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WOJCIECH SADURSKI



EUROPEAN UNIVERSITY INSTITUTE

Department of Law

EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW

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Abstract

This paper claims that the intuitive and widespread legitimating power of majority rule (MR) arises from the link between majority rule and the principle of equality of political opportunity. The egalitarian character of MR is established by exploring “puzzles” in democratic theory, such as the insensitivity of democratic voting procedures to unequal intensity of citizens’ preferences, the inalienability of voting rights, and the relationship between the principle of unanimity (sometimes thought better to respect citizens’ equality) and MR. Special attention is directed to the relationship between political equality, and equality in the outcomes of political decisions: the claim is made that the language of equal political opportunity captures well the idea of equal political influence, in the circumstance of disagreement about what is required to achieve equal treatment through the outcomes of political decisions.

Keywords

equality; political equality; equality of opportunity; voting; democratic theory; political legitimacy

Majority Rule, Legitimacy and Political Equality

Wojciech Sadurski*

The legitimating force of the majority rule (MR) is so pervasive that we often do not notice it and rarely do we question it: we usually just take it for granted. All sorts of collective decisions are taken by majority, even if not always by a simple majority: the election of a new pope by the conclave of cardinals, the laws passed by parliaments, the verdicts laid down by courts, the regulations adopted by clubs and associations, as well as the decisions between friends as to which film to see together. There are, of course, some important exceptions to this pervasive authority of the principle of majority: there are contexts in which unanimity is required (as in many jury systems or in some voluntary organizations practicing blackballing in the admission of new members) and, conversely, there are contexts in which only one person, or a few persons, are in a privileged position to make the decisions for the group: consider some of the decisions in a family, in the army or in a church structure. (In fact, to characterize the unanimous vote and the decision by a single person as being the opposite may be contested as mistaken: unanimity requirement amounts to a power of decision, albeit only a negative decision, endowed upon one member. But is a power of veto tantamount to a power to decide? I will return to this issue below). It is, however, precisely because these are exceptions that we take the majority decision as a norm about the legitimacy-conferring decision rule. To confirm this intuition, one can reflect upon the fact that very often, and in varying contexts, the reason for accepting a particular decision as that of the whole group (and feel bound by it, if we are members of that group), is “Because the majority has so decided” – and this is taken as satisfactory, and conclusive. This does not neglect a popular idiom in which such a discussion-stopper is challenged: “But the majority is not necessarily right”. We all know this, and in those circumstances in which the rightness of the decision relies significantly upon the ascertainment of some empirical facts, this challenge may be effective. By way of example, let us consider the issue of establishing the criminal guilt of a particular celebrity: holding a national poll on his guilt or innocence with a verdict by majority seems like a particularly bad decision procedure in this case. This does not mean, however, that the rule of majority has no place in this example, but rather that the constituency of the decision-makers has been identified in an inappropriate way. Once we have decided, in a more reasonable manner, the proper range of decision-makers, whether a jury or a panel of professional judges, we may well establish that, in the situation of inevitable uncertainty about the truth of the facts, we need to settle for a decision by the majority. (Or we may not: we may require unanimity or a qualified majority. But a majority decision is not to be regarded as absurd in such cases). In any event, my point is not that MR applies or should apply to all collective decisions (which would be nonsensical) but rather that it is intuitively taken as a norm about the sources of *legitimacy* of collective

* Professor in the European University Institute, Department of Law, and in the University of Sydney, Faculty of Law.

decisions in a wide range of contexts. It is a source of their legitimacy, although not necessarily of their truth (insofar as some collective decisions rely on statements of facts which can be true or false) or of many other attributes that we may consider valuable about a collective decision, such as its practicality, coherence, feasibility, elegance, etc. This MR/legitimacy link may depend on a notion of “legitimacy” which we adopt, and one must be careful not to allow for a tautology in which legitimacy is already defined in terms of a decision by majority. To avoid being embroiled in a complicated analysis of what legitimacy of a collective decision means¹ I will rely here on the simplest, and hopefully the most uncontroversial even if necessarily question-begging, definition that collective decisions are legitimate when all members of the group have good reasons to consider these as *their* decisions – that is, as the decisions of the whole group of which they are members, even if they may happen to disagree with the substance of this decision and indeed, even if they had registered their opposition to it at any earlier stage leading to making this decision. I will simply take it as an axiom which does not require any further proof, and claims that in our conventional thinking, we accept intuitively MR as a legitimacy-conferring procedure in a great number of contexts, groups and types of decisions.

But why should we do so? MR is not self-justifying, and we should find out what can possibly account for this legitimating force of MR in numerous and diverse circumstances. Such an exploration may be motivated by a critical aspiration: one may try to show that MR, considered *in abstracto*, has no sufficient justifying assets to endow it with a universally legitimating power. This will not be my approach here: the pervasive force of intuitive support for MR is much too powerful to make it vulnerable to a philosophical challenge, and in any event I have no stake in launching or supporting such a challenge. Rather, I wish to discern some good justifying rationales behind the MR which can be seen as endowing MR with a legitimating power. The argument will be that MR is thoroughly egalitarian in its rationale, and that it is this aspect of equality which is intrinsic to MR which can account for the legitimating power of the MR. What sort of equality we are speaking about will need to be clarified a later stage; for the time being what is important to emphasize is that the burden of this article will be to show and defend the relationship between MR and equality of citizens.

If this link can be properly established, then the implication will be that, given the intuitive legitimating force of MR (treated here as an axiom) the true legitimating work is done by the principle of equality of people as citizens. This implication resonates quite well with a conventional, liberal-egalitarian conviction that “equal concern is a precondition of political legitimacy”.² On the face of it, this conviction may seem to apply only to the social *outcomes* of the decisions rather than the involvement in the process. However, the principle of equal concern for the interests of all is usually (and plausibly) combined with the anti-paternalistic understanding that “everyone is assumed to be the best judge of his or her own good or interests”;³ hence the requirement of equal right to participate in the political process if the aim of equal consideration of the interests of all is to be attained. This insight applies, in my view, to a broader range of institutions and circumstances than just the relationship between the state and its citizens. In any event, I will not try to justify why the principle of equality has, and should have, a legitimating force. Thus the project of this article can be schematically defined as follows: the belief in a legitimating power of the MR will be taken for granted as

¹ On the concept of legitimacy more generally, see Wojciech Sadurski, “Law’s Legitimacy and ‘Democracy-Plus’”, *Oxford Journal of Legal Studies*, forthcoming 2006.

² Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press: Cambridge, Mass., 2000) at 2.

³ Robert A. Dahl, ‘Procedural Democracy’, in Peter Laslett & James Fishkin, eds., *Philosophy, Politics and Society*, Fifth Series (Basil Blackwell: Oxford): 97-133 at 126.

an empirical fact of our widespread moral convictions; the burden of the argument will be the relationship between the MR and the principle of equality; and the implication will be that it is this equalitarian ingredient which truly accounts for the legitimating force of the MR.

1. Majority Rule and Legitimacy: a Shortcut Link?

Before addressing the merits of the main argument of this article, a preliminary observation is in order. A general strategy of the argument here is, not only that majority rule is based on substantive equality principles (which serves to substantiate a more general observation that even merely “procedural” democracy has substantive moral moorings), but also that there is a normative connection between majority rule and legitimacy of law, and that an important work of mediating between majority rule and legitimacy is done by egalitarian values (the specific nature of which still remains to be ascertained). But one may observe that there are other, perhaps simpler, ways of displaying a link between MR and legitimacy of the law without any need for reconstructing the latent egalitarianism of MR and then showing that this egalitarianism goes some of the way towards legitimating the law. One such way is by the following function that MR typically serves: it stabilizes the commitment of people to the system as a whole by making it feasible that even those who are in an outvoted minority on a given law will be able to remove this law in future. The closer the law-making system comes to a simple majority rule, the easier such a possibility becomes; by contrast, any departures from a single majority rule (qualified majority requirements) cause for more entrenched preferences of the current majority, and consequently lead to the unlikelihood of today’s minority accepting the legitimacy of the system and from abstaining from undoing the majority’s rulings by violent means. This is a feature of MR which Ian Shapiro describes as the “institutionaliz[ation of] the perpetual possibility of upsetting the status quo”,⁴ and which he then identifies as one of those findings in the public choice literature which are “less threatening to democracy’s legitimacy than is often assumed.”⁵

There is no doubt that this incentive for people to stay loyal to the system is an important merit of the majority rule: it makes the task of undoing the results of today’s decision less overwhelming tomorrow than many other decision-making rules. But is it really a satisfactory strategy of supporting legitimacy of the law-making system as a whole? There are some doubts about it. For one thing, the link between this feature of MR and legitimacy of law-making hinges upon certain additional conditions which may or may not be fulfilled, and therefore the link is very contingent. Without entering into too much detail (which would take us to the empirical political science) the link exists when the majority/minority division is fluid, when various minorities of today have a reasonable chance of entering into majority-constituting coalitions, and when the cleavages of preference cut across various social classes. If these conditions are not met, (i.e. when there are groups constituting “permanent minorities”), and when there is a single dominant cleavage in society, minority rule is of no use for today’s “losers” and the incentive for them to accept the legitimacy of the system does not occur, or must be found in the other features of the system than in the MR. Second, there is something fundamentally suspicious, perhaps even perverse, about a proposition that the legitimacy-generating feature of a given law is that it can be easily undone. It is equivalent to saying that a particular official is legitimate on the basis that she can be reasonably easily removed from the office. Let us pursue this analogy for a moment. The easy removal of an official *may* be an indirect indicium of her legitimacy in the sense that it signals that she was

⁴ Ian Shapiro, *The State of Democratic Theory* (Princeton University Press: Princeton, 2003) at 14

⁵ *Id.* at 16.

appointed (or elected) into the office by the use of legitimacy-endowing processes, such as the election or appointment by a body authorized to make such decisions. But it just shows that it is not the fact of easy removal per se which endows the official with legitimacy but rather the fact that she had been elected in the first place. Similarly, it cannot be the fact of an easy change of the laws which may endow the law with legitimacy. We need some *positive* features of the law in question, or of the law-making process which led to its enactment, rather than the consolation for those who dislike the law that it can be easily upset if we want to identify the sources of its legitimacy. Third, the feature of MR just noted, if it is taken to be a factor of the legitimacy of law (which is the only perspective that presently interests us) relies upon a distinction between legitimacy of a particular rule (or legal act) and the legitimacy of the system as a whole. For it is implicit to this feature that the sources of legitimacy can be found in the aspects of the law-making regardless of dissatisfaction with a particular outcome of the process. Elsewhere, I have rejected the strategy of building the legitimacy on such a distinction between an isolated instance and a system as a whole; such a distinction (as I had suggested) does not carry the weight needed for the conclusion just discussed.⁶

But one must not protest too much: there *is* an element of legitimacy-building in the feature of MR depicted by Ian Shapiro and by other political theorists, and described as institutionalization of the possibility of upsetting the status quo. The link between this feature of MR and legitimacy is, however, not to be found in the political stability which it enhances nor in the loyalty of the opposition it promotes (even though it certainly does that, under some empirical conditions mentioned above), but rather in the fact that it creates a certain type of *equality* between those who have won (the majority) and those who were outvoted (the minority) on a given proposal. What sort of equality is it? A metaphor will help explain this. Consider two athletes: one has just won the competition whereas the other, judged by his recent record and his capacities, is well within the reach of winning in the next game. This likelihood of winning in future renders them both “equal” to each other in the meaningful sense of the word, and in the sense in which two athletes of highly different capacities are not “equal”. It is not just a trivial proposition about varying degrees of difference: it is rather that the differences kept within certain limits do not amount to inequality. All members of a given class are “equal” by virtue of the likelihood of victory, and the marginal distinctions of capacities do not count for the purpose of recognizing the fact of equality. (We can claim, without any absurdity, that Juventus, Inter and AC Milan are “equally good” football teams even though at any time when we make this statement they will almost certainly occupy different positions in the current ranking). This is what John Rawls dubbed as the relationship of equality by virtue of having a “range property” which he described (in the context of a discussion of resting equality upon natural capacities of individuals) by the following example: “the property of being in the interior of the unit circle is a range property of points in the plane. All points inside this circle have this property although their coordinates vary within a certain range. And they *equally* have this property, since no point interior to a circle is more or less interior to it than any other interior point”.⁷ There are many contexts in which equality is a matter of all equal persons meeting a particular threshold, such as when meeting a particular legal requirement (say of age for voting eligibility) is all that matters for equal qualifications for a particular benefit, and the marginal differences in the degree of satisfying

⁶ See Sadurski, *supra* note 1.

