

Dennis C. Mueller

Constitutional and Liberal Rights*

Abstract: Amartya Sen has demonstrated a possible inconsistency between a (liberal) right and Pareto optimality. Neither Sen nor the subsequent literature have discussed the origin of the rights that lead to the liberal paradox. In this article I examine one possible origin of rights definitions—a constitutional contract agreed to by all members of the community. Constitutional rights are shown to be vulnerable to a similar paradox as with liberal rights, but if the writers of the constitution were correct in their choice of actions to protect, such paradoxes will be unlikely and involve small welfare losses when they do occur. The article demonstrates that both the origin of rights and their potential role in advancing the interests of citizens can be explained using a utilitarian/welfarist methodology.

1. Introduction

In his initial illustration of the 'liberal paradox' Amartya Sen (1970a; 1970b) demonstrated a possible inconsistency between a (liberal) right to read what one wished, and Pareto optimality. In subsequent writings, Sen (1976; 1979; 1992) has suggested that the paradox should be resolved by abandoning the Pareto postulate, and its welfarist methodological underpinnings.

Neither Sen nor much of the subsequent literature on the liberal paradox have discussed the origin of the particular right that leads to the paradox. They have simply assumed that such rights exist. Given that their existence can result in Pareto inefficiency, the question of why and from whence such rights arise seems relevant. Would rational, self-interested individuals establish liberal rights, if they produce Pareto inefficiencies? If not, is there some fundamental inconsistency between being rational and self-interested and being liberal?

One authority for defining rights is, of course, a constitution, and recent debates in the United States over abortion rights and free speech (flag burning), and in Germany over asylum rights have centered on the constitutional

* I would like to thank James Buchanan and Yew-Kwang Ng for helpful comments on an earlier draft.

nature of these rights. If a constitution is a form of contract among the citizens defining the institutions of the polity, and this contract is agreed to by all, then constitutional rights must, if citizens are rational and self-interested, be Pareto efficient. Constitutional rights, therefore, would seem not to be subject to the paradox. Are liberal rights incapable of being included in a constitution written by the citizens?

In this article I shall first examine, from a public choice perspective, the nature of constitutional rights. Having done so, I consider whether constitutional rights can be subject to a similar paradox as with liberal rights, and more generally the relationship between the kinds of rights one might expect rational, self-interested people to put into a constitution and different conceptions of liberalism. In doing so, my goal is not so much 'to resolve the paradox', but rather to examine the salient characteristics of these different notions of rights. In so doing I shall also attempt to illustrate their relevance to recent public debates over various rights.

2. The Constitutional Contract

There are four possible consequences of any action by an individual:

- (i) Only the actor's welfare is affected by the action.
- (ii) The action makes one or more other people better off.
- (iii) The action makes one or more other people worse off.
- (iv) The action makes some other people better off, and some others worse off.

In the last three instances the action is *collective* in an obvious and meaningful sense, and can produce situations in which a collective decision over whether the action should take place, and if so under what conditions, makes all affected parties better off than if the individual makes this choice by himself. Recognizing the potential gains from collective decisions in the latter three situations, any group of individuals living in close enough proximity to one another to make these situations likely to arise will wish to establish institutions to facilitate making those collective decisions that can improve the welfare of all affected parties.

Falling in category (ii) would be situations in which individuals voluntarily interact with one another for their mutual benefit. Market transactions are an important subset of these, and any group of individuals that wished to establish institutions to advance their collective welfare would certainly create and protect market institutions. All voluntarily joined contracts, which affected only the welfare of the contracting parties, would also be allowed.

A second set of actions contained in categories (ii), (iii) and (iv) involves actions by an individual that *inadvertently* affect the welfares of others, what

we commonly call *externalities*. In situations in which only one or two people are affected by an individual's action, a community might rely on Coasian (1960) bargaining to achieve mutually beneficial outcomes. But when large numbers of individuals are affected, the transaction costs of Coasian bargaining are generally too large to make this the optimal procedure. With large numbers of individuals, some form of democratic institutions for making collective decisions becomes optimal (Dahlman 1979, Mueller 1989a, ch. 2). Following Buchanan and Tullock (1962) we shall assume that these institutions are imbedded in a constitution to which all members of the community agree. We make the welfarist assumption that their constitutional choices are predilected to maximize their expected utility under the constitution.

3. The Choice of Voting Rule

The consequences of the four possible outcomes from an individual's action listed above can be illustrated with the help of Matrix 1. At any point in time an individual A has a set of actions (including no action) that he can undertake, $\{A_1, A_2, \dots, A_j, \dots, A_m\}$. Each action A_j has a payoff of a_j for individual A and b_{ij} for any other individual B_i . For the time being we shall assume that all individuals passively absorb any change in their welfare caused by A 's action. In the absence of any constraints imposed by the community, A undertakes that action A_j that promises him the highest welfare level a_j . The collective action problem is to determine whether this choice is also optimal with respect to the community, and if not what institutions can be put into place to induce A to make the optimal choice.

Matrix 1
Payoffs from A's Actions

A's Actions	Individuals			
	B_1	B_2	... B_i B_n
A_1				
A_2				
:				
:				
A_j	(a_j, b_{1j})		(a_j, b_{ij})	(a_j, b_{nj})
:			:	
:			:	
A_m			:	

At the constitutional stage each individual must contemplate being both an actor A wishing to undertake a given action A_j and the passive recipient of any welfare change this action causes. Without loss of generality, we can assume that all passive recipients are identical, or that we average the payoffs of the passive recipients and construct a *representative* B_i . If

$$p_j a_j + p_i b_{ij} \geq 0 \quad (1)$$

holds, where p_j is the probability that the individual is the actor, and p_i is the probability that he is individual B_i , then the expected gains from an individual's undertaking a given action outweigh the expected costs imposed on others.

