constitution of rights.”

Second, protecting rights requires action. For example, for the right to free speech to be respected, it is not enough for the government to do nothing. Rather it is necessary for the government to actively protect people from those who may commit acts of violence or intimidation if they speak freely. Put another way, it is necessary to dispense with the libertarian fallacy that governments are the only threat to rights and to recognize that both governments and nongovernmental actors can be equally destructive of rights. Thus rights should be seen as an outcome of government action. Government action (or inaction) in period t ensures that rights are respected. This means that democratic choice is possible in period $t + 1$. Rather than viewing rights as something that has to be guaranteed prior to a democratic decision, rights can rather be viewed as a dynamic part of the democratic process, both an outcome and a prerequisite of democracy.

Third, rights are not free. Rights are privileged claims. Therefore if we grant one person a claim over an outcome, we necessarily impose a restriction, duty, or cost on someone else (except in the trivial case where we grant someone a right to do something that no one would want to stop them doing anyway). To put it starkly, one man’s right to property in the antebellum South was another man’s slavery. Later the right of states to self-governance conflicted with individual civil rights. Any rights claim that requires resources to fulfill necessarily imposes a duty on society. If we decide an individual has a right to receive health care in an emergency room, society has to pay for it, either through taxes or through higher premiums. If we grant a right to one person, we necessarily take a right from someone else. One person’s right to health care conflicts with another’s right to keep their income untaxed; one person’s right to play metal guitar in their apartment conflicts with another’s right to quiet. In this context, it makes little sense to talk about maximizing rights, even subject to the requirement that these rights are universal (Rawls 1971/1999).¹¹ Given that all rights granted involve taking rights from others, a case needs to be made not for why rights should be trumps (to use Dworkin’s 1978 phrase), but for why some rights should trump others.

In politics there are very particular costs to granting rights. If rights are taken as claims that take precedence over ordinary democratic decisions, then there is a trade-off between the level of constitutionally protected rights and the level of democracy. At the extreme, if someone or another has a constitutionally protected rights claim over every decision, there is no room left for democracy, as every decision has already been taken. Furthermore, as Glendon (1991) argues, rights claims tend to be absolute, which makes reasonable political compromise harder. Of course, as Dahl (1988, 182) argues, it is natural for everyone to want their most cherished interests to be given special protection (i.e., for their interests to be privileged over others'). However, as already argued, it is logically impossible for everyone to be privileged over everyone else.

Fourth, too many rights may make everyone worse off. If we give individuals absolute control over certain decisions, and they act without regard for the interests of others, we may end up with an outcome that nobody likes, even though it is the result of individual choices. Amartya Sen (1970b) first demonstrated the pervasiveness of this problem (referring to it as the “Impossibility of a Paretian Liberal”). The illustration he gave, however, does not capture the importance of the problem for us.¹² Aldrich (1977) recognized that the problem highlighted by Sen was essentially a collective action problem. (See Miller 1977b for a discussion of the differences between Aldrich’s game-theoretic and Sen’s social choice–theoretic interpretations.) The problem can be illustrated in the game shown in table 5.1.

Suppose we have two neighbors in an apartment. One plays electric guitar, the other trombone. They both like to practice. However, if they both practice whenever they like, they inflict significant costs on each other. This gives each a payoff of zero. However, if they coordinate their practice times (perhaps practicing when the other was out of the building), they would both be better off, receiving a payoff of 5 each. However, if each has an unconditional right to practice whenever he or she would like, this may not happen. Whatever the trombonist does the guitarist is better off practicing whenever she likes, and whatever the guitarist does,

TABLE 5.1. A Prisoner’s Dilemma Game (trombonist’s payoff first)

		Guitarist			
		Show restraint		Play loud, anytime	
Trombonist	Show restraint	5, 5	[A]	-5, 10	[C]
	Play loud, anytime	10, -5	[B]	0, 0	[D]

[A] → [D] ~ [B] ~ [A]

the trombonist is better off practicing whenever he likes. Thus we have the familiar Prisoner's Dilemma situation. If we were just dealing with two apartment dwellers, we would hope that they could negotiate an amicable solution, although Glendon's (1991) tales of litigation on matters like this caution us against too much optimism. However, if we are dealing with a situation where there are many agents, this is less likely. The usual solution to a collective action with many players is to have some type of central enforcement. We do not rely on people to pay taxes or provide national defense voluntarily but have the government enforce this obligation. But this is precisely the solution we foreclose when we give the players unconditional rights to choose their own behavior.