⁷ John Rawls, *Theory of Justice* (Harvard University Press: Cambridge Mass., 1971) at 508, emphasis added. Rawls’s concept of “range property” has been taken up by Waldron in his interpretation of Lockean idea of equal rationality of human beings, see Jeremy Waldron, *God, Locke, and Equality* (Cambridge University Press: Cambridge 2002) at 76-81.

a particular condition are irrelevant. But this type of equality may also apply to some moral and political arguments which do not have a rough-and-ready threshold condition (as in legal classifications) and where the moral or political condition is, theoretically at least, lending itself to judgments of degree but where we refuse to accord any relevance to such degrees. Precisely that type of equality occurs also, I believe, when there is a reasonable likelihood of becoming a winner in the political voting game next time round, and this likelihood is higher in the MR-based process than when a more qualified majority is required. Admittedly, this is a vague and rather unsatisfactory description – but the only reason why I include it here is in order to show that what may seem to be a legitimacy-enhancing factor of MR in fact boils down to its egalitarian characteristics.

2. Majority Rule and Intensity of Preferences

One of the central puzzles raised in democratic theory about majority rule is that it seems to presuppose equal intensity of felt interests (or of preferences), which is deeply implausible: “A man who is passionately opposed to a given measure and a man who is slightly favourable but does not care greatly about it are given equal weight in the [majoritarian] process of making final decisions”.⁸ This is often seen to be a perversion of equality, and therefore either a basis for making proposals for departures from MR or at least as a proof that MR procedure is not really equality-based. It is only this last argument that is of interest to the present discussion. To begin with, one needs to observe that a point at which MR is employed does not exhaust the entire political decision-making process in a democracy, and that the adoption of the MR may actually presuppose (rather than being a departure from) the existence of elements of the process which are sensitive to differing intensities of political preferences. As Henry B. Mayo observed, “Intensity of feeling – often an acute political phenomenon – has abundant opportunity to make itself felt in the many political processes which are open” and which, we may add, are connected in various ways with the process of voting.⁹ MR applies only to the final stage of decision-making process which follows, and is responsive to, an earlier stage consisting, as it normally does, of the deliberation of various proposals. No doubt differing intensities of views affect the way in which a deliberation develops: those who feel stronger about a matter will probably participate in the debate more actively and more forcefully, and those who are indifferent or apathetic about the issue will not care to take part or will make only very meek expositions of their views. If the voting stage is affected (as it should be in the ideal model of democracy) by what was going on in the deliberation stage, then the final vote will be sensitive, though indirectly, to intensities of preferences.

The second aspect in which MR coexists with intensity-sensitive mechanisms is as follows. To say that when “we vote” each vote counts equally, without regard to the motives for voting and thus to the intensity of preferences behind the vote, is correct but only as a shorthand for something much more complex which in fact does recognize unequal intensities of preferences. We rarely “vote” for and against a specific proposal: as citizens, we do so only in these rare moments when there is a referendum on a single issue. In such circumstances, for a number of reasons (ignorance as to how others will vote, high transaction costs involved in collaboration on making strategic alliances, secrecy of the ballot making it impossible to verify the performance of the commitments undertaken previously) we are unable to engage in processes where unequal intensities can be recognized. (It is only at the margins that these

⁸ James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (University of Michigan Press: Ann Arbor, 1965) at 132.

⁹ Henry B. Mayo, *An Introduction to Democratic Theory* (Oxford University Press: New York, 1960) at 178.

unequal intensities can be registered: those who do not care at all about a given issue, or whose preference is of extremely weak intensity, can, and do, abstain from participating in the referendum thereby reducing the perverse effect of unequally counting intense preferences equally). But more often than not, we as citizens “vote” for our representatives on the basis of the broad package represented by a party (or individual) platform, and the actual votes on the specific proposals is done by the representatives. The mechanisms of representative democracy allow, of course (and indeed, in an ideal model, encourage) the processes of negotiations and bargaining in which preferences of unequal intensity will be compared, and the resultant “exchanges of votes” will occur. As James Buchanan and Gordon Tullock observe in their classic study, “[S]uch exchanges significantly affect the results of political process. It seems probable that this fact provides one of the major reasons for the widespread use of representative democracy”.¹⁰ Now one does not have to represent this process in a cynical way as a “horse-trading” or “logrolling” in a way analogized to market exchange in which the goods gravitate to those who can extract better value from them, measured by the willingness and capacity to pay. One can view the process as a virtuous mechanism of finding the optimal solutions through mutual compromises in the environment of trust, to which representative mechanisms (again, in their optimal embodiment) are uniquely tailored. It is clear that these mechanisms (which derive their existence from MR because representation is based on the majority vote in the elections) are intensity-sensitive, and so MR is not totally blind to unequal intensities of preferences. In fact, this dimension of intensity can also be present at the stage of the popular vote in the elections, albeit in an indirect way, by being reflected in the voters’ preferences where some aspects of the “packages” presented to them by the parties (or the individual candidates) will overshadow other aspects. Buchanan and Tullock have dubbed this effect an “implicit logrolling” which may be orchestrated by the political entrepreneurs who “keep firmly in mind the fact that the single voter may be so interested in the outcome of a particular issue that he will vote for the one party that supports this issue, although he may be opposed to the party stand on all other issues”.¹¹

Thus unequal intensities of preferences are not fully invisible in the MR-based process. It is, however, true that when it comes to the most paradigmatic use of the MR-procedure, a single vote on a particular proposal, taken in isolation from other votes and processes, does not register inequality of intensities. This may not be so bad from the point of view of egalitarian values served (as it is argued here) by MR. One problem about trying to factor different intensities of preferences into a design of the political process would be that it would be necessarily reflective of intensities of *expressions* of preferences which may be a function of many factors which are irrelevant for the intensity of preferences themselves but have to do with purely subjective characteristics such as differences in temperament, emotionalism, etc. As Peter Jones has observed, “Some people seem to feel more strongly than others about almost everything. Some become excited without good reason; others fail to become excited when they have good reason. Taking account of intensity of preference may therefore favour over-sensitive busybodies to the disadvantage of long-suffering stoics”.¹² Now one could respond that this is a notorious fact about all attempts to register in politics the features corresponding to the state of mind: all that we see are the external expressions of those states of mind, and this cannot be an argument against trying to make politics responsive to the avowed preferences: we must hope that there is a degree of correlation between the expressions of preferences and the preferences themselves. But in the case of trying to reflect

¹⁰ Buchanan & Tullock, *supra* note 8 at 134.

¹¹ *Id.* at 135, footnote omitted.

¹² Peter Jones, “Political Equality and Majority Rule”, in David Miller & Larry Siedentop, eds., *The Nature of Political Theory* (Oxford University Press: Oxford 1983): 155-82 at 162.

the intensity in the aggregation of preferences the problem noted by Jones is of different character. When *A* expresses preference *P-1* and *B* preference *P-2*, the danger of the false inference from the expressions of preferences to the preferences themselves is minimal: we may doubt whether the preferences have been formed in a rational way but it is hard to doubt that these *are* really the preferences of *A* and *B* at the moment, unless we consider the facts which render these expressions insincere. But when *A* expresses a preference *P-1* in an enthusiastic and emphatic way, and *B*'s preference for *P-2* strikes us as bland and weak, these differences may very well (and very plausibly) be due to the differences in the excitability and temperament between *A* and *B*. And if it is the case (which our common sense suggests that often it *is* the case) then to try to factor in this difference of intensities into the social outcome would in fact offend against, rather than respect, equality between *A* and *B*.

This serves to focus the argument about intensity on the only issue which is of interest here: not whether, in general, it is a regrettable fact that MR tends to disregard the differing intensities of preferences of voters, but more specifically, whether this feature of MR shows that our intuitive endorsement of MR cannot claim support from any egalitarian values. Whatever the defects of MR can be as far as the intensity of preferences is concerned, the question for us is only if these defects deprive MR of its egalitarian credentials. So far my argument has been that they do not: either because MR presupposes (or at least coexist with) the processes which are sensitive to differing intensities, or because redesigning MR in a way which would make it alert to different intensities would be harmful rather than beneficial for the very equality which we claim to discover as underlying MR. Without denying the force of these strategies, they cannot be decisive for the argument that intensity-insensitive MR gives effect to the political equality of persons. The decisive strategy must neither be extraneous to MR (as the former strategy is) nor negative (as the latter is): it must be both intrinsic to, and positively about, the MR and its relationship to equality of persons. Such a strategy must be based on a recognition that there may be a difference in the intensity-of-preferences problem when we look at the process of political decision-making at its input and at its output ends. When we look at the decision-making from the point of view of outputs, to disregard the unequal intensities indeed upsets the equality between persons. For when we consider citizens as fundamentally stake-holders in the decisions, an equal recognition of preferences of those who have high stakes and low stakes in the decision violates the principle of equal treatment. Consider the strong feelings about the construction of a new factory by those who will have to live next to it and weak feelings of those who will be unaffected by the negative externalities of the new production: to place one and the other on equal level and merely to count the votes is not egalitarian. But viewed from the point of view of the input, the relationship between intensity-insensitive MR and the principle of equality is different. Or at least, it is different if we recognize (as we should) that people's political opinions express not merely their interests but also their judgments about values. While interests have the dimension of intensity which should be counted in the calculus of social decision, the judgments about values do not.¹³ The force with which we hold a particular value is not indicative of its worth. The intensity of judgment is not a symptom of its quality. Consequently, all that counts for the political process which attempts to reflect individual judgments of members of the group is the fact that each of us espouses a particular judgment and not how strongly we espouse our respective values. The fact that I believe in the need to permit doctor-assisted suicide and you are against it is fundamentally the only relevant fact for the political process leading to a collective decision on this issue: how strongly we hold on to our beliefs is not relevant, at least if the process wants to respect our politically equal status. By contrast, if the political

¹³ For this reason, Rawls rejected the idea that "the intensity of desire is a relevant consideration in enacting legislation", supra note 7 at 230.

process tried to attach more importance to one of us only because one of us has stronger feelings about the issue, it would have treated us in an objectionably unequal way because it would penalize another person for the factors which are irrelevant to the exercise of a citizen's role of influencing the collective decision. Now there *may* be an equality-respecting reason for differentiating the importance to your and my opinion about the subject on the basis that your stakes are higher than mine in the social outcome (I am a suffering patient wanting to die; you are a young and healthy person), but this is precisely where the input and output perspectives on the issue diverge. In so far as the input perspective matters, and as long as the point of the political process is not merely to take account of expressed interests but also of expressed judgments, insensitivity of MR to differing strengths of preferences is a requirement rather than a negation of political equality of citizens.

In the end, and somewhat ironically, this argument supports a certain thought expressed by Buchanan and Tullock on this subject. It is ironic because these two scholars have, of course, harshly criticized an intensity-insensitive design of the political decision-making system. But at the outset of their discussion of the subject, they offered (almost *en passant*) the following analysis which I will quote at length because it captures well the nature of the argument that I have in mind:

As with certain other aspects of political theory, there seems to have been a failure here [i.e., in the literature on the voting rules] to distinguish between positive analysis and normative theory. Implicit in much of the discussion of majority rule has been the idea that individual votes *should* be treated as reflecting equal intensities of preference, quite independently of whether or not the norms agree with the facts in the case. This idea, in turn, probably stems from the more fundamental norm of democratic organization – that of political equality. Political equality may be fully accepted as essential to any form of democratic process, but this does not imply that individual votes on particular issues should be considered *as if* they reflect equal intensities of preferences over all participants.¹⁴

I think that Buchanan and Tullock have it exactly right here although they would probably not applaud the use I am making of their statement. Indeed, exactly as they insist, insensitivity of the process to intensities is mandated by political equality. It is based on an “as if” proposition: if we want to respect political equality of citizens-voters, we must treat their preferences *as if* they were of equal intensity. But of course, they are not, and Buchanan and Tullock are at pains to debunk this myth, in their “positive analysis” as opposed to a “normative theory”. What we are interested in here, however, is a “normative theory”: the theory about how the voters *should* be treated if we wish to respect their political equality. And if the nexus between the intensiveness-insensitivity of the conventional account of MR and the principle of political equality is established so firmly by the detractors of the former, then we can be satisfied that this insensitivity is a meaningful symptom of the egalitarian credentials of MR, as we intuitively endorse it.