One possibility for ensuring that (1) is satisfied would be to make a collective decision on each and every action an individual undertakes to determine whether net benefits are greater than zero. The decisionmaking costs of such an approach would be overwhelming, however. There are a limitless number of actions an individual can undertake at any moment—scratch his ear, scratch his elbow, think about eating an orange, think about scratching his ear, etc. Most of these do not affect the welfare of anyone other than the actor, $b_{ij} = 0$, for all i . Thus, for countless routine actions like scratching one's ear, equation (1) is satisfied so long as $a_j > 0$, i.e., so long as the actor himself wishes to undertake the action. Recognizing this someone at the constitutional stage will want the constitution to allow individuals to undertake any action they wish to undertake *unless* a collective decision has been made to prevent them from doing so. Such a provision will greatly economize on decisionmaking costs relative to its converse. Thus, on pure welfarist considerations of benefits and costs, the constitution should contain a libertarian presumption in favor of freedom to do as one chooses.

An individual at the constitutional stage would like to prevent any actions that violate condition (1). What democratic institutions will make this determination possible?

Obviously, if individuals only undertake actions that improve their welfare, (1) can only be violated if $b_{ij} < 0$, i.e., in situations involving negative externalities. Now consider the special case in which the loss to an individual harmed by a negative externality just equals the gain to the person committing it, i.e., $a_j = -b_{ij}$. Condition (1) then becomes

$$(p_j - p_i)a_j \geq 0 \quad (2)$$

and is satisfied so long as the probability that an individual commits the action in question is greater than the probability that he is adversely affected by it. If the action in question is, say, driving above a certain speed, and we assume that people who wish to drive above a particular speed vote against its being made the legal limit, and those who feel adversely affected by others driving above this speed vote for the limit, then the probabilities that an indi-

vidual benefits from the action or is harmed by it will be revealed by a simple majority vote on allowing the action. Someone at the constitutional stage, who did not know which side she would favor in the future on actions that promised equal gains and losses to individuals on both sides, could maximize her expected gains from collective decisions on whether to allow these actions, by having these decisions made using the simple majority rule.¹

If the probabilities that an individual is benefited or hurt by a given action are to be determined in the post-constitutional stage by voting on whether or not to allow these actions, then an individual at the constitutional stage will wish to require higher majorities to forbid any action, the larger the gains to the actor (a_j) are relative to the losses to those harmed by the action (b_{ij}). In the extreme, when a_j is very large relative to $-b_{ij}$, an individual at the constitutional stage, who was uncertain of whether she would be A or B_i , would want to require that unanimity was needed at the post-constitutional stage to prevent A from being able to undertake the action.

4. Constitutional Rights

An action that might involve such extreme asymmetries in payoffs to warrant using the unanimity rule to prevent it is practicing a religion of one's choice. The costs imposed on those denied the option of practicing their religion may be expected to be very large relative to the gains for the rest of the community from such denials.

In contemplating protecting the freedom to worship for individuals and minorities by requiring the use of the unanimity rule, the constitution framers can anticipate future situations in which, say, a particular group's religious practices offend some members of the community. The offended members propose banning the religion, or restricting its practice, and try to induce the religious group's support by offering it some sort of compensation—free membership in the majority's church. Long and acrimonious debate ensues, but in the end the religious group exercises its veto under the unanimity rule and votes against the proposed ban.

Contemplating many situations like this arising in the future, the constitution framers may choose to minimize future decisionmaking costs by protecting religious groups' freedom to worship through a constitutional right to practice a religion of one's choice, rather than by requiring the use of the unanimity rule to impose such restrictions. For example, the constitution

¹ The importance of the equal intensity assumption to justify the simple majority rule is well known. See May 1952; Buchanan/Tullock 1962, 128-30, Rae 1969, Mueller 1989a, ch. 6. Strictly speaking conditions (1) and (2) only suffice to select the optimal rule for binary choices, as assumed by Rae and May. Since the bulk of the literature on liberalism deals with binary choices, we do not deviate from it here.

might contain a clause stipulating “that no group, or parliament, or other government authority shall take any action that infringes a person’s freedom to practice a religion”.²

Such a clause would prevent a majority of the polity from passing a law that curtailed a religious group’s freedom to worship, and thus would offer the same protection as the unanimity rule, but at much lower decisionmaking costs. Note that, as with the unanimity rule, those wishing to stop a group from practicing their religion may still succeed in doing so, even if this practice is protected in the constitution. The notion of a right carries with it the freedom to exercise or not to exercise the right. Those offended by a group’s religion are free to try and persuade or bribe the group not to practice it, and conceivably might succeed in doing so.

5. Constitutional Rights and Pareto Efficiency

Under the interpretation offered here, there can be no inconsistency between the existence of a constitutional right and Pareto efficiency, *at the time the rights are defined*, since we assume that the constitution is unanimously agreed to by rational, self-interested individuals. Indeed, rights, like both the constitution and government itself, will be created *solely* for the purpose of reducing decisionmaking costs and facilitating the achievement of Pareto optimality in the various social dilemmas a community faces (Mueller 1991; 1996, ch. 14).

Situations resembling Sen’s paradox can arise in the post-constitutional stage after rights have been defined, however. To see this consider again a social interaction situation like Matrix 1. Because all issues involving Pareto optimality can be illustrated with only two individuals, and the analysis is obviously much simpler with only two individuals, let us assume the existence of a single individual *A* and a single *B*.

The first thing to note is that a conflict between having a constitutional right to act and the Pareto principle cannot arise, if we continue to restrict *B* to a single column ‘choice’. With *A* choosing the row which gives him the highest payoff, any move within a single column must lower *A*’s welfare even if it increases *B*’s, and thus cannot yield a Pareto superior outcome. To produce a Pareto inferior outcome by allowing *A* to select a particular row, *B* must have at least two column choices.