The consequence for us of Sen's paradox is that assigning rights inappropriately may make everyone worse off. It is clear that assigning rights may make some people better off at the expense of others. However, it is possible for some rights assignments to harm everyone. This is typically the case when the actions of the players not only affect the players themselves but also affect other people or groups. As Saari (2001) shows, this is an inevitable result of decentralized decision making where the aggregate consequences of decisions are not internalized by the players. (For reasons explained in chapter 4, we should also note that this implies a majority-rule intransitivity—outcome [A] is unanimously preferred to [D], we are indifferent between [D] and [B], but [A] is not majority-rule preferred to [B].) This problem clearly applies to environmental issues—if we grant an unconditional right to emit, we are likely to end up with a level of pollution no one would choose. If we grant an unconditional right for landowners to do as they choose on their land, we may well see land use patterns that the landowners collectively would not choose. The same framework would apply also to questions of federalism (Sen 1976). If we grant different subnational units unconditional control over certain actions that affect other states (such as pollution control or interstate commerce) we may end up with highly suboptimal outcomes.

Clearly, decentralizing decision making has benefits—where the decision does not have strong effects on other people or units, it makes little sense not to delegate the decision. Delegation both increases freedom and may well increase the quality of the decision, given that decisions can be tailored to local or individual tastes and circumstances. However, if the choices of individual units have strong effects on other units, then delegation can lead to outcomes nobody would want. The problem is to decide which decisions should be delegated, or, to put it another way, when to give decision-making rights to decentralized units as opposed to when to make the decision collectively. A democratic solution would be

to allow the people collectively to decide this question via majority rule. After all, the principle of popular sovereignty is that the people should be decisive over every decision, *should they choose to be*. This, however, brings us back to straightforward majority-rule democracy, not constitutionalism, where some decision-making rights are delegated regardless of the opinion of the majority.

This brings us full circle to the basic problem of constitutionalism. If certain rights are to be protected, even against the majority, some group has to decide which rights these are to be, and it also has to have the power to overrule the majority in cases *where this group decides that rights have been violated*. The group with this power then has the ability to use it to protect entrenched privileges or oppressions. As Dahl (1956) argues, a constitution cannot decide whether its provisions are being used to defend legitimate rights or unjust privileges. If the majority is not sovereign, then a minority must have the power to overrule the majority. If the right to overrule the majority belongs to a group subject to no higher power (at least earthly), then you have a form of judicial guardianship. (The Iranian Council of Guardians, which has a veto over all legislation, would be an example of this.) If the right to overrule the majority belongs to a constitutional court, the degree of guardianship is less, as it is possible to change the constitution. Amending constitutions, however, typically requires more than a simple majority. Thus constitutionalism is essentially a form of supermajoritarian rule, albeit one that gives an unelected body of judicial guardians considerable discretionary power.

In terms of empirical evidence, there is no evidence I am aware of that constitutional rights protection regimes protect basic rights better than simple majority rule. As Dahl (2001) argues, the problem is that all advanced industrial democracies for the most part respect the basic rights necessary for democratic governance, such as freedom of speech, the press, and organization. If we consider cross-national assessments of basic liberal rights, such as those compiled by Freedom House (2004), we find very little variation among industrial democracies—the United States, with its constitutionalist rights regime, receives a virtually perfect score, as does the Netherlands, which has virtually no formal checks on a parliamentary majority. Furthermore, even within the United States, it is not clear that judicial review is responsible for the high level of respect of basic rights—Dahl (1956, 1988) argues that there is not a single case of the Supreme Court overturning an act of Congress that would have taken away a basic right.¹³ Thus it seems that high-income democracies respect basic rights regardless of whether there are constitutional protections such as judicial review. However, if we move away from basic rights and consider the protection of the interests of minorities, it is here we would

expect majority rule regimes to provide more protection than supermajoritarian ones. We would expect to see differences in the status of ethnic minorities, the poor, and also some majority groups (such as women). We turn to the evidence for this in chapter 8.