3. Vote Trading and Equality

The line of thought proposed here to explain the intensity-insensitivity written into MR can also account, *mutatis mutandis*, for our intuitive and widespread hostility towards commodification of votes, i.e. vote selling. This is a pervasive feature of our democratic practice everywhere: while abstention from exercise of a right to vote is almost everywhere¹⁵

¹⁴ Buchanan & Tullock, *supra* note 8 at 126, emphases in original.

¹⁵ I put to one side those few cases where an exercise of a right to vote is considered to be a matter of legal obligation, as in Australia, which can be considered to be aberration rather than a norm. These cases may raise

considered as a right consequent upon a right to vote under a MR regime (and does not raise any difficult problems from the point of view of an egalitarian defence of MR), the trading of votes for money or for other material goods is generally considered to be contrary to good democratic practices. The intuitive rationale for this hostility is worth exploring here. No doubt, much of our hostility is based on practical considerations: we understand that, in the world as we know it, the temptation upon the poorer people to trade whatever minimal value their vote may have for them (even if we understand the value of the vote for them in expressive terms, and not merely in terms of the marginal impact that an individual vote may have)¹⁶ in exchange for the much needed money or food may be so strong that, if such practice is permitted, it would, when generalized, significantly distort the picture of societal preferences as revealed by the voting. But if we put aside, for the sake of argument, this practical consideration we may consider the more theoretical reasons for our widespread hostility to votes' buying and selling. After all, one may argue that under an equality rationale for MR, votes can be considered just the same type of commodity as any other scarce good: people derive value from these goods, and since they are allowed to trade with others in order to achieve the most optimal distribution (satisfying the Pareto optimality criterion) in a great number of any other goods, why not add the value derived from exercising a right to vote to the list of these goods, and allow free trading of votes to the highest satisfaction of everyone? This very way of posing the question suggests some of the lines of response. One strategy of responding to the objection would be along the lines of arguments about general limits of commodification of many other goods:¹⁷ after all, votes are not the only valuable goods which we remove from the range of tradable goods. In Walzer's words, "we can buy and sell universally only if we disregard real values; while if we attend to values, there are things that cannot be bought or sold".¹⁸ The boundaries of commodification are of course historically and culturally contingent but at least in some places, and in some times, a great many goods are not subject to trading: exemption from military service or from jury duty, human life, honours or aristocratic titles, children, marriage, offices, official decisions (buying of which is normally called bribery), bodily organs, salvation.¹⁹ These cases of today's quasi-universal non-commodification do not usually raise important objections in terms of equality, just the contrary; it is in terms of equality that we often object to a proposal for commodification of certain goods (think about purchasing the exemption from military service in a time of war) even if one might be tempted to think that equality (or social justice) might be improved if we allowed the worse-off to sell some goods thought normally non-commodifiable.²⁰ Perhaps, at a general level, all we can say is that equality cannot be an argument against or in favour of market exchanges, and that, at this general level of argument, we must resort to other, non-

interesting theoretical issues from the point of view of the equality-rationale for MR but I will not be pursuing this question here.

¹⁶ For an exposition of the expressive theory of voting, see Geoffrey Brennan & Loren E. Lomasky, "Large Numbers, Small Costs: The Uneasy Foundation of Democratic Rule", in Geoffrey Brennan & Loren E. Lomasky, eds, *Politics and Process: New Essays in Democratic Thought* (Cambridge University Press 1989): 42-59.

¹⁷ See, generally, Margaret Jane Radin, "Market-Inalienability", *Harvard Law Review* 100 (1987): 1849.

¹⁸ Michael Walzer, *Spheres of Justice* (Basil Blackwell: Oxford, 1983) at 97.

¹⁹ As this very non-exhaustive list indicates, in some places and in some times, at least some forms of these "blocked exchanges" were unblocked, and the goods listed were turned into commodities which could be purchased. For a nice discussion of "what money cannot buy" see id. at 97-99.

²⁰ For a discussion of this temptation, see Margaret Jane Radin, "Justice and the Market Domain", in John W. Chapman and J. Roland Pennock, eds., *Markets and Justice: Nomos XXXI* (New York University Press 1989): 165-197 at 187-88.

equality-related arguments about the dangers resulting from commodification of the goods generally thought non-commodifiable, such as the degradation and erosion of the worth of values associated ideally with these goods, the depletion of opportunities for altruism, and slippery-slope arguments claiming that, once admitted into the market sphere, some goods will gravitate from the non-market sphere and leave the space of non-market empty even for those who do not choose the market regime.²¹ Presumably, some of the reasons against the commodification in general are applicable to a prohibition on vote trading.

But before I look at these reasons, it is important to realize that the prohibition on votes trading is not absolute: we normally oppose trading votes for material goods but not votes for votes. “Vote exchange” happens routinely at the political level, and is considered to be a legitimate part of the political process: my representatives in the parliament agree today to support a proposition A (even though I do not like it all that much) in exchange for a support of your proposition B tomorrow which is of much higher importance to me than opposing proposition A.²² As I have suggested earlier, this is an indirect form of factoring the intensity differences into the MR regime characteristic for a representative system and, far from being objectionable, it adds (in a generally non-objectionable way) the intensity dimension into MR in that it promotes deliberation of the process (because it requires the representatives of different constituencies to talk to each other and to weigh and balance competing arguments), etc.

But if we allow the (indirect) trading of votes for votes, why not take a step further and allow trading votes for other goods, e.g. money? (Remember that the only perspective on this question which we are interested in here is from the point of view of the equality-rationale of the MR; all other reasons for the rejection of vote trading are outside of our interest here). There is one bad answer which should be discarded at the outset: the answer which appeals to the special value of the vote in expressive terms. According to this answer, it would be acceptable, under an equality rationale, to trade votes for money if the value of votes to the voters corresponded to the marginal impact that a vote has on promoting the collective decisions favoured by a voter. But since (the argument goes) this theory is deeply implausible, and we must find a different interpretation of the value of the vote, for instance in terms of its expressive value, under these alternative interpretations the expressive value of the vote is so incommensurable with the value of money that we cannot imagine any promotion of equality as a result of permissible trading of votes for money. This, I believe, is not a good argument, and not just merely because the critique of the utilitarian theory of voting from the standpoint of an expressive theory is not necessarily convincing,²³ but also because the incommensurability argument goes only so far. If we can legitimately measure a great number of emotional, aesthetic and sentimental gratifications in monetary terms (as we do), then what is special about the expressive value of the act of voting (compared to many other tradable expressive values) which renders it inappropriate to alienate for monetary values, which in turn can bring us other expressive or emotional gratifications which we may happen to value more? Now this way of putting the question shows that the answer by appeal to the expressive value of voting in itself does not provide us with a satisfactory rationale for non-commodification of votes but merely refers back to a more fundamental answer about the special nature of voting which in turn cannot be given in terms of the expressive value that the voting has for the voters.

²¹ See *id.* at 168.

²² See Buchanan & Tullock, *supra* note 8 at 131-35.

²³ For a mild critique of the expressive theory of voting, see Dennis C. Mueller, “Democracy: the Public Choice Approach”, in Brennan & Lomasky, *supra* note 16: 78-96 at 82-87.

The right answer can be given, I believe, in terms similar to those I have employed earlier for the argument about disregarding the differences in intensity of preferences in the MR procedure of collective decision making. If voting is seen as promoting the utility of the voters (in serving their interests) then vote-trading would be acceptable under the equality rationale (subject only to an additional proviso, about which below). But if, and insofar as, voting is about the judgments about a good society then the selling of votes is inconsistent with the principle of equality of voters. This is because the sort of equality which is furthered by MR is the equality of impact on the collective decisions about a society: it is not about equality in specific satisfaction of desires or meeting of the preferences. This sort of equality, equality of voters as equal autonomous persons who can equally affect the shape of their society, cannot be improved by trading of votes for money because equal impact of the voters, after votes trading, will be eroded, even if other aspects of equality will be promoted. If A trades her vote with B for money then A and B will reach a more optimal distribution of votes/money in terms of satisfaction of their interests (A makes a better use of extra money than of a vote, B prefers an extra vote that the money she paid for it) but they are no longer equally influential judges about the ideas of justice to prevail in their society. *This* equality, if it had existed before, had been lost for the duration of the surrender of a vote by A.

But there is another equality-based argument against alienability of votes, an argument which would hold even insofar as we consider votes as devices for furthering their individual interests by the voters. Even if as a result of vote-trading between A and B a sort of equality is established between them, the inequality between A and C (who does not trade *her* vote for money with anyone) is brought about.²⁴ Inalienability of votes serves not only to prevent the situation in which some people's views do not count at all, but also the situation in which some people's votes count for *more* than others (with no role by those others in this new and unequal dispensation). This cannot be tolerated under the egalitarian rationale for the MR, and so this egalitarian rationale accounts well for our intuitive hostility to votes-for-money trading.

4. Majority Rule, Unanimity and Equal Respect

The precise nature of the background values which underlie democracy as institutionalized through the forms of MR is, of course, a matter that notoriously divides various theorists of democracy. To say that it is a form of equality may be seen as not particularly illuminating because the 'one person-one vote' rule is (one may claim) egalitarian only in a formal and admittedly objectionable sense: for one, it ignores the unequal resources that various voters have at their disposal to persuade others in a particular way. Consequently, the rigorous application of the 'one person one vote' rule may lead to drastically unequal results that offend against the principle of equal concern, substantively understood: the result of a majority decision (with a one person one vote principle respected) may, for example, lead to unequal treatment of members of a minority.²⁵ This last argument has been made forcefully by Charles Beitz (author of arguably the most important work on political equality in the recent years) in the context of a broader argument that majority rule cannot be properly defended on the basis of the more fundamental principle of the equal moral status of persons. This is not to say, Beitz claims, that MR is indefensible: just to the contrary, it is, under

²⁴ See, similarly, Harry Brighouse, "Egalitarianism and Equal Availability of Political Influence", *Journal of Political Philosophy* 2 (1996): 118-41 at 122.

²⁵ For this argument, see Charles Beitz, *Political Equality* (Princeton University Press: Princeton 1989) at 64. The distinction between equality as expressed in an equal vote and equality revealed in the substance of the decision corresponds to Dworkin's distinction of a 'detached' and 'dependent' interpretations of democracy (focused, respectively, on the input and the output of political decisions), see Dworkin, *supra* note 2 at 185-90.

normal circumstances, the best decision-making procedure, but its rationale must be found elsewhere, for instance, as Beitz believes, in the claim that it is “the social decision procedure most likely to produce outcomes to which no one will have good reasons to object” which is another way of saying that “it is more likely than any other to produce substantively correct decisions”.²⁶

Beitz erects his argument against the equalitarian credentials of the MR on the opposition between two theoretical points of reference: a May/Ackerman notion of neutrality in collective decision making, on the one hand, and Rousseauist view about majority and unanimous voting, on the other. The former posits the idea of neutrality (leading to the majority decision) on the notion of equal respect for people, and is (according to Beitz) mistaken. The latter is considered correct by Beitz because it derives the normal majoritarian decision-making from sources other than equality while the locus of equal respect is in unanimity voting which, in Rousseau, is reserved only for the most extraordinary, constitutive choices. The first theoretical point of reference is a theorem formulated in a classical article by Kenneth May who had showed that only the procedure of simple majority can satisfy four, reasonably thin conditions: of decisiveness, equality, neutrality and positive responsiveness.²⁷ In his *Social Justice in the Liberal State*, Bruce Ackerman used May’s theorem (with a slightly changed vocabulary) in the service of his own theory, integrating a defence of a MR into his broader theory of social justice, consistently with the overall constraint of neutrality.²⁸ The details of Ackerman’s argument (as well as May’s) are beyond the topic of this paper. What matters for our current argument is that, according to Beitz, the May/Ackerman account relies upon the conditions which “reflect an implausibly narrow understanding of the more basic principle [of equal respect for persons], from which substantive concerns regarding the content of political outcomes and the context of public deliberation have been excluded...”.²⁹ Granted this is the case. Indeed, in Ackerman’s neutral discussion the criteria of neutrality are outcome-independent. But the problem is that, as Jeremy Waldron has remarked, in the situation of disagreement we are simply unable to identify the criteria of the “content of political outcomes” which support the ideal of equal respect for persons. What counts as treating people with equal respect is often the very heart of the controversy among the contestants who are arguing about a particular law or policy. If the outcome were to be determinative of whether the political process respects the equality or not between people then we will be unable to come up with the workable criteria of political equality: they will simply be at the mercy of substantive conceptions of the good espoused by different contestants.