With only one other person affected by the actions of *A* the last of the four possible consequences of *A*’s action listed above cannot occur. The first possibility cannot produce a Pareto suboptimal outcome, since *B* is not affected by *A*’s action, but both the second and the third situations can.

² The decisionmaking costs for constitutional rights is developed in greater detail in Mueller 1991; 1996, ch. 14.

Consider first the second situation, A 's action makes B better off. As noted above, one way this can happen is when A and B engage in market exchange. But the Pareto optimality of this process is its most celebrated feature. Constitutional rights to barter and exchange and voluntarily joined contracts are not likely candidates for Pareto suboptimal outcomes.

Possibility (ii) from above also characterizes actions of A that have positive externalities, and these can give rise to Pareto inefficiencies. A plants flowers in his garden which his neighbor B also enjoys. When he acts independently of B , A plants 40 square meters of flowers. B would like A to plant more flowers, however, and would be willing to offer him a bribe (pay a tax), if A were to plant 50 square meters. Both A and B are better off when A plants 50 square meters and receives the bribe, than when he makes this choice independently of B (see Matrix 2, utility payoffs to A and B , respectively, are given in each box).³

Matrix 2
Social Interaction With Positive Externality

		B	
		<i>Bribes A to plant more flowers</i>	<i>Does not bribe A</i>
A	<i>Plants 50 m² of flowers</i>	1 11 11	3 7 16
	<i>Plants 40 m² of flowers</i>	2 16 7	4 10 8

Although positive externalities can produce Pareto inefficiencies, they cannot arise because of the existence of constitutional rights. Individuals writing a constitution will not feel compelled to include a clause protecting the freedom to plant flowers out of fear that some future group of citizens that benefits from its neighbor's flowers will pass a law prohibiting their planting.⁴

The existence of rights can lead to Pareto inefficiencies when the actions they protect produce negative externalities. B is a monotheist, who worships the sun. A is a duotheist, who worships the sun and the moon. B experiences

³ I have used a strategy matrix like Matrix 2 to illustrate the liberal paradox in my *Public Choice* books 1979, 201-06; 1989a, 400-05, as have Gaertner, Pattanaik and Suzumura in their recent article 1992.

⁴ In terms of equation (1) above, both a_j and b_{ij} are positive, and so (1) is satisfied trivially.

anguish from *A*'s idolatrous worship of the moon, and fears that *A*'s example might lead others to take up tritheism, or even higher orders of theism. *B* is willing to offer *A* a sizeable bribe, if she will give up worshipping the moon. As it turns out *A* has only taken up worshipping the moon recently, and does not have strong convictions about (fear of) this god. For a reasonable sum, she is willing to give up praying to the moon. The situation is as depicted in Matrix 3. If each acts independently of one another, the outcome is square 4, which is Pareto inferior to square 1.

Matrix 3
Social Interaction With Negative Externality

		<i>B</i>			
		<i>Gives A money</i>		<i>Does not give A money</i>	
<i>A</i>	<i>Worships sun only</i>	1 11 11	3 7 16		
	<i>Worships sun and moon</i>	2 16 7	4 10 8		

I have made the payoffs in Matrix 3 identical to those in Matrix 2 to emphasize that the situation with respect to a negative externality is identical to that of a positive externality in terms of its Paretian properties. Both create a form of prisoners' dilemma, and can as with all prisoners' dilemmas produce Pareto dominated outcomes. The important difference between the two is that in the case of a negative externality, those adversely affected do have an incentive to prevent *A*'s action. If the relative payoffs to people like *A* and *B* envisaged at the constitutional stage are sufficiently asymmetric, *A*'s freedom to act, i.e., to worship as she chooses, might be protected in the form of a constitutional right.

The Coasian solution to both positive and negative externalities is private contracting and the offering of bribes or other forms of compensation (see also Buchanan/Stubblebine 1962). The symmetry between both positive and negative externalities in terms of their Paretian properties suggests that this solution should be optimal in both situations. Since having a right to act always includes the right not to act, the fact that actions in the case of negative externalities may be protected as constitutional rights does not in itself rule out the possibility of Coasian bargains to achieve Pareto optimality, and several authors have suggested this way out of the liberal (right) paradox

(Bernholz 1974; Mueller 1979; 1989a; Gärdenfors 1981; Sugden 1985; Barry 1986; Hardin 1988). Amartya Sen has made several objections to this way around the paradox. Before taking up his objections in the next section, a few points need to be made with respect to the paradox, in the context of constitutional rights.

First it must be emphasized that constitutional rights, under the analysis put forward here, will be explicitly protected *only* in situations involving negative externalities. Not only will they not be created to protect actions that produce positive externalities, they will not be created in situations of type (i) above where only the actor's welfare is affected. As pointed out already, an optimal constitution *implicitly* allows all actions not explicitly prohibited by parliamentary actions. If not explicitly protected in the constitution, my 'right' to scratch my ear could be taken away from me at any time by an act of the Austrian Parliament, just as my right to drive through the center of Vienna at 100 km/h has already been taken away from me. The logic put forward here could be used to explain why the Austrian Constitution fails to protect the freedom to drive fast in all situations on the grounds that its drafters felt that the likely costs from fast driving to those hurt by it were sufficiently high relative to the gains to those wishing to drive fast that future parliaments were allowed to limit driving speeds. No protection was provided for ear scratching, because no one envisaged that this action caused any negative externality and thus needed to be protected. Even if ear scratching produced intense pleasure, the freedom to do so might never be explicitly protected as a right, since the action is not perceived to produce any negative externalities.