7. Cycling and Minority Protection under Majority Rule

I have argued that majority rule provides the most protection for minorities and that supermajoritarian rule merely replaces the possibility of domination by a majority with domination by a privileged minority. We can now relate this argument to the discussion of majority-rule cycling in the last chapter. It is precisely the presence of multiple, cycling majorities that provides the possibility of a check on majorities without artificially empowering a minority. We see this at work in many of the small countries of Europe (Austria, Denmark, Finland, Norway, the Netherlands, Sweden) that have coalition government but very few constitutional checks and balances.

Majority-rule cycling can protect minorities in two ways. First, as Miller (1983) argues, it can ensure that there are no permanent losers. A group out of power can always expect to be able to defeat the incumbents in the future and thus have an incentive to keep playing the game, which enhances the stability of the system. Second, the need to build and maintain majority coalitions provides protection to minorities. Because any winning coalition can be split, the minority always has a means of retaliation. Furthermore, it is not in the interest of members of the winning coalition to try to drive the losers to the wall. If the winning coalition is too harsh to the other players, then these players may approach part of the winning coalition and sell their support for a very low price. They may give their support on all other issues in exchange for votes on the one issue that they view as crucial to their identity. For example, if a coalition of liberals and socialists in the Netherlands tried to prevent state funding of parochial schools, the confessional parties could go to the socialists and offer them support for any economic program they prefer, in exchange for abandoning the schools proposal. The socialists, being more concerned with economics than parochial schools, would accept this, thus breaking the coalition with the liberals. The liberals, anticipating this outcome, would not try to end support for parochial schools. Far from being a problem for democracy, majority-rule cycling actually provides a way to reconcile the demands of majority rule and minority protection.

Interestingly, although Buchanan and Tullock have been among the foremost advocates of unanimity rule, the following quotation from *The*

Calculus of Consent (1962, 132) provides an argument very similar to the one I have just made.

Applying the strict Pareto rules for determining whether one social situation represents an improvement over another, almost any system that allows some such exchange to take place would be superior to that system which weights all preferences equally on each issue. By way of illustration, it is conceivable that a proposal to prohibit Southern Democrats from having access to free radio time might be passed by simple majority vote in a national referendum should the issue be raised in this way. Such a measure, however, would not have the slightest chance of being adopted by the decision-making process actually prevailing in the United States. The measure would never pass the Congress because the supporters of the minority threatened with the damage would, if the issue arose, be willing to promise support on other measures in return for votes against such discriminatory legislation.

Summary

The previous chapter argued that majority rule uniquely embodies the values of popular sovereignty and political equality. However, these are not the only values we are concerned with in matters of constitutional choice. This chapter has considered minority protection and rights. It is commonly argued that there is a trade-off between political equality (best served by majority rule) on one hand and minority protection (best served by external checks and balances) on the other. This chapter has argued that this trade-off is illusory and that majority rule provides more protection for the worst-off minority than any other decision rule.

Majority rule offers the most protection to minorities because it makes it easiest for a minority to form a coalition that can overturn an unacceptable outcome. Supermajority rules can certainly protect (or rather privilege) some minorities, but only at the expense of others. It is not logically possible for every minority to be privileged over every other minority. Supermajority rules make the status quo hard to overturn and thus privilege minorities who favor the status quo over those who favor changing it. Arguments in favor of supermajoritarian institutions have tended to be built on the assumption that the threat to minorities from government action or a change in the law is greater than the

threat from government inaction or the maintenance of current laws. Given the history of the United States this assumption is problematic, especially given the use of supermajoritarian institutions to impede the extension of civil rights. Furthermore, given uncertainty about legal interpretation, technology, social mores, and preferences over the timescale involved in constitutional choice, any assumptions about where the threats to rights are likely to lie are inevitably heroic.