Does the Rousseauist conception, invoked in this context by Beitz, indeed provide us with the right basis for the majoritarian procedure in a way which abstracts from the ideal of equal respect? Can Rousseau, in other words, be used as the support for the disconnection between the MR and the principle of equal respect for persons? I do not think so. Beitz’s account of Rousseau relies on a rather radical distinction between the majoritarian and the unanimous procedure in Rousseau: while the latter could be identified with equal respect for people, it cannot be the decision procedure applied in routine situations. “[O]n Rousseau’s view equal respect for persons is modeled by the unanimity requirement of the initial contract situation and is reflected in the standard for assessing political outcomes accepted there...”, says

²⁶ Beitz, supra note 25 at 66.

²⁷ Kenneth O. May, “A Set of Independent Necessary and Sufficient Conditions for Simple Majority Decision”, *Econometrica* 20 (1952): 680-84.

²⁸ Bruce A. Ackerman, *Social Justice in the Liberal State* (Yale University Press: New Haven 1980) at 274-93.

²⁹ Beitz, supra note 25 at 64.

Beitz.³⁰ For my part, I do not read Rousseau as containing such a radical distinction between the unanimity-decision circumstances (where the principle of equal respect seems to be properly observed) and the circumstances allowing for the operation of majority rule (where, Beitz claims, the principle of equal respect cannot be found). Rather, I find in Rousseau a fundamental *continuity* between the unanimity and majority rule because both are oriented towards a detection of the general will, though in different contexts. Unanimity is reserved for constitutive decisions because the stakes are too high to allow any objectors to stay in the polity: when setting up a polity, we all must agree to its constitutive principles, and those who do not agree, simply stay outside: “There is one law only which by its nature requires unanimous consent. That is the social pact.... If, then, at the time of the social pact, there are some who oppose it, their opposition does not invalidate the contract, it only keeps them from being included in it; they are foreigners among the Citizens”.³¹ But the routine law-making decisions cannot stick to the unanimity because under such a requirement no decisions would be taken most of the time: it is a regrettable fact, for Rousseau, which he accepts only grudgingly and with a sense of loss, as an inevitable second-best.³² But the constitutive-stage unanimity rule still importantly prefigures the majority rule in the less important occasions: majority rule is for Rousseau, so to speak, the closest we can get to the unanimity in non-ideal situations. The governing principle is the same: that the whole point of the collective decision is to identify the “general will”, or the common good. Now how well the majority mimics the unanimity-modeled general will is for Rousseau an empirical question, and it may well be that both epistemic defects and moral vices will contaminate the majority in a way preventing it from detecting the general will. Rousseau is explicit about it: having described the proper motives for an individual voter (which is to pronounce about the consistency of the proposal with the general will) he adds a crucial proviso: “This presupposes ... that *all the characteristics of the general will are still in the majority*: once they no longer are, then regardless of which side one takes there no longer is any freedom”.³³

So if the constitutive-stage unanimity decisions do give effect (as Beitz believes) to the principle of equal respect to all persons, so do the majority decisions, albeit in a less perfect way. Now it is important to emphasize that I offer this interpretation of Rousseau not as an exercise in the exegesis of a classical thinker but as a contribution to the debate on the relationship between majority rule and the equality principle. Rousseau is instructive in this context precisely because of Beitz’s established link between the pursuit of the general will and the egalitarian principle of respect for all is compelling. Still, one needs not accept Rousseauist theory of majority rule as a pale shadow of the unanimity principle (which is the way I read Rousseau)³⁴ to see the former as expressing a significant egalitarian insight. Indeed,

³⁰ Id. at 63; similarly at 54.

³¹ Rousseau, “Of the Social Contract”, IV.II in Rousseau, *The Social Contract and Other Later Political Writings*, ed. and transl. Victor Gourevitch (Cambridge University Press 1997) at 123.

³² In *Considerations on the Government of Poland* Rousseau distinguishes between the unanimity which is required for “the formation of the body politic and for the fundamental laws that bear on its existence”, on the one hand, and on the other hand, those less important issues for which either a simple majority rule or a qualified majority set at “any number of proportions ... depending on the importance of the matters [under consideration], *Considerations on the Government of Poland and on Its Projected Reformation*, in *The Social Contract and Other Later Political Writings*, pp. 217-18.

³³ Rousseau, “Of the Social Contract” IV.II, supra note 31 at 124, emphasis added.

³⁴ I do not claim my reading of Rousseau to be the only correct one, all I claim is that it is a plausible one. One should take heed of Henry Mayo’s observation, made precisely with regard to the relationship between majority principle and the general will in Rousseau: “Of Rousseau it is possible to prove quite contradictory propositions by selected quotations; one sees it done all the time”, Mayo, supra note 9 at 181.

at this point we may perhaps challenge the underlying insight in Beitz's use of Rousseau, namely, the idea that the unanimity requirement expresses equal respect for persons. Perhaps it does, but only in a rather limited and questionable way: unanimity requirement creates a guarantee that no-one will be coerced to comply with the views that she does not share. There is, admittedly, an important equality ingredient revealed in the word "no-one": everyone is *equally* protected against a duty to comply with unwanted directives. This may be seen as a good prudential rule: everyone is equally protected against the costs of having to comply with unwanted rules. It may be prudential all right, but is it egalitarian? It is quite obvious that a unanimity regime creates a very important *inequality*: those who support a particular directive count for much less than those who oppose it if the unanimity is required for the adoption of the directive. In fact, any decision-making procedure other than a simple majority rule creates an immediate inequality between proponents and opponents of a proposed directive, and the further we go in departing from a simple majority rule, the more unequal their positions become. In the limiting case, unanimity is a power of veto given to a single opponent whose opinion becomes more weighty than the opinions of all proponents of a directive put together. This is an obvious defect, from the point of view of equality, of any special majority rule, and all the more so, of the unanimity rule.

The prudential defense of the unanimity rule is also questionable. Both decisions and non-decisions have costs for an individual, so to say that unanimity is a good prudential policy presupposes that the costs of having bad collective decisions (from the person's point of view) prevail over the costs of not having good collective decisions. But such a calculus is question-begging: there is nothing prudentially rational in preventing me, and the other individuals who form a majority, from enacting good common rules simply on the basis that if the rules happen to be bad, I will not need to work towards forming a majority against these rules. A privileging of the unanimity rule (or a special majority rule) involves a bias towards the status quo: departures from status quo require stronger support than keeping it. But this is irrational and if there is one great lesson of both the public choice theory and of the economic analysis of law it is that the omissions are also costly, not just in terms of the commissions, which means that in assessing the risks of action we need also to compare them against the risks of inaction. Unanimity rule violates this precept because it seems to be based on the unstated presumption that the costs of inaction are nil (or at least, are necessarily lower than the costs of positive action). As Ian Shapiro rightly observes: "We may feel in certain circumstances that failures to act collectively, rather than collective action itself, should shoulder the burden of proof".³⁵

The force of the principle of unanimity (and of the opposition to the use of majority rule qua an egalitarian rule) is exploited by an appeal to a hypothesis such as this: "imagine you, me, and a third person in the same room. Two of us decide that you should give your life to serve us. Is our decision legitimate, do you have an obligation to obey simply because we were a majority within the room? ... On the face of it, you can claim that our decision 'enslaves' you and denies you 'equal status' with us".³⁶ But this example, provided by Robert A. Burt, shows that the decisions taken by majority may lead to drastically unequalitarian results. This is clear, and banal: majority can exploit, oppress, and even enslave a minority. But this does not show that the majority rule itself does not presuppose *some* egalitarian moral principles. And, *a contrario*, it does not show that unanimity does support a notion of equality superior, or more refined, to that of the one presupposed by the majority rule. Burt's example is instructive,

³⁵ Shapiro, *supra* note 4, at 19, footnote omitted. See, similarly, James S. Fishkin, "In quest of the social contract", in Brennan & Lomasky, *supra* note 16: 183-193 at 185 and James S. Fishkin, *The Dialogue of Justice* (Yale University Press: New Haven 1992) at 56-57.

³⁶ Robert A. Burt, *The Constitution in Conflict* (Harvard University Press: Cambridge Mass., 1992) at 27-28.

though, because he explicitly uses the language of “legitimacy” and of the “obligation to obey”. Note that the (intuitively persuasive) lack of such legitimacy (and of obligation to obey) of the exploitative decision taken by Burt’s characters is not (or at least, not necessarily) the result of a violation of some fundamentally egalitarian norm about the political process but rather of the moral heinousness of the outcome. We can explain our revulsion at the outcome imagined by Burt without resorting to the language of (in)equality but rather talk about moral vice of an instrumental treatment of some persons to the benefit of others – and this shows that equality is an unreliable asset in defending unanimity against majority rule.

Then why would anyone think, as Beitz clearly does, that the unanimity rule expresses the principle of equal respect? There are two possible defenses of the unanimity-equality nexus, offhand. One is based on a radical distinction between the foundational and the post-foundational level of politics with unanimity defended strongly at the foundational, or constitutional, level of polity. This is a strategy of Buchanan and Tullock in *Calculus of Consent*, and of course it has since been the dominant approach of the public choice movement in that there is a clear and radical dichotomy between the constitutional and non-constitutional level, or the levels of setting and of applying the rules of the game. Indeed, this dichotomy is seen as central to the very idea of constitutionalism.³⁷ This is fair enough, and for analytical purposes we can adopt a “foundational” conception of constitutionalism, and an associated fiction that there are moments in the life of the society where everything is being designed from scratch – much as this fiction is unrealistic. But why would this distinction lead to the privileging of unanimity at the level of foundations of the legal system? In *Calculus of Consent* this is never properly explicated but rather is taken for granted: the advantages of the unanimity rule are presented in a way which does not rely on the centrality of the foundational versus non-foundational politics. The crucial virtue of the unanimity rule in Buchanan & Tullock’s book is that it “will insure that all external effects will be eliminated by collectivization”,³⁸ i.e., that it is the only rule which guarantees an individual will not suffer any negative externalities from a collective action – because she will be able to veto it *ex ante*! This is not an equality-based rationale (because it establishes a single dissenter in a much more powerful role than each of the remaining actors), and as a prudential guarantee it is subject to the argument just made, i.e. that it unreasonably distinguishes between risks of action and of inaction. (Not to mention that it puts to one side the rising transaction costs of reaching any decision as we move from the simple majority towards the unanimity regime).³⁹ But the case launched by Buchanan and Tullock for unanimity rule stands or falls with equal weight whether applied to the foundational (constitutional) or day-to-day politics. This is implicit in the explanation provided by them for the (grudging) approval of majority rule “as one among many practical expedients made necessary by the costs of securing widespread agreement on political issues when individual and group interests diverge”;⁴⁰ majority rule is adopted for purely contingent, practical reasons relating to transaction costs rather than its inherent virtues. Whatever advantages it may have, therefore, occur as pale derivatives of the unanimity rule; hence, it is difficult to see any crucial role for the dichotomy of the constitutional and non-constitutional activities in this picture.

³⁷ See Geoffrey Brennan and Alan Hamlin, “Constitutional Political Economy: The Political Philosophy of *Homo Economicus?*”, *Journal of Political Philosophy* 3 (1995): 280-303 at 287-88.

³⁸ Buchanan & Tullock, *supra* note 8 at 89.

³⁹ Of course, the transaction costs are further brought into the picture by Buchanan & Tullock, see e.g. *id.* at 90-91; I am referring just to the formula cited in the sentence accompanied the previous footnote.

⁴⁰ *Id.* at 96.