Because all actions protected as rights in the constitution should have the potential for producing negative externalities, all raise issues of collective action to achieve Pareto optimality. The difference between rights-protected actions and other actions that produce negative externalities is in the relative payoffs to the affected parties and thus the form of collective action that is allowed. In the case of run-of-the-mill negative externalities, the parliament is allowed to pass legislation to curb the action. In the case of a right-protected action, the parliament is (should be) impotent. A Coasian-type bribe is the *only* way those adversely affected by the action can, legally, try to prevent it.⁵

⁵ In responding to suggestions by Ng 1971 and Blau 1975 that the paradox be avoided by introducing information on intensities, Sen 1982, 296, stresses that, "The impossibility of the Paretian liberal ... is based on the assumption that social preference be dependent on individual *preference orderings only* without bringing in *intensity* of preference." (emphasis in original) He goes on to question the desirability of introducing intensity information *in areas where rights exist*. I would argue, however, that expectations about the likely intensity differences between individuals, who undertake an action, and those adversely affected by it are essential to understand why they would agree to protect this action through a constitutional right.

Although one can (all too?) easily construct a story to fit a Paretian failure as in Matrix 3, if the constitutional convention has correctly identified those actions needing constitutional protection in the form of rights, situations like that depicted in Matrix 3 should be rare, and thus the welfare losses, even if Pareto optimality is not obtained, should be small. If religious freedom warrants constitutional protection, then *A*'s expected loss from not practicing her religion should be very large, the externality imposed on *B* relatively small. *B* is unlikely to be willing to offer a big enough bribe to get *A* to alter her religious behavior, and the situation in Matrix 3 does not arise. Of course, not all people are alike, and thus even if the relative payoffs are such as to warrant constitutional protection of religious freedom, there might be some *B* who feels so strongly about a given *A*'s religious practices, and an *A* with sufficiently weak religious convictions, that a bribe would be Pareto optimal. Even if for whatever reason this bribe did not take place, and thus a Pareto move was missed, it would not be tragic since these sorts of *As* and *Bs* should be fairly few. If they are not few in number, then the paradox is due simply to the wrong action having been offered constitutional protection. The way around the paradox is to abolish the right.

6. Can Rights Be Bartered Efficiently?

If rational, self-interested individuals write a constitution, any definitions of rights that they include will be chosen to advance their collective welfare, all will be Pareto optimal *ex ante*. If the purpose of the constitution is to advance the collective interests of those writing it, then they will not wish to exclude future options that could make all parties better off. They will not preclude the kinds of agreements needed to achieve Pareto optimality in situations like Matrix 3. With individuals free to exercise their rights or not, and to contract over the actions protected by rights, all Pareto moves should be possible.

Amartya Sen has made the following objections to Coasian trades to avoid the liberal paradox. First, in a strictly logical sense, that *A* and *B* *could possibly* reach square 1 does not contradict the theorem as Sen formulated it (1970a; 1970b; 1976; 1992). Sen's definition of liberalism gives each individual the right to select the social ordering of two states of the world. *B* has the right to give *A* money or not, when *A* only worships the sun. *B* prefers not giving and thus state 3 is socially preferred to state 1, $3P1$. *A* prefers praying to the sun and moon to praying only to the sun, when *B* gives her nothing, and thus $4P3$. Transitivity of the social preference implies $4P1$, but state 1 is Pareto preferred to state 4. If each individual exercises her right to define

the social ordering over her assigned pair of states, the social choice that is consistent with the exercise of rights is Pareto dominated.⁶

Once one recognizes that rights-related actions can, and in Sen's and my examples do involve externalities, the possibility of a Pareto dominated outcome is no longer a paradox. If each individual exercises his 'right' to drive on whichever side of the road he chooses a lot of accidents occur. This outcome is neither surprising nor disturbing if individuals have the capacity to make the Pareto move. Sen's subsequent arguments are that in some situations individuals *may not* be able to make the move, in some they *may choose not* to, and in some they *ought not* to.

Sen points out that the contracts needed to achieve Pareto optimality may not be feasible or enforceable. How can *B* be sure, if *A* agrees not to pray to the moon, that she does not rise in the night and go to her window and secretly offer up a prayer? Knowing that the contract cannot be effectively monitored, it does not go into effect, square 1 is not attained.

Although I agree that this is a possibility, I do not think that it introduces any fundamental conflict between rights and Pareto efficiency, in the sense of citizens being worse off because of the existence of rights than they are without them. The fact that financing the construction of a bridge by a toll is hypothetically Pareto inferior to allowing free access and financing it by a lump sum tax, is of little consequence if the costs of instituting the lump sum tax are so large relative to the toll as to make everyone better off under the toll. In judging the Pareto efficiency of any state of the world, one must weigh not only the payoffs in other states, but the transaction costs of obtaining them (Dahlman 1979). If the payoffs in square 1 of Matrix 3 can be obtained only by incurring large additional monitoring costs, then these payoffs should be recalculated net of these costs. If the payoffs in square 1 net of monitoring costs are lower than those in square 4, then square 4 is Pareto optimal and there is no paradox.

Sen (1982, 314, 342-44) stresses that rights are often defined to protect freedoms that involve beliefs and actions that are very personal and private. The notion that one would *trade* one's right to hold these beliefs or engage in these actions seems alien to their very nature. I agree again, but again do not see that the nature of the actions introduces any fundamental conflict with welfarism and the Pareto principle.

When I choose to purchase a loaf of bread I consider not just my utility from the bread, but perhaps also the ambiance of the bakery, whether its

⁶ As Buchanan emphasizes in his contribution to this symposium, one cannot simultaneously grant two individuals rights to define social states of which both are apart. This impossibility is readily apparent when one thinks of rights as delineated in a constitution. A constitution can grant an individual the right to read what he chooses. It cannot grant an individual the right to read what he chooses, *conditional on others not reading a given book*. Constitutional rights cannot be conditional on the actions of others.

owner is friendly or not, and perhaps even whether he is poor or not, how many children he has, etc. My decision to purchase from the bakery across the street rather than from the supermarket depends on a variety of factors, but this does not mean that it cannot be described in utilitarian terms.