The protection of minorities under majority rule is a direct result of the instability and cycling phenomena outlined in the last chapter. The defense against a “tyranny of the majority” is that any majority can be split and defeated. Indeed, under such circumstances it would be very foolish for the current majority to try to drive those excluded from it to the wall by attacking their most vital interests. This would provoke members of the minority to try to buy off some members of the majority coalition, trading their support on other issues for concessions on the one issue they consider vital. (Chapter 8 argues that this is precisely the dynamic at work in the so-called consensual democracies of Europe.) There is no “tyranny of the majority” because there is no single, cohesive majority ready to dominate everyone else. This, of course, is essentially the “extended republic” argument made by James Madison at the Constitutional Convention of 1787 and in *Federalist* 10.

APPENDIX: PROOFS

LEMMA 1: *Let the i -Core be the “core for agent i ,” that is, the set of points that a coalition C including agent i cannot overturn. The i -Core with quota q will be a subset of the i -Core with quota $q + 1$. The i -Core must contain at least the ideal point of agent i .*

The i -Core can be thought of as the set of points that agent i cannot block by proposing a point that i and $q - 1$ other voters prefer. Let $L(C)$ be the set of points that coalition C cannot overturn—that is, the set of points for which there does not exist another point that coalition C unanimously prefers. Then the i -Core for quota q is

$$\bigcap_{C \subseteq N: |C| \geq q, i \in C} L(C) = \left(\bigcup_{C \subseteq N: |C| \geq q, i \in C} (L(C))' \right)'$$

It is clear that for \bar{C} such that $|\bar{C}| = q$, $L(\bar{C}) \subseteq L(\bar{C} + i)$, where $i \notin \bar{C}$. If there is a point x such that coalition \bar{C} cannot find another point that it unanimously prefers, then there cannot be a point that the larger coalition $(\bar{C} + i)$ unanimously prefers to x . Therefore

$$\begin{aligned}
 & (L(\bar{C}: |C| = q))' \supseteq (L(\bar{C} + i))' \\
 & \Rightarrow \bigcup_{C \subseteq N: |C| \geq q, i \in C} (L(C))' \supseteq \bigcup_{C \subseteq N: |C| \geq q+1, i \in C} (L(C))' \Rightarrow \left(\bigcup_{C \subseteq N: |C| \geq q, i \in C} (L(C))' \right)' \\
 & \subseteq \left(\bigcup_{C \subseteq N: |C| \geq q+1, i \in C} (L(C))' \right)' \Rightarrow \bigcap_{C \subseteq N: |C| \geq q, i \in C} L(C) \subseteq \bigcap_{C \subseteq N: |C| \geq q+1, i \in C} L(C) \\
 & \Rightarrow {}_i\text{Core}(q) \subseteq {}_i\text{Core}(q + 1).
 \end{aligned}$$

Given that a coalition containing i cannot overturn i 's ideal point, and the ${}_i\text{Core}$ is defined as those points that a coalition containing i cannot overturn, then the ${}_i\text{Core}$ must at least contain i 's ideal point. QED

PROPOSITION 1: *Given a voting rule with quota q , let $m_i(q)$ be the utility associated with the least preferred position for agent i that, if enacted, no coalition including i could overturn given sincere voting. Then $m_i(q) \geq m_i(q + 1)$.*

Formally $m_i(q) = \min_{x \in {}_i\text{Core}(q)} u_i(x)$. It is obvious that $\min_{x \in X} u_i(x) \geq \min_{x \in Y: Y \supseteq X} u_i(x)$, given $X, Y \neq \emptyset$. Given Lemma 1 that ${}_i\text{Core}(q) \subseteq {}_i\text{Core}(q + 1)$, it can be seen that $\min_{x \in {}_i\text{Core}(q)} u_i(x) \geq \min_{x \in {}_i\text{Core}(q+1)} u_i(x)$, and thus $m_i(q) \geq m_i(q + 1)$. QED