Some quarter of a century after co-authoring the book with Tullock, Buchanan made this distinction more explicit in the context of yet again praising the unanimity rule and criticizing the popularity of the majority rule. He distinguishes between three spheres of politics: enforcement of the actual law, collective action within the law that exists, and the changing of the law, and further argues that within the first and the third spheres the majority rule should have no application. In particular, in the third (foundational) sphere, the only rule permitted by his contractarian premises is that of unanimity.⁴¹ To be sure, he later makes a concession to the real world in which the “abstract contractarian logic need not be pushed to its extreme, which would require that constitutional changes be reached only through unanimous agreement”,⁴² nevertheless the theoretical rationale for the unanimity rule at the constitutive level remains a puzzle. Buchanan’s contractarianism is not of a Rawlsian variety, i.e. the individuals are not behind the veil of ignorance while negotiating the terms of the constitutional dispensation; hence, the contract cannot be viewed as a modeling device of our own moral argument about the impartiality-constrained ideal conception of justice.⁴³ In this more recent article of Buchanan, unanimity rule at the constitutional stage is defended with the appeal to analogy with the market exchange, where an exchange of apples and oranges will take place only if it is seen as “value enhancing for both parties”, and we are told that “a change in the constitution (in the rules) is not different in this fundamental respect [i.e., in the mutual value-enhancing condition] from a simple exchange between two traders”.⁴⁴ But if that is so (as opposed to, as one would expect, the constitutional change being analogized to the negotiation between the traders about the rules to govern their trade), the specificity of the foundational stage is all but lost, and the above-mentioned equality-based and prudential objections to the rule of unanimity remain valid.

5. Majority Rule and the “aggregation of wills”

One legal theorist who insisted strongly on *not* trying to rest MR upon the principle of equality was Hans Kelsen. For Kelsen, in his 1929 essay “On the Essence and Value of Democracy”, the problem was how to reconcile MR with the principle of political autonomy of individuals: a project strikingly similar to that of Rousseau whose solution to the problem was, as we saw, in the political freedom understood as the congruence of collective decisions with the general will, and in the MR as a second-best device tailored to detect the general will. But Kelsen’s solution was entirely different: political freedom (in the state which must take collective decisions binding on all, including on those who disagree with them) is measured for Kelsen by the ease with which the outvoted minority can alter the laws they do not like. This, Kelsen says, applies equality to the member of the majority who has changed his mind since the decision was taken: “The legal irrelevance of such a change of will reveals only too clearly the *alien will*, or – speaking non-metaphorically the *objective validity of the social order* to which he is subject. He must find a majority for his change of will if he, the

⁴¹ James M. Buchanan, “Contractarian presuppositions and democratic governance”, in Brennan & Lomasky, eds, 1989: 174-182 at 179.

⁴² *Id.* at 181.

⁴³ For his self-characterization by comparison to Rawlsian theory, and in particular for the rejection of the “veil of ignorance” in the original contract, see James M. Buchanan, *The Limits of Liberty* (The University of Chicago Press: Chicago 1975) 174-75.

⁴⁴ Buchanan, *supra* note 41 at 179.

individual, is once again to be free”.⁴⁵ This is best done under the simple majority rule: the higher the majority necessary to change the law, the more difficult such a change is, and the higher political unfreedom of Kelsen’s individual. Here, Kelsen says, we face a paradox: “That which earlier, at the founding of the state order, served to protect individual freedom, in accordance with the idea of freedom, becomes its shackle if it is no longer possible to escape the order”.⁴⁶ “That” – refers, of course, to the unanimity requirement. It was a freedom-protective guarantee at the “founding” stage and becomes a hindrance of political freedom at the stage of the operation of the system.

Kelsen’s solution shares its weakness with the analogous political conception of legitimacy of majority rule, mentioned above, in Part 1 of this article. While it is an important virtue of a democratic law-making system that it leaves open the avenues for the revisions of enacted laws, it would be ironic to see the sources of political autonomy (as it was ironic to see the sources of legitimacy of laws) in the ease of the repeal of disliked laws. I find it an unattractive conception of political freedom to be told that, while the laws which govern my behavior are repulsive (*ex hypothesi*), I can nevertheless work towards repealing them, and the repeal is easier than in any other alternative system of law-making. This sounds to me like an excessively thin, negative, and defensive account of what political autonomy is grounded in. But, for our present purposes, what is important is the use Kelsen makes of this idea in negating the link between MR and the principle of equality. Having established the conception of political autonomy as founded upon the (comparative) ease of repeal of unwanted legislation, he goes on: “From this idea the *majority principle* is to be derived. Not, however – as it tends to happen – from the idea of equality. That everyone’s human will is equal is indeed a precondition of the majority principle. But this being equal is only figurative; it cannot mean that human will or personalities can actually be measured or added together. It would be impossible to justify the majority principle by saying that more votes have a greater total weight than fewer votes”.⁴⁷ Note that Kelsen links together two separate ideas: a proposition that MR is equality-based and a proposition that we can somehow aggregate different individual wills, and that the total aggregate of a greater number of wills has a higher “weight” than the aggregate of a smaller number. It is on the basis of the implausibility (in Kelsen’s eyes) of the latter that the former is rejected. He makes this link explicit as he continues: “If one attempts to derive the majority principle only from the idea of equality, it does indeed have that purely mechanical, even senseless, character with which the autocratic side reproaches it. It would only be the roughly formalized expression of the experience that the many are stronger than the few...”.⁴⁸

I think that Kelsen is right in rejecting the “mechanical” idea of a larger number of expressed wills as representing a “greater total weight”, but consider that he is wrong in believing such a view to be intrinsic to the egalitarian justification of MR. His rejection of the “mechanical” view is made easier by the fact that he operates with vague metaphors which may stand for different things. If we consider a “greater weight” of the aggregate of a larger number of wills as similar, in a purely mathematical way, to the putting together of a number of boxes of equal size, each of which represent one person’s “will”, then such an image is indeed implausible and “senseless”: revealed preferences are not like physical objects which can be

⁴⁵ Hans Kelsen, “On the Essence and Value of Democracy”, in Arthur J. Jacobson & Bernhard Schlink, eds, *Weimar: A Jurisprudence of Crisis* (University of California Press: Berkeley 2000): 84-109 at 87, emphasis in original (trans. By Belinda Cooper).

⁴⁶ *Id.* at 87.

⁴⁷ *Id.* at 87, emphasis in original.

⁴⁸ *Id.* at 87.

put on a weight. But we do not need to espouse such a mechanical image in order to rest MR on prima-facie equal moral competence of each individual whose life is affected by collective decisions. (It is prima facie only because it may be weakened by special disqualifying facts – as in the cases of criminals denied a right to vote, or enhanced by special circumstances, such as when an individual has a special stake in the decision, disproportionately higher than other members of the group. But what we are interested in here is why we should adopt equality as a default position, or as a normal state of affairs the departures from which call for special justifications). We can disconnect the egalitarian defense of MR from a “mechanical” account of aggregation of votes ridiculed by Kelsen, by agreeing with Waldron that the majority rule is egalitarian in an undisputed sense that, when employed in the process of decision-making it “attempts to give each individual’s view the greatest weight possible ... compatible with an equal weight for the views of each of the others”.⁴⁹ There is no “mechanical” image of putting together the wills in order to achieve the highest possible “weight” behind Waldron’s formula. It does not presuppose, to abandon the mechanical imagery, that a view aggregating a larger number is somehow superior to the view aggregating a smaller number of opinions. There is no aggregation of views or opinions at all necessary to make meaningful the egalitarian account of MR. Rather, it relies on an argument which is distributive as opposed to aggregative, or individualized as opposed to the collective: it says that *if* we are to use each person’s preference in a prima-facie equal way to that of all others then we cannot use any other procedure for collective decisions than MR.

This can be represented in the form of a principle of “minimal decisiveness”. If there is, *arguendo*, an evenly split vote then under a majority rule, a single person’s vote is decisive: if you know (or suspect) that your group is split in half regarding a particular outcome, then your vote determines the social outcome, as does, individually and taken one by one, every other person’s vote who voted as you. In Ackerman’s account: “If, say, there are 99 people in the Assembly, then majority rule gives me a decisive voice when the rest of you are split 49-49; and the same is true of your decision as well”.⁵⁰ Now the force of this argument is limited because the perfect split, which is necessary to make a single vote count, is hardly imaginable in political circumstances, but it indicates a way of reasoning about how majority rule can adopt a distributive, as opposed to aggregative, strategy of legitimation. In Ackerman’s depiction, the force of this argument seems to rely upon a hypothetical proposition: we may persuade the citizens to the simple majority rule by telling them that this is the only rule which, in a situation of a perfect tie, *would* make a single vote of any citizen decisive for the collective outcome; in the words of Ackerman, majority rule positively responds “to the considered judgments of any citizen when this will serve to break a tie”.⁵¹ But then, any other publicly announced rule for collective decision-making may make a single citizen’s vote decisive for the outcome:⁵² under a unanimity rule, if I know (for the sake of argument) that everyone else is in favour of a proposal, my single dissent will be decisive, as will the case in any qualified majority rule, so long as I know that just one vote is needed for the satisfaction of the majority requirement. So this “minimal decisiveness” is not an argument for the MR as

⁴⁹ Jeremy Waldron, *The Dignity of Legislation* (Cambridge University Press 1999) at 148; for a general argument linking the principle of equal consideration of interests with an equal vote, see Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview Press: Boulder 1996) at 53-71, and, more recently, Thomas Christiano, ‘The Authority of Democracy’, *Journal of Political Philosophy* 12 (2004): 266-90.

⁵⁰ Ackerman, *supra* note 28 at 282-3.

⁵¹ *Id.* at 283.

⁵² As is, incidentally, acknowledged by Ackerman himself, see *id.* at 283.

such but rather shows *a pattern of arguing* about different voting rules which do not appeal to crude aggregative imagery of wills assembled into a larger whole.

Such a pattern, I would suggest, is not too superficial or convoluted to serve as a model for thinking about the individual motivations of the voter in a large polity. The well-known puzzle about an apparent irrationality of the individual voter wanting to go to the polls, even though the impact that she can make on the result favourable to her is incomparably smaller than the costs of voting, has led various public choice theorists to propose a theory which would reconcile this cost-benefit comparison with the belief in the basic rationality of a great number of voters in any elections in democracies: their real motivations are, we are told, not to contribute to the result which they favour but rather because they derive satisfaction from the act of expressing support for certain candidates or causes. Advocates of the expressive conception tell us that, if someone votes for X it is not because one prefers X to other alternatives but rather because one prefers *to vote* for X.⁵³ But quite apart from whether this solution really restores our belief in the rationality of voters (is it rational to “like to vote” for X without necessarily liking X?), the point is that there is little resemblance between this theory and widespread intuitive knowledge about the psychology of voters (based also on introspection) which suggests that they do believe that they make a difference by voting in a particular way because they accept, rightly or wrongly, an argument of the “What if everyone...” form. Now the way in which a critique of this expressive theory of voting connects with our non-aggregative approach to the image of the majority rule is this: every voter, taken separately, properly models himself as a person whose vote does make, individually, a difference, not unlike in the minimal decisiveness conception. Consider the following scenario imagined by Denis Mueller: “[O]ne might imagine a process in which each year one citizen is selected at random and allowed to make the decisions for the community (perhaps to save decision-making costs)”.⁵⁴ This highly stylized example serves Mueller to argue that the motives that such a single decision-maker use could be ethical (about the good of the community) rather than selfish “because he knows that next year someone else will be making the community’s decisions and he wants that person to feel compelled by the same moral imperative as he is to make decisions on everyone’s behalf.”⁵⁵ But my purpose of using this example is different than Mueller’s: I argue that it is realistic, psychologically speaking, to model our voting behaviour on the motives of this single decision-maker, and that in the voting booths we can identify ourselves with the conduct of this person, not just in terms of motives for a decision but also in our perception of our impact. And such a modelling is not based on aggregative terms, where a single voter is viewed as a replaceable parcel of a larger whole, but rather as an individual who behaves as though her choice can make an equal difference. For any other decision procedure: unanimity requirement, or special majority rule, gives some individuals a much higher influence on the collective decisions than to others. This is not to say that there cannot be other, non-egalitarian arguments for MR (as we have seen before, there are some, and very plausible). And this is not to say that MR cannot be employed for non-egalitarian ends: this indeed is the whole point of the present discussion, that a species of equality which is behind the MR may conflict with other equalities which may be negated by the individual cases of employment of MR. But all that is being argued here is that MR is based, among other arguments, on a meaningful form of political equality, and Kelsen’s critique of egalitarian arguments for MR as allegedly linked to the “mechanical” image of aggregating individual wills is unpersuasive.

⁵³ This is a paraphrase of Brennan & Lomasky, *supra* note 16 at 51.

⁵⁴ Mueller, *supra* note 23 at 85.

⁵⁵ *Id.* at 86.