Suppose that after spending all week wrestling with liberal paradoxes I sit down Friday with the intention of reading *Lady Chatterley's Lover*. Having read so much *about* it, I have decided to read it. As I open to the first page, my wife enters and asks what I am doing. I say that I am about to read a book. She asks me if I would not rather accompany her to the movie. In fact I would prefer to read the book than see the movie that she selected. But I know that she will not go alone, and I would feel unhappy if she missed going to the movie on my account. I put the book down, even though I know that my schedule will not allow me to pick it up again. Although I would have been happier reading the book than going to the movie, if my wife had not asked me to go, I do not see any methodological error in saying that my utility is higher going to the movie with my wife, once she asks me and I take into account the effect of the action on her.

Nor would the situation be any different, if I responded when my wife entered the room that I was about to read *Lady Chatterley's Lover*, and she replied that she would be very upset at the thought of my drooling over the juicy passages in the book (obviously she has also not read it). Should I put the book down that would simply mean that I thought that I would be better off if I did not read the book and did not make my wife angry (and have to endure the consequences) than I would be reading the book.

Sen (1982, 344; 1992, 146) objects to this way of explaining these actions on the grounds that it makes welfarism or utility maximization, *tautological*. But his use of liberalism is equally tautological. If we assume that all individuals prefer having an extra \$100,000 to not having it, how do we explain a politician's refusing a \$100,000 bribe if he knows he will not get caught? The welfarist interpretation would be that he experiences enough disutility from accepting the bribe to more than offset the utility gain from the \$100,000. Sen (1982, 314) would appear to favor an interpretation that would say that the politician's ethical principles *override* his pleasure from the money, and thus the latter *do not count*. Similarly, *A* might refuse the bribe in the Matrix 3 example, because her liberal principle that one should not sell one's religious practices overrides the utility gain from the money. But if some people accept bribes and some do not, how do we account for the difference? How would we explain the politician's refusing a \$100,000 bribe, but accepting one for a \$1,000,000? Presumably we would have to say that commitments to ethical principles can vary across individuals, and for any person may be strong enough to resist some temptations but not others. When we observe someone accepting a bribe we say that his principles are too weak to resist the temp-

tation, when someone refuses we say that his principles are strong enough. Ethical principles of the appropriate strength are invoked tautologically to account for any behavior seemingly inconsistent with straightforward selfish utility maximization.

Invoking overriding ethical principles is much the same as assuming that people have two sets of preferences, a normal, hedonistic one for making everyday choices, and an ethical one called up to make ethical choices (Margolis 1982; Etzioni 1986). However, without being able to predict when people will and will not call their ethical preferences up, we do not have a predictive theory.⁷

Why do Mexicans have a fond preference for hot chilies, while Canadians prefer sharp cheddars? To explain these differences in taste we would want to look at the past consumption patterns of Mexicans and Canadians, the relative prices of these products, etc. Similarly to explain why some people vote and some do not, some give to charities and some do not, etc., we would study the past histories of these individuals. It is commonplace now in economics and public choice to explain voting, charity and other seemingly irrational or nonnarrowly selfish actions with models in which other persons' income or utility goes into the actor's utility function. When combined with an analysis of the past histories of individuals, these models can be used to predict these nonnarrowly selfish actions. Although the assumption that individuals maximize their utility is tautological in 'explaining' any single decision by a particular individual, it can be used to derive refutable predictions about the actions of different individuals.⁸ If utility models can be adapted to be used in positive analyses of ethical choices, why discard them to consider the normative properties of these choices?

The difference between Amartya Sen and myself on this matter is entirely over the appropriate methodology to employ to examine the kinds of choices involved in the liberal paradox, not about the substantive issues that underlie it. Given that we are going to employ a utilitarian framework to study some individual actions, Occam's razor dictates that we employ it to study all actions if we can, and I think we can. Sen prefers to use the utilitarian methodology in some circumstances, but to override it with propositions about ethical principles in others.

⁷ See my critiques in Mueller 1986; 1992.

⁸ My own preferred way to study how individual preferences are formed would rely on behavioral psychology. People are conditioned to behave in certain ways by past rewards and punishments (see again Mueller 1986; 1992). This approach puts much more emphasis on the selfish part than on the rationality part of the standard behavioral assumption in economics and public choice. People only behave *as if* they maximized an utility function, and even then in situations where they have been conditioned to act in certain ways. If people have been rewarded for undertaking good actions and punished for bad actions in the past, their *preferences* to act in certain ways will reflect this past conditioning, and we as third party observers will be able to make predictions about their future actions.

But as far of the substantive implications of people having strong preferences (principles) when rights issues arise, Sen and I agree. As discussed at the end of the last section, rights to undertake explicit actions should be defined only when it is expected that the potential actor would suffer a great harm if not allowed to act, and those affected by this action suffer modest harm. When these conditions are met, one expects few situations when those harmed can induce someone to forgo her right to undertake this action. The implication of this is that if rights are correctly defined situations like Matrix 3 with square 4 the outcome will be rare. The welfarist interpretation of this is that the utility losses from offering and/or accepting bribes to prevent these actions are so large that the payoffs in square 1 are in fact less than those in square 4. The square 4 outcome *is* Pareto optimal. Sen's preferred interpretation is that the payoffs in square 1 indeed do exceed those in square 4, but that square 4 is obtained because at least one individual's ethical principles override her utilitarian preferences. Under both interpretations square 4 is the optimal social outcome, under both interpretations square 4 is obtained.

The objection that individuals ought not to make the contracts necessary to achieve square 1 warrants a separate section.

7. The Nature of Externalities and the Nature of Rights

In Sen's *Lady Chatterley's Lover* example the two actors are *meddlesome* in the sense that they experience significant utility changes not from their own action, but from contemplating the action of the other person. The externality involved does not *physically* or *materially* affect the two parties, as in the familiar externality examples of loud noise, smoky factories and the like. Nor are the parties' rights violated by being prevented from reading a book, or forced to read one. Rather each experiences a *psychological* externality, each has his welfare changed by *contemplating* the other's exercising his right to read a book. Sen (1982, 297, 310) has proposed as a solution to the paradox that these meddlesome preferences be ignored (see also, Gibbard 1974, Blau 1975).