Kelsen's representation of an aggregation of wills in a "mechanical" way can be analogized to a "physical" interpretation of Locke's defence of majority rule, in Locke's proposition that "it is necessary the Body should move that way whither the greater force carries it, *which is the consent of the majority*: or else it is impossible it should act or continue one Body, *one Community*, which the consent of every individual that united into it, agreed that it should...".⁵⁶ There is a temptation to understand this argument for majority-rule in a purely physicalist way, corresponding to Kelsen's depiction of "mechanical" aggregation of human wills. But this temptation should be resisted, as Waldron has persuasively shown in his discussion of this passage from Locke. The society that goes along with the choice by majority is not viewed, by Locke (or by Waldron for that matter), as "the body [which] as a whole moves either north or south in accordance with the tendency of the greater number of its elements, as a result of their cumulative motion".⁵⁷ It is not the "force" or the "weight" that makes majority prevail but rather the normative significance of individual consent which endows the authority upon the majority preference, says Waldron, taking inspiration from John Dunn's suggestion that one possible interpretation of Locke's proposition is "to see the concept of force as moralized by the notion of consent...".⁵⁸ As Waldron puts it: "Consent does not carry physical weight or even pure political force; rather, it carries moral force with regard to the purposes for which consent is required".⁵⁹ It is a normative theory with no physicalist (or mechanical) connotations: it can be stated as the idea that consent is ultimately the irreducible, fundamental element which can endow the collective decisions with authority. And since the fact of consent is not subject to degrees, the only way to "aggregate" individual consents into a collective preference is by counting each person as one, as a result of which the majority rule is the only procedure consistent with both (1) equal value of each individual consent, and (2) the maximum strength given to each consent. Respecting only the first condition does not necessarily lead to majority rule because we may have equal value respected by not taking into account anyone's views (or by tossing a coin to take a decision when people disagree) but the combined respect for these both conditions may be put into effect only by the MR procedure. When we, therefore, accept without objections the operation of the majority rule, we implicitly, at least, accept the rule of an equal respect for everyone's view about the subject put to the collective decision.

6. Equality of Political Opportunity and Unequal Outcomes

Can the egalitarian credentials of the majority rule be challenged by appealing to (possibly) unequal outcomes produced by the uses made of majority rule? The question is somewhat misleading because it collapses various types of possible "outcomes" into one category even though different types of outcomes may have different status from the point of view of their significance to political equality itself. Ronald Dworkin's distinction between what he calls a "detached" and a "dependent" conception of democracy, understood as the system of political equality, is useful here. For Dworkin, a detached conception is the one where we can certify a system as democratic on the basis of the characteristics of the process alone. In contrast, a dependent conception "supposes that the best form of democracy is whatever form is most likely to produce the substantive decisions and results that treat all members of the

⁵⁶ John Locke, *Two Treatises of Government*, Book II, quoted in Jeremy Waldron, *God, Locke and Equality* (Cambridge University Press, 2002) at 129, emphases in original.

⁵⁷ Waldron, *supra* note 7 at 129.

⁵⁸ John Dunn, *Political Thought of John Locke* (Cambridge University Press: Cambridge 1969) at 129.

⁵⁹ Waldron, *supra* note 7 at 130. See also Waldron, *supra* note 49 at 143-4.

community with equal concern”.⁶⁰ In this latter version one may observe democracy is in fact derivative of justice, or substantive equality: our controversies regarding what system treats people with equal concern, in whatever fields of distribution, may be decisive for our views about whether the system is democratic. But on such an undifferentiated view, the specificity of political power (and therefore political equality) disappears, and our attention to politics as one particular field of equality is unwarranted. A “dependent conception”, without any further qualifications, offends in my view against our linguistic usages in which we frequently do draw the line between justice (or equality) in the political area and justice in the field of distribution of material resources.

We may, of course, become convinced that economic justice is more important than political democracy: that democracy in the field of equal political impact is worthless in the circumstances of drastic economic injustice. This is, for example, the position espoused by Philippe van Parijs for whom democracy is not “an independently important ideal” but merely an “institutional instrument, from which it is legitimate to deviate *if* the pursuit of the ideal [of justice] requires it”.⁶¹ But it is a *normative* position, which is certainly respectable but which needs a properly normative defence: for van Parijs, for example, one of the arguments leading to such a conclusion is the observation that the adherence to the democratic rules leads to the closed-borders regime, anti-immigration rules, and in consequence, growing economic and other inequalities on the world scale.⁶² This normative argument obviously cannot be adopted by a conceptual fiat in virtue of which we agree to call political justice only a system which leads to a just economic distribution. In fact, such a fiat would make it impossible to claim that political democracy may coexist with economic injustice: something that seems to be not only non-absurd but a rather commonplace observation. In our everyday language we distinguish between the calls for greater democratisation in the political field (in terms of more equal and more full empowerment of people in collectively deciding about their destiny) and the calls for greater social justice, and even though both these calls (and others) must be included in a broader, more comprehensive social ideal, they are clearly distinguishable from each other, and our moral language should preserve rather than blur this distinctiveness.⁶³ Further, we may of course claim that political democracy in the situation of strong economic injustice cannot be a *real* political democracy because those suffering economic deprivation and exploitation are rendered so vulnerable and dependent that they are simply unable to exercise free political choice and that, on the other hand, those who are very rich will find the ways of converting their economic clout into a political influence. This is quite obvious, and for these reasons the distribution of economic resources cannot be insulated under any realistic analysis from political procedures which assign influence in collective decision-making. We know that those who have a disproportionately high control of economic resources can affect political outcomes in all sort of ways, including the influence on the process of public deliberation (through media, advertising etc) or by threats of withholding their investments unless their preferences concerning the outcomes are satisfied. But this very plausible observation relies upon a set of empirical propositions and, again, cannot be adopted simply by virtue of adopting a “dependent” conception of democracy as a conceptual choice.

⁶⁰ Dworkin, *supra* note 2 at 186.

⁶¹ Philippe van Parijs, “Justice and Democracy: Are they Incompatible?”, *Journal of Political Philosophy* 4 (1996): 101-117 at 110, emphasis in the original, footnote omitted.

⁶² *Id.* at 108-9

⁶³ See similarly David Miller, *Principles of Social Justice* at 15; Robert E. Goodin, “Democracy, Justice and Impartiality”, in Keith Dowding, Robert E. Goodin & Carol Pateman, eds., *Justice and Democracy: Essays for Brian Barry* (Cambridge University Press: Cambridge 2004): 97-111 at 97-98.

We need to be clear about what is at stake in arguing for a “detachment” of political equality from the various laudable ideals of social justice. This is not just the matter of respecting our linguistic usages under which we frequently distinguish between the calls for a higher political democracy as well as the calls of a fairer distribution of other goods than political influence. After all, our linguistic usages may not be accepted by all, and may rest on a confusion which clouds rather than clarifies a proper articulation of normative issues at stake. The choice between a detached and a dependent conception is a *normative* one rather than resting upon a conceptual analysis of the word “democracy”. The choice of a detached conception rests upon a judgment that equality in political power is a valuable, attractive ideal which is not parasitic upon a more-encompassing ideal of equality in a society, and that we properly should be concerned about how the power is distributed (that is, about *how* the collective decisions are made), irrespective of, or in addition to, our concern about *what* is the substance of these decisions and how they shape the distribution of other (other than political power) resources. This is, of course, a normative position: it rests upon a judgment that we have legitimate interests in participating in political life which is an important human good, separable from the good of having our other interests protected by the outcomes of political decisions. As such, there is nothing neutral about a choice between a “detached” and a “dependent” conception, whatever further contours of the conception may be. One can also launch a normative defence of a dependent conception by developing a purely instrumentalist defence of democracy (democracy as valuable only insofar as it leads to other valuable goods) and of individual interests, claiming that it would be mistaken to consider the good of equal political influence (or the good of influence in politics, as such) to be of value independently of the values which can be promoted through exercising the political influence. I, for one, would consider such an argument morally questionable but all that matters here is to identify what is at stake in the choice between a detached and a dependent conception of democracy. And one way of thinking about it is by considering trade-offs between political equality and other spheres of equality. If we had a fully dependent conception, we would have to accept that any reduction of political equality is made up by a higher increase of other (for instance, material) equality. But if we insist upon political equality as a specific domain of equality, separable from others, we do not need to accept such trade-offs as necessarily justified, and we may wish to protect democracy (understood, under a detached conception, as a distinctive ideal) from the sacrifices justified by increases of material equality.⁶⁴ We might wish to defend this protection by saying, for example, that political equality and other types of equality are incommensurable for the reason that political equality is about a distribution of second-order resources: of resources which permit decisions about distribution of resources, and therefore should not be mutually tradable. (Politics need not *only* be a second-order resource: it may also be a first-order resource as a means leading directly to individual satisfaction and fulfilment regardless of the effects of one’s political influence for the pursuit of other resources. But the degree to which politics *is* about second-order resources therefore leads it to become incommensurable with these other first-order resources). We need not, of course, go as far as to insist that no reduction in democracy is ever justifiable by the demands of social justice, but the very fact that we are prepared to, at least partly, entrench democracy against marginally higher improvements in social justice reveals an implicit normatively based choice of a detached conception.

But it is one thing to say that on normative grounds we may wish to preserve the sense of specificity of political equality by opting for a detached conception of democracy, and another to show that we can articulate the terms of political equality in such a way that they do *not* collapse into non-political goods which in turn does not render political equality seriously

⁶⁴ See, similarly, Christiano, *The Rule of the Many*, supra note 49 at 56-57.

unappealing. It is now worth returning to Dworkin since this is precisely the point he makes. Soon after making the distinction between a detached and a dependent conception he highlights an important caveat: “We must be careful not to confuse that distinction with a different one, between two types of outcomes or consequences of a political process”: distributive and participatory ones.⁶⁵ The former are about consequences of political decisions regarding various resources: about acquisition and transfer of wealth, etc., therefore they correspond – by and large – to economic justice. The latter (participatory outcomes) are about symbols, agency and community. Symbolic consequences are about affirming an equal membership in the community of all those having a right to vote. Agency consequences build connections between an individual moral experience and politics: they rely not just on a vote but also on expressing our commitments in the public deliberation. Communal consequences are defined by Dworkin as those which permit individuals to “share[] in the pride or shame of collective decisions” and in “nourishing a cohesive and fraternal political community.”⁶⁶ Now these three types of “participatory” consequences sound to me suspiciously like the attributes of the process rather than that of the outcome: they are about what meaning we can attach to the fact of voting, and also how it connects with the pre-voting stage, that is, the stage of the public deliberation which precedes the vote. This process-related character of these consequences is perhaps most clear at the symbolic level which emphasizes that particular procedural forms have clear expressive consequences that are related to the message sent by a particular procedure about its participants; in Beitz’s words, this is related to the “idea that fair institutions should express public recognition of the equal worth of persons, conceived as autonomous centres of deliberation and action”.⁶⁷ Anything other than a one person-one equally weighted vote is demeaning to those who get a lesser vote, regardless of the substantive outcomes of the voting. But surely nothing hinges upon the characterization of these (or the other) aspects of the democratic decision making as belonging to the process itself as opposed to the outcome, and the significance of Dworkin’s distinction between a detached and a dependent conception of political equality must, for us, be deeper than whether we can certify a procedure as egalitarian on the basis of the process only (as the detached conception would seem to dictate) or on the basis of consequences (as the dependent conception seems to warrant). A temptation to settle for such a simplistic distinction (where the detached/dependent distinction relies simply on the process/outcome distinction) should be resisted as uninteresting, if only because of the inevitable arbitrariness of characterizing particular phenomena as belonging to the category of process or of outcomes. This arbitrariness is illustrated by Dworkin’s own examples about three “participatory consequences” cited above. But there is more to it than that.

A truly central role in Dworkin’s argument about political equality is played by yet another distinction: between equality of impact and that of influence. The difference is that while the impact a person makes is defined as “the difference he can make, just on his own, by voting for or choosing one decision rather than another”, the person’s influence is defined as “the difference he can make not just on his own but also by leading or inducing others to believe or vote or choose as he does”.⁶⁸ I will not attempt to summarize in full the use that Dworkin makes of this distinction (which, in the strategy of his reasoning is quite complex) but will limit myself to identifying the broad framework relevant here. When applied to the considerations of political equality, impact is not a useful category claims Dworkin: in

⁶⁵ Dworkin, *supra* note 2 at 186.

⁶⁶ *Id.* at 187.

⁶⁷ Beitz, *supra* note 25 at 92.

⁶⁸ Dworkin, *supra* note 2 at 191.

vertical relations (as between the citizens and officials) equality of impact is just unthinkable, while in the horizontal dimension (as between different citizens) it is not ambitious enough because it cannot account, for instance, for the importance of freedom of speech, of political associations etc. in contributing to political equality. This would seem to leave “equality of influence” as the only attractive interpretation of political equality. Not so, warns Dworkin: to try to bring about equality of influence (in the sense just defined) would offend against a great number of important features of a liberal-democratic society: we would need to equalize not only those sources of influence which most of us consider to be illegitimate (such as unequal financial means) but also those which are perfectly legitimate sources of unequal influence, and which are based on the fact that “some people are more politically motivated or trained or charismatic than others”.⁶⁹ If we tried to equalize some of the sources of *these* inequalities (which in turn lead to unequal influence) it “would conflict with other egalitarian goals”⁷⁰ and more generally, it would be “incompatible, even in principle, with other attractive aspects of an egalitarian society”.⁷¹ We would, for example, either be compelled to reduce the influence in politics overall, or try to convince people not to attempt to influence others in ways which can be traced to their special experience or commitment or reputation, etc. Now in the broader strategy of Dworkin’s argument this conclusion serves not as an argument for returning to equality of impact but rather as a demonstration that a “detached” conception of democracy cannot provide a sufficient scope for any convincing notion of political equality. The alternative is to opt for a “dependent” conception, which would rely upon distributive values (i.e. those about the distributive consequences of the decisions) as relevant to political equality, and which would preserve the ideal of “equality of impact” but only with respect to those collectively decided issues which are “choice sensitive”, i.e. where a correctness of a solution “depends essentially on the character and distribution of preferences within the political community”.⁷²

But such a “dependent” conception raises the spectre of diluting the specificity of political equality compared to other aspects of equality and social justice. The remedy to this danger, namely the insistence upon the equality of impact in the choice-sensitive areas, is illusory for two reasons. First, it brings us back to an unsatisfactory reach of “equality of impact” if understood in a way contrasted to “equality of influence” (by not being able to account for various aspects of equality in the deliberation phase: equality of impact is simply met when all have one vote even in the circumstances of drastic inequalities of access to the means of political communication, etc). Second, it is confined to the “choice sensitive” area while the demarcation of this area from choice insensitive matters is fundamentally contingent and arbitrary, and as such, as a second-order determination, is choice-insensitive, as Dworkin himself concedes.⁷³ Under a certain expansive approach to the field of choice sensitive issues (and the approach *is* likely to be expansive whenever the rights figure prominently in our constitutional landscape because, as Dworkin hints at it, choice insensitive issues correlate with the issues of “principle” as contrasted to the issues of “policy” in Dworkin’s own old distinction)⁷⁴ the sphere of relevance of “equality of impact” may be quite narrow and all we end up with to guide our judgment about political equality are the outcome-dependent

⁶⁹ Id. at 196.

⁷⁰ Id. at 196

⁷¹ Id. at 198.

⁷² Id. at 204.

⁷³ Id. at 204-5.

⁷⁴ Id. at 205.

distributive consequences. The consequence of dropping the ideal of equality of political influence is therefore that, in order to make a judgment of political equality, we need to appeal directly to the judgments of distributive justice more generally.

In the end, if we accept Dworkin's reasoning, we face a dilemma: either adopt the ideal of equality of influence (with the perverse consequences attributed by Dworkin to such an ideal, as noted above) or reduce the judgment of political equality to an undifferentiated judgment of social justice, insensitive to the specificity of claims for *political* equality. (We can extend the list of options into a trilemma by adding a purely formal "equality of impact", fully satisfied whenever each person has one vote, period). But are we really compelled to face such an unpalatable choice? I do not think so, and I believe that the way out can be offered by a reflection about the ideal of equality of political *opportunity* – an ideal which Dworkin fails to consider, and yet which seems to be particularly well suited to address the specific concerns raised by him. Let us recall the main reason why he urges us to reject the ideal of equality of influence: This is because it is unable to discriminate among different sources of political inequality, some of which may be legitimate and others not. If we were to equalize political influence across the board we might wish to reduce the impact upon a political discourse of those who are more influential because of their higher motivation, intelligence, experience, reputation earned through record of service for public causes, etc, and such an attempt would be perverse. If, however, we wish to equalize only those sources of political inequality which are themselves illegitimate, then we might as well drop the ideal of equality of influence and talk directly about these aspects of inequality which we consider illegitimate. This is how we can paraphrase Dworkin's argument without, I hope, doing injustice to the complexity of his argument.

But if such a gambit has an obvious cost (a loss of specificity of political equality talk, compared to other fields of equality and distributive justice), why not try to rescue the notion of equality of political influence all the while discarding its undesired and perverse consequences? The danger depicted by Dworkin is precisely the danger that in various other areas of equality is normally addressed by the notion of (genuine) equality of opportunity.⁷⁵ In the conventional language of equality of opportunity it can be presented, in a somewhat stylized manner, as occupying a space half way between a purely formal equality of opportunity and the equality of effect, where the distinguishing criterion concerns the grounds of access to the means of satisfying the conditions regulating the distribution of a particular good. When only very few such grounds matter for our judgment of equality of opportunity (EO) being satisfied (and they are thin and easily satisfiable; for instance, a citizenship in a given state) then we will call (often disparagingly) such an ideal a purely "formal" equality of opportunity because it is blind towards the many grounds of unequal access which, we know, are significant. If, on the other hand, all possible grounds of unequal access count for a judgment of equality of opportunity, then such an ideal effectively collapses into equality of outcome, because any unequal outcome is taken to be a sufficient symptom that inequality of access was at play. A more meaningful ideal of genuine equality of opportunity must be thicker than a formal EO (because it must be sensitive to a large number of factors which make access of some of us more difficult to the conditions required in a distribution of desired goods) but at the same time stop short of collapsing into equality of outcome because it must acknowledge that some causes of unequal outcomes are (or at least, may be) legitimate. Hence, the way of finding a right point between a formal EO and an equality of outcome is, for genuine EO, to discriminate between the legitimate and illegitimate sources of unequal access to satisfaction of the conditions which figure as criteria for distribution of scarce and desired resources.

⁷⁵ See Andrei Marmor, "Authority, Equality and Democracy", University of Southern California Public Policy Research Paper No. 03-15, January 2003.

It should be noted that this is precisely the concern that Dworkin raised as a reason for rejecting the principle of equality of political influence in that it is unable to distinguish between the legitimate and the illegitimate causes of unequal influence. To better reflect on how the language of genuine EO can further a solution to this concern, let us consider an example of an application of the language of EO: equality of opportunity of admission to a university. A “formal” and therefore unsatisfactory principle of EO is satisfied when there are no conditions of entry which simply cannot ever be fulfilled by some groups of candidates, for instance of race or place of birth, and therefore which would totally exclude some applicants. But that is not sufficient for satisfying ourselves that genuine EO has been met because the conditions which control access to the university may be such that they are much more difficult to satisfy for some candidates than for others. If some candidates attended much better secondary schools which better equip them with the required qualifications at the point of entry to the university whereas the others, through no fault of their own, had no access to the better secondary school, then we cannot recognize university access as satisfying the principle of EO. In contrast, if some of the prospective applicants have not reached necessary qualifications because they had chosen to devote more time to sport then they cannot complain about inequality of opportunity now: unequal degree in which they satisfy the conditions of entry is a result of causes which are themselves legitimate. So EO crucially depends on a distinction between those causes of unequal access to qualifications required at the point of selection which are themselves legitimate and those that are illegitimate.

But the matter is more complicated than that. Suppose we have a theory about the causes of unequal access to qualifications that are illegitimate and those that are not; for example, that the causes which can be traced back to a person’s own, freely taken choices are legitimate, and those which can be traced back to the circumstances over which a person has no control are illegitimate. But “tracing back” is a long and tedious process in the cases of EO analysis, for any access at a particular point of time is conditioned by factors which have affected the access to goods at an earlier stage and which are relevant to the acquisition of qualifications required for today’s selection, and this earlier access been already conditioned by an even earlier one, ... etc. This is because, EO requires “not merely that there should be no exclusion from access on grounds other than those appropriate or rational for the good in question, but that the grounds considered appropriate for the good should themselves be such that people from all sections of society have an equal chance of satisfying them”,⁷⁶ and each “access” in one’s life is affected by an earlier crucial access in one’s life. In our university-access example, even if we are satisfied that the opportunities for secondary school access have been equalized, nevertheless if the access to equally good primary schools had not been equalized, the access to qualifications supplied by the secondary school will (partly) reproduce the inequalities of this earlier stage, which in turn had reproduced inequalities of access at an even earlier stage, etc. I have discussed this understanding of “equality of opportunity” elsewhere, and here I just want to make use of this “multi-tiered” understanding of EO without explicating it in any greater detail.⁷⁷ Now this multi-tiered structure of EO *may seem* to disqualify this ideal altogether: either we stop the chain of argument at a certain stage (in which case our myopia about the earlier unequal access is totally arbitrary) or we trace it to the earliest causes, some of which may be based on unequal genetic endowment (which, after all, is also outside a person’s control) in which case not only do we reduce the ideal ad absurdum but also collapse EO fully into equality of outcome. This is because the very notion of an “opportunity” to something (to a good X) means that the only thing that stands between

⁷⁶ Bernard A.O. Williams, “The Idea of Equality” in Hugo A. Bedau, ed., *Justice and Equality* (Prentice-Hall: New Jersey 1971): 116-137 at 132.

⁷⁷ Wojciech Sadurski, *Giving Desert Its Due* (D. Reidel: Dordrecht 1985) at 198-204.

me and X is my own choice, will, effort, etc. But this already presupposes a certain theory about my own choice, will, effort etc. being fully under my control, and not being pre-determined in a way which is outside my control. Not only does this argument raise a spectre of infinite regress but, more damagingly for the equal-opportunity argument, it hinges the determination of equality of opportunity upon some fundamental metaphysical problems of free will and determinism, as to which philosophers deeply disagree and “ordinary people” usually do not have a clue.

But this is not devastating to the ideal of EO because there is a certain ambiguity in the notion of a source of unequal qualifications being “illegitimate”, and our everyday language of EO relies upon this ambiguity in a way which rescues the ideal of EU against the charge of absurdity. At times, we use the notion of illegitimate sources in a thick moral way where a source of inequality is “legitimate” only if it can be fully and exclusively explained in terms of a free individual choice (as in our example of a free choice to devote more time to sport than to academic study, as a result of which a person has lower qualifications required at the point of entry to the university). But often a resort to such fully choice-dependent factors is not available, and in any event often raises the complicated issues of relationship between a free choice and choice-independent factors (perhaps a free choice to devote more time to sport was genetically conditioned?). When the point of such perplexity is reached we normally do not abandon the language of EO altogether but rather use a second meaning of “illegitimate” sources: they are such factors which (even though they do condition a person in a choice-independent way) we do not *want* to be equalized because it would lead to deplorable and sometimes even perverse consequences. This is a “consequentialist” rather than thick moral sense of illegitimacy of sources of unequal qualifications which enters into the reasoning in order to prevent the EO discourse into absurdity. Consider our earlier argument: even if, under some arguments on free will and determinism, we would reach the conclusion that our willingness to undertake effort (say, to study rather than to play) is genetically predetermined, we do not want to equalize the genetic potentials (or, alternatively, to compensate for genetically differential propensities for learning and playing). Thus our equal-opportunity argument considers this particular factor as legitimate for the differentiation of outcomes, the operation of which does not negate the existence of equal opportunities. One can obviously protest at this point that in using the consequentialist argument we are putting a cart before a horse: we judge whether the opportunities were equally distributed from the predicted consequences of the steps aimed at equalizing them. Indeed, this is precisely what we are doing but this should not be seen as a defect but as an ordinary feature of our moral discourse, and our language of EO should be sensitive to these *both* senses of illegitimacy of factors of inequality.