There are three different senses in which these meddlesome preferences might be ignored. First, the analyst might ignore them, i.e., assume that they do not exist. The unrestricted domain assumption is relaxed in this way, and the paradox vanishes. But if actual people really do have meddlesome preferences, as some most certainly do, then the paradox potentially continues to exist in the real world, even if it is expunged from the analyst's theorems.

Ignoring meddlesome preferences can be treated as a prescription to the actors involved. Each actor should mind his own business, and not allow the contemplation of what others do to affect his own actions. This prescription amounts to the behavior described at the end of the previous section in

which individuals' ethical principles override their narrow utilitarian interests. Whether this disposes of the paradox depends on the methodological-style issues discussed above.

In the theorem, each individual is given the right to make a social choice, and the aggregation of these individual exercises of rights becomes the social choice. A third interpretation of the prescription to ignore meddlesome preferences is that *society* should ignore them in deciding what the ultimate social choice is.

Society gets involved with questions of rights in three different ways: when it passes laws to curtail the implicit rights of all citizens, as with speeding laws, when its representatives in the judiciary arbitrate and interpret the rights defined in the constitution, and when society (the citizenry) writes the constitution and first defines them. The prescription that society ignore meddlesome preferences might be directed at any of these potential interventions.

Many of the debates involving rights issues in recent years have involved psychological externalities of the type presented in the liberal paradox literature. Someone contemplates the suffering of an animal, and demands rights for the animal; someone contemplates a flag's being burned, and objects that this act is not a protected right; someone contemplates being an aborted fetus and demands a right to its life.

No one will deny that mental suffering occurs. Each of us can imagine the anguish suffered by a parent forced to watch his or her child being tortured. Nevertheless, most of us would not argue from this that torturing children should be prohibited *to prevent the suffering of their parents*.

All conventional definitions of rights, as contained say in the U.S. Constitution, can be justified in terms of their direct impact on the welfare of the person whose action, or inaction, is protected. The first amendment protects a person who wishes to worship in her own way, the sixth protects a person from arbitrary arrest and imprisonment, the 13th from involuntary enslavement. Of course, the sixth amendment also protects third parties from any suffering they would incur contemplating someone's arbitrary arrest and incarceration, but it is presumably not this third party effect that is the primary justification for the amendment.

Sen (1982, 344) offers the following quotation from John Stuart Mill:

"There are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings; . . . but there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it. And a person's taste is as much his own peculiar concern as his opinion or his purse." (Mill 1859, 140)

If Mill is correct, then we will expect delegates to a constitutional convention to be more likely to protect certain freedoms to act in situations in which these actions can have negative externalities, *if* they think that they themselves or their immediate descendants might be the ones benefited from such protection. Many delegates to the Philadelphia Convention, or their parents and grandparents had experienced religious persecution in Europe. The country had recently fought a war to free it from what many thought to be a tyrannous master. Perceptions that they or their descendants might benefit from the protection of religious freedom, protection from arbitrary arrest, protection from a bullying prosecutor were likely to be real and immediate.

Since psychological pain can cause as much suffering as physical pain, we cannot preclude the possibility that a community will pass a law or even a constitutional clause to protect some people from psychological suffering. If a community felt anguish at the thought of stones being jostled around, it might conceivably include in its constitution a clause that protected a stone's right to remain unturned with harsh penalties proscribed for anyone who violates this right. As outsiders we might question whether the rational, self-interest postulate was fully applicable to members of this community, and we might not line up to obtain citizenship in it. But as nonmeddlesome liberals, we would have to respect the freedom of a community to design its social and political institutions however it saw fit, and thus the legitimacy of this right for this community.⁹

Following Mill we might also suspect that this clause would be much more susceptible to future attacks and repeal, than other clauses in the constitution that protected individual welfares in a more direct way. Should someone convicted of violating a stone's rights at some future date choose to protest, and her protest caused others to reflect upon the chances of their being punished for violating stones' rights, they might choose to hold a new constitutional convention and repeal the clause. Not being able to participate in the proceedings, stones would be powerless to prevent their loss of rights.

Of necessity a constitution is written by the citizens alive at that time and will reflect their interests, their values, their expectations about the future. Animals cannot participate, future immigrants cannot participate, future generations cannot participate. The interests of these groups will be reflected in the constitution only in so far as the citizens writing the constitution choose to protect them.

Moved no doubt by remorse over the preceding events, delegates to the convention that wrote a new constitution for West Germany after World War II included rather generous provisions for those seeking asylum in the country. A half century later, when many people chose to exercise their right to asylum in Germany, the current generation felt themselves and their culture

⁹ For a discussion of the normative underpinnings of this statement see Mueller 1989b.

threatened. Debate over the issue pitted those who felt threatened by the asylum seekers against those who empathized with their suffering. Not being able to protect their interests directly, potential asylum seekers saw their constitutional rights cut back.

No better illustration of the importance of self-interest in determining rights exists than the treatment of slavery in the United States. The U.S. Constitution, with its Bill of Rights, has been the model for many subsequent constitutions. It was written by men steeped in the ideals of the Enlightenment, who sought to establish a free and democratic society, unlike those that existed in Europe. Yet it condoned and protected slavery. The simple explanation for this is, of course, that slaves were not present at the Constitutional Convention, slaveowners and their representatives were. Had slaves been present, and their votes were required for the success of the convention, either no outcome would have been reached, or the United States would have been free of slavery from day one.

Over the course of the nineteenth century, many were moved by their contemplations of the sufferings of slaves to advocate the abolition of slavery. But not everyone was so moved. The South did not give up slavery because its citizens had been persuaded by Rawlsian-type arguments about imagining themselves in other people's shoes.