Consider this proposition from Bernard Williams’ classical article on equality: “one is not really offering equality of opportunity to Smith and Jones if one contents oneself with applying the same criteria to Smith and Jones at, say, the age of 11; what one is doing there is to apply the same criteria to Smith as affected by favourable conditions and to Jones as affected by unfavourable but *curable* conditions. Here there is a necessary pressure to equal up the conditions...”⁷⁸ The emphasis should be on the words “curable” which should play here an operative role, and “curability” is a matter not only of a theoretical feasibility of remedies but also of a practical cost-benefit calculus. Some unequal conditions may be “curable” but only with such a great cost in terms of damage to other important values that, for all practical purposes, we consider them to be beyond the reach of any remedies. What is important for us here is that, if EO is viewed in this way, then it resonates with the argument of Dworkin leading him to the rejection of the ideal of equality of influence (in Dworkinian

⁷⁸ Williams, *supra* note 76 at 133, emphasis added.

strict sense of “influence” contrasted to “impact”); indeed, one of the main reasons for rejecting this ideal was that the imaginable ways of equalizing the political influence would lead to highly unattractive results, and the way Dworkin depicts the ways in which these results would be unattractive evokes the perversity of some ways of equalizing the factors of qualifications, under the EO analysis. For instance, one way of making influence more equally distributed would be by limiting the resources that people can freely spend on the means of politically influencing others; in a less egalitarian society than our societies are, this would be contrary to the value of equality, Dworkin says, because it would “prevent some people from tailoring their resources to fit the lives they wanted though leaving others, who had less interest in politics, free to do so”.⁷⁹ To translate this scenario into the language of EO, such a result would offend against EO in a plain and obvious way because it would equalize the outcomes conditioned by inequalities which can be traced fully to choice-sensitive factors. Another strategy of equalizing “influence”, Dworkin claims, would be by “educat[ing] people not to attempt to influence others, with respect to political decisions, *except in ways that do not rely on special advantages they might have, in experience or commitment or reputation*, and also to attempt to resist being influenced by other people whose arguments might have special force traceable to such advantages”.⁸⁰ To translate this into the language of EO, it would be perverse in a different way: we would be restoring political equality but in a way which would bring about some obviously appalling consequences. It would be perverse to try to bring about equality of opportunity by making it impossible for the better arguments to influence the public opinion more strongly than the worse ones, even if the strength of the argument may be traceable to the individual factors which cannot be themselves “deserved” in a morally meaningful way. For consequentialist reasons, we therefore consider the differences in political persuasiveness as “legitimate” factors of different opportunities, even if these factors cannot be traced back to purely choice-sensitive causes.

These two main hypothetical strategies of equalizing influence under Dworkin’s conceptual framework,⁸¹ which play the role of the “parade of horrors” and thus lead him to the rejection of the ideal of “equality of influence”, can therefore be accommodated into the language of EO, and the perverse implications of adopting the ideal of equality of influence can be well handled by the discourse of equality of political opportunity. This would mean that, if we can speak meaningfully of equality of political opportunity (and if this talk allows us to come to grips with the problems that the parallel ideal, that of equality of political influence, would generate) then perhaps we need not collapse the language of political equality into that of undifferentiated equality or social justice, as the “dependent conception” of Dworkin’s analysis would demand. The ideal of equal political opportunity would seem therefore to preserve those aspects which Dworkin found missing from the ideal of equal political influence (such as its insensitivity towards the distinction between legitimate and illegitimate sources of unequal influence) and at the same time preserve the specificity of political equality, which was the aspiration articulated earlier in this article.

How is the principle of equal political opportunity related to MR? The relationship is only indirect. Equal political opportunity applies quite obviously to the deliberation stage of the political process. It is with respect to *this* stage that the concept of equal *influence* was generated (and indeed, it was defined in terms which have relevance to the deliberation stage

⁷⁹ Dworkin, *supra* note 2 at 197, footnote omitted.

⁸⁰ *Id.* at 197, emphasis added.

⁸¹ There is also a third strategy in Dworkin’s reasoning, namely that of reducing the role of influence of politics overall, see *id.* at 197, but Dworkin quickly disposes of it as so self-evidently unacceptable that it cannot be seriously entertained in a democratic society. He is of course right, and its short appearance in Dworkin’s argument does not affect the discussion here in any way.

only), and the ideal of equal political opportunity enters the stage as a remedy to the defects that the ideal of equal influence had. But it is worth considering an opportunity *to what* should be equalized, under the principle of EO? From an individual point of view, the purpose of deliberation, it would seem, is double: first, it is to acquire the best ideas and information for oneself; second, to affect the views of other people. Equal political opportunity is, obviously, mainly concerned with the second function of deliberation because it is the second function which is relevant to political *influence*. What can equal opportunities, with regard to this function, be the opportunities *to*? I suggest that the object of the opportunities (that is, the benefit which the opportunities are targeted on) is located somewhere half-way on the spectrum between being able to communicate one's views and being able to actually convince the audience to one's views. The former good is too weak: a mere ability to communicate is too thin a good for people wanting to attain it, without more. Any Hyde Park speaker has already attained this good, and the thinnest regime of freedom of speech (understood merely as absence of censorship) easily satisfies this ideal. The latter good, an ability to convince one's audience to one's own views, is too strong to lend itself for equalization. The likelihood of convincing the audience is largely dependent upon the audience's *prior* views which belong to the category of factors outside of the speaker's control, and which are not the subject of "equalization" in the equal-opportunity discourse. This is due to various causes of disagreement between people which can be explained neither by a lesser rationality of some people than others, nor by the fact that those different views are merely rationalisations of people's narrow interests, which themselves are different. John Rawls labelled these reasons "the burdens of judgment".⁸² In Rawls's view, those causes include the fact that the evidence bearing on a case is often conflicting and complex; there may be disagreement about the weight of different kinds of considerations that are relevant; concepts are often vague, indeterminate and subject to hard cases; our experiences are different and these differences affect the way we assess evidence, etc. Even assuming that listeners are fully receptive to the speakers' arguments, a number of decisive factors of the effectiveness of persuasion are, and should remain, outside the powers of speakers.

So if the ability to communicate one's views is too weak, and an ability to convince one's audience is too strong as the objects of a political opportunity, what is a plausible good in-between these two extremes? It can probably be characterized as the ability to effectively get one's own political message across to the audience one wants to reach. Anything less is an insignificant good; anything more is implausible because it engages the factors which are, and should remain, outside the control of a person making this communication. But it is quite plausible to claim that equal political opportunity in the deliberation stage of collective decision-making should mean an equality of opportunity to reach one's desired audience, to get one's message across, to be heard. This is more than an opportunity to speak, and less than an opportunity to convince; it is an opportunity to convey one's message to the audience which the speaker wants to reach. Because deliberation is largely carried on through speech, the ideal of equal opportunity with respect to speech can be applied here. Elsewhere, I have argued at some length about the attractiveness of an ideal of an "equal opportunity to be heard" as a plausible and meaningful interpretation of equalizing expressive opportunities.⁸³ I will not be summarizing my conclusions here, beyond stating that the ideal of equality of opportunity seems to capture well the various policies aimed at equalizing access to media of political communication because "(1) being heard by one's audience is an important social good which many people seek, and (2) we may legitimately and meaningfully aim to reduce

⁸² John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 54-58.

⁸³ Wojciech Sadurski, *Freedom of Speech and Its Limits* (Kluwer: Dordrecht 1999) at 73-98.

the impact of those factors which are outside the speaker's control and affect his or her access to the means of effective speech".⁸⁴

So much for equal political opportunity at the stage of political deliberation. When it comes to the stage of the actual making of a decision, we obviously do not need to find an interpretation of the good in political *influence*: by voting (either in the elections or in the referendum or in the parliament) we do not try to *influence* anyone but we actually take the decision. It is too late to talk about the influence here, and thus also about political opportunities to affect the decisions. MR is therefore an institutional embodiment of what Dworkin called "equal impact": a weight that a person's vote has (taken on its own) in the collective decision-making. But there is an indirect connection between equal impact and equal political opportunity which parallels the connection between voting and deliberation. If there was no vote at the end of the road (for instance, if the decision was to be taken by a mild dictator who would tolerate all sorts of deliberations but did not care about it one bit when taking the decisions, or if the decisions were taken by lottery) deliberation would be meaningless. It could, and perhaps would, still go on, but the motivations that people would have to participate in the first-order deliberation (about the decisions to take), as opposed to the second-order deliberation (about how to change the decision-making process) would be nil. It would therefore not matter whether the deliberation stage respected the condition of equal political opportunity, or of equal influence, or of equal whatever. But when the decision-making procedure respects the principle of equal impact, then an equal opportunity to affect the views of those who will be taking the decision acquires an urgent value. Equality at the output of the system radiates upon the importance of equality at the input, so to speak. For if our adoption of the system of MR is motivated by strong egalitarian reasons (as has been the main theme of this article) and gives an expression to the principle of equal impact, then we do not want to upset this political equality by the lack of equality at an earlier stage, which in turn significantly informs the final stage. There should be a degree of continuity in the egalitarian credentials of all stages of the process, if equality is our true reason for settling upon MR. It is important to be clear about this connection. It is not the case that if we violate the principle of equality of political opportunity at the deliberation stage then the equality of impact at the stage of decision-taking (in the institutional form of MR) is in some way contaminated by inequality or damaged. It is rather that the adoption of MR at the final stage reveals our intention to give effect to the principle of equality in the political process, and therefore the integrity of this intention demands that we try to respect it at the earlier stages of the process as well, especially since these earlier, deliberative stages, inform the substance of the decision itself.

Conclusion

Political equality which underlies and supports the majority rule is an important though limited ideal. It can coexist with, and is not necessarily discredited by, unequal political outcomes which result from the employment of majoritarian procedures. Equality of political opportunity and of political impact have a powerful legitimating power for democratic decisions, and need to be assessed in a way which is at least partly detached from controversies about what constitutes equality in the outcomes of these processes. We adopt a democratic rule for the reasons that are egalitarian through and through, but it is at this point that our egalitarian consensus ends. It is not that political equality is more or less egalitarian than a substantive principle of equal concern, but rather that, in a pluralistic community, we would not agree on the common criteria as to which outcomes are substantively equal (that is,

⁸⁴ Id at 85.

which express, in their substance, the principle of equal concern for all citizens) while we may more likely agree on standards of equality in the process.⁸⁵ The detachment of political equality from substantively equal concern as displayed in laws and political decisions renders it possible for us to establish that the very adoption of a democratic procedure reveals a prior acceptance of a strongly egalitarian premise; a premise weighty enough to override the arguments for a non-democratic system of government.

There is one issue which has been placed, deliberately, outside the bounds of my argument. I have not discussed the question of who constitutes the demos within which the majority counts for the purposes of MR: an unstated presupposition has been that the demos corresponds more or less with the range of people to whom the collective decisions apply, and who are expected to comply with them. But it is, of course, a risky presupposition, and the “more or less” clause may hide the real problems. Some exclusions from the demos are taken almost consensually for granted: of children, of mentally incompetent, or of those criminally punished. Others are less obvious and are under increasing scrutiny: the exclusion of long-term residents, nationals of other countries, for example. A determination of the bounds of the demos is crucial for any fully-fledged conception of democracy because, even if my argument about the link between MR and equality is correct, a fundamental inequality may be caused by a disenfranchisement of some groups of people for the purposes of ascertaining majority. As Robert Dahl had persuasively argued, at the occasion of criticising Schumpeter’s democratic theory, it is one thing to say “System X is democratic in relation to its own demos” and different to say “System Y is democratic in relation to everyone subject to its rules”;⁸⁶ naturally, it is only the latter which is meaningful. This is because, ultimately what we are interested in is the relationship of equality (as displayed by MR) to the *legitimacy* of a democratic system, and by placing some people outside the bounds of the demos, the system fails to make out the claim of legitimacy of its laws towards them. This is, at least, a *prima facie* proposition which can be rebutted by some special circumstances which may redeem the legitimacy of the system’s directives addressed to those who have not made it to its demos, such as children or foreigners. Why these groups have reason to consider the system as legitimate concerns issues outside of equality: clearly, they have not been given an equal status in the law making process. But this just goes to show that there may be other bases of legal legitimacy that don’t relate to equality; there was nothing in my argument which required an insistence that equality (as displayed through MR) is the only possible source of law’s legitimacy. But it is an *important* source, and a source which in a democratic system is a norm, while other grounds of legitimacy (e.g. towards children or foreigners) are exceptions. To draw the permissible scope of these exceptions requires a theory of citizenship, an essential ingredient of any developed theory of democracy, but is an issue outside the aspirations of this working paper.

⁸⁵ See similarly Waldron, *supra* note 49 at 162.

⁸⁶ Dahl, *supra* note 3 at 112.