We draw the following conclusions from these reflections. On welfarist logic we would expect a constitution written by the citizens¹⁰ to reflect their perceptions of their immediate and future interests. Any explicit definitions of rights will be predicated on the citizens' perceptions of their expected gains from being allowed to undertake certain actions versus their expected losses from others undertaking these actions. The set of rights added to the United States Constitution to secure its ratification are arguably consistent with this interpretation.

It is, of course, possible that the writers of a constitution are moved by the contemplation of certain actions on the welfare of parties not represented at the convention, and define rights for these parties. So long as these parties remain unrepresented, we expect their constitutional rights to be more tenuous and vulnerable to repeal than those that directly protect the interests of the participants.

¹⁰ Most constitutions are written by the parliaments of a country, its dictator, or a commission appointed by the parliament or the dictator. Citizens play limited if any roles in their writing and adoption, and the constitutions tend to reflect and advance the interests of their writers. See Mueller 1996, ch. 21.

8. Implicit Versus Explicit Constitutional Rights

A constitution designed to advance the interests of its writers will allow citizens to undertake any action that they choose, unless the community explicitly chooses to prohibit or curtail an action because of the negative externalities that it causes. If decisions to prohibit actions are not made by unanimous consent, then the writers of the constitution will wish to protect an individual's freedom to commit those actions that promise very high benefits to the actors relative to their likely costs on others. Such protection can be provided by a constitutional right to commit these actions, a right that no future parliamentary majority or government majority can abrogate.

Several of the examples used in the liberal paradox literature resemble the kinds of actions that could and do get explicit protection in constitutions. The *Lady Chatterley* example involves the right to read a book, and this free speech right, when generalized to all books, does arguably involve the kind of asymmetric expected payoffs to warrant constitutional protection. The legal history of the First Amendment in the United States demonstrates that explicitly defined rights can offer citizens true protection against other citizens and the government, when the judicial system staunchly defends those rights.

Sen also uses examples, however, that do not seem to involve dramatic asymmetries in potential gains or losses, like whether I choose to sleep on my stomach or my back. In my constitutional schema this action would fall in the large category of implicitly protected actions. But this implies that it is much more tenuously protected than the right to read what one chooses.

Sen's pooling this kind of example of implicit rights with the *Lady Chatterley* example suggests that he feels that actions of both sorts should get rights protection in a liberal society. Each person has a 'protected sphere' that is impenetrable by other persons or the state (Sen 1982, 314). But what defines the dimensions of that protected sphere?

The Ninth Amendment to the U.S. Constitution states that, "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." If one looks for the locus of Sen's protected sphere in the U.S. Constitution, it must be here. But what are these rights retained by the people? Do they include the choice of position in sleeping?

Suppose that a study appeared that demonstrated conclusively that people who sleep on their backs are more prone to erotic dreams. Another demonstrates that people who have erotic dreams are less likely to attend church. A third finds that people who do not attend church have higher divorce rates. Sleeping on one's back begins to be viewed as a major cause of the decline of the family. Alarmed citizens soon form CASOB (Citizens Against Sleeping On Backs). Legislation is passed forbidding sleeping on one's back. The police

are empowered to enter homes and make spot checks to see if this law is being violated. Fanciful, perhaps, but one cannot really be sure.¹¹ One can be sure that the Ninth Amendment offers backsleepers much less secure protection than the Fifth Amendment offers those who choose not to testify on their own behalf, owing to the Fifth Amendment's greater explicitness. The only true protection for those 'rights' not explicitly delineated in the constitution is the willingness of other citizens to ignore their own tendencies to meddle, and for the courts not to give into meddlesome preferences, when they manifest themselves in obtrusive legislation.

9. Conclusions

From small acorns giant oaks grow. This has certainly been true of the 6 page note of Amartya Sen published over a quarter of a century ago. Neither Sen nor anyone else probably predicted the quantity of articles and books it would stimulate. In part this development is due to the implications of the theorem, in part it is because the term 'rights' means so many different things to so many people, in part it is because in academia as in the world it reflects upon, some people feel very strongly about the concept of rights.

In this paper we have tried to shed light on the rights issue by inquiring into their origin. In particular we have examined the nature of those rights that rational, self-interested individuals might agree to protect in a constitution. Explicit protection for certain actions would be provided when these actions involved possible negative externalities, and it was expected that the loss in utility to those prevented from undertaking the action would be substantially greater than the loss to those experiencing a negative externality. Rights protection would be provided in the constitution for actions, which the constitution framers wished to remove from the domain of normal parliamentary jurisdiction.

A society of unmeddlesome liberals would tend to give great weight to the direct utility effects of reading and writing books, practicing a religion, being out of jail, and so on, and little weight to the psychological costs imposed on others from these actions. In such a society rights would be defined to protect freedoms to act.

But we cannot presume that all societies are composed of citizens who reason as John Stuart Mill did. One can imagine a society of meddlesome individuals, all of whose utilities depend much more on the contemplation of the actions of others, than on their own actions. In such a society few if any rights would be protected in the constitution. What a person reads, how she

¹¹ In Austria and Germany government officials are empowered to enter homes to search for radios and televisions for the noble purpose of assessing a tax on those who watch television or listen to the radio.

prays, whether she is free to move about, are all questions of great concern to her neighbors, just as the speed at which she drives her car is. All would have to be left open to possible curtailment by collective action by the community.

Given that rights-protected actions are likely to involve negative externalities, one is not surprised to find that their exercise can result in Pareto inefficiencies. The standard solutions to eliminate these inefficiencies are Coasian bargains in small numbers cases, and Pigouvian taxes and subsidies in large numbers cases. Because a right always entails a freedom to act or not to act, there is nothing inherent in the concept of a right to prevent someone from not acting as part of a Coasian exchange or to obtain a public subsidy.¹²

The kinds of bargains that would be needed to achieve Pareto preferred exchanges will often be difficult to monitor and enforce. *Potentially* Pareto moves are infeasible. Given the nature of rights, those harmed by an action may often be unwilling to make an offer that will induce a person or group to forgo the rights-protected action. Among the feasible options, the outcome of people exercising their rights is likely to be the Pareto optimum.

Thus, welfarism can be used to explain why rational self-interested individuals would delineate a set of rights in a constitution to which they all agreed and, for the relentless welfarist, there is no inherent conflict between people having these rights, and society obtaining Pareto optimality. Sen objects to the tautological nature of this welfarist construction, but his preferred interpretation is equally tautological. In the one case the appropriate degree of utility or disutility is introduced to 'explain' an action or an inaction. In the other case the appropriate degree of ethical principle is introduced to 'explain' the same choices. What is at issue here is methodological style and semantics, not why and where society winds up in rights situations.

The nature of constitutional rights implies that when conflict over them arises, a perhaps large majority will often be pitted against an intense minority. That such conflicts often turn out to be strident and lead to violence is probably not because of a failure to make a Pareto move, but because of the numbers and preference intensities of those on both sides of a distributional struggle.

If rights are to play a role in advancing a community's common interests, then the community should agree upon what these rights are. Such agreement seems much more likely when members of the community write the constitution, and perhaps weigh the relative gains and losses from being the actor and a person affected by the action. The United States has had but one constitutional convention, and that occurred more than two centuries ago. It seems unlikely that it will have another. The result has been that new definitions of rights have entered the Constitution either through a Supreme Court deci-

¹² An example of such a trade might be the Mormons' decision to abandon polygamy in exchange for the benefits of Utah's entry into the United States.

sion, by amendment usually following a long period of agitation and protest, or in the case of slavery, following a bloody civil war. When the Supreme Court defines a group's rights by judicial interpretation of the Constitution, 'the losers' from the decision often respond with demonstrations and acts of violence.

In the United Kingdom, the absence of a written constitution implies that all rights are effectively defined by a majority of the Parliament, and can be taken away in the same manner. Minorities seeking rights protection must persuade the majority to grant it. Such procedures for defining and redefining rights involve unduly large transaction costs. An important step toward making rights play a more effective role in selecting social outcomes would be to facilitate citizen involvement in the definition and implementation of rights in the constitutional process.

Bibliography

- Barry B. (1986), Lady Chatterley's Lover and Doctor Fischer's Bomb Party: Liberalism, Pareto Optimality, and the Problem of Objectionable Preferences, in: J. Elster/A. Hylland (eds.), *Foundations of Social Choice Theory*, Cambridge, 11–43
- Bernholz, P. (1974), Is a Paretian Liberal Really Impossible?, in: *Public Choice* 20, 99–107
- Blau, J. H. (1975), Liberal Values and Independence, in: *Review of Economic Studies* 42, 395–401
- Buchanan, J. M./W. C. Stubblebine (1962), Externality, in: *Economica* 29, 371–84, repr. in: K. J. Arrow/T. Scitovsky (eds.), *Readings in Welfare Economics*, Homewood 1969, 199–212
- /G. Tullock (1962), *The Calculus of Consent*, Ann Arbor
- Coase, R. H. (1960), The Problem of Social Cost, in: *Journal of Law and Economics* 3, 1–44
- Dahlman, C. J. (1979), The Problem of Externality, in: *Journal of Law and Economics* 22, 141–62
- Etzioni, A. (1986), The Case for a Multiple Utility Conception, in: *Economics and Philosophy* 2, 159–83
- Gaertner W./P. K. Pattanaik/K. Suzumura (1992), Individual Rights Revisited, in: *Economica* 59, 161–77
- Gärdenfors, P. (1981), Rights, Games and Social Choice, in: *Noûs* 15, 341–56
- Gibbard, A. (1974), A Pareto-Consistent Libertarian Claim, in: *Journal of Economic Theory* 7, 338–410
- Hardin, R. (1988), *Morality Within the Limits of Reason*, Chicago
- Margolis, H. (1982), *Selfishness, Altruism, and Rationality*, Cambridge
- May, K. O. (1952), A Set of Independent, Necessary and Sufficient Conditions for Simple Majority Decision, in: *Econometrica* 20, 680–4
- Mill, J. St. (1859), *On Liberty*, repr. in J. St. Mill, *Utilitarianism: On Liberty; Representative Government*

- Mueller, D. C. (1979), *Public Choice*, Cambridge
- (1986), Rational Egoism versus Adaptive Egoism as Fundamental Postulate for a Descriptive Theory of Human Behavior, in: *Public Choice* 51, 3–23
 - (1989a), *Public Choice II*, New York
 - (1989b), Individualism, Contractarianism, and Morality, in: *Social Justice Research* 3, 1–19
 - (1991), Constitutional Rights, in: *Journal of Law, Economics, and Organization* 7, 313–33
 - (1992), On the Foundations of Social Science Research, in: *Analyse & Kritik* 14, 195–220
 - (1996), *Constitutional Democracy*, New York
- Ng, Y. K. (1971), The Possibility of a Paretian Liberal: Impossibility Theorems and Cardinal Utility, in: *Journal of Political Economy* 79, 1397–401
- (1981), Welfarism: A Defence Against Sen's Attack, in: *Economic Journal* 91, 527–30
 - (1990), Welfarism and Utilitarianism: A Rehabilitation, in: *Utilitas* 2, 171–93
- Rae, D. W. (1969), Decision-Rules and Individual Values in Constitutional Choice, in: *American Political Science Review* 63, 40–56
- Sen, A. (1970a), *Collective Choice and Social Welfare*, San Francisco
- (1970b), The Impossibility of a Paretian Liberal, in: *Journal of Political Economy* 78, 152–7
 - (1976), Liberty, Unanimity and Rights, in: *Economica* 43, 217–45, repr. in Sen (1982), 291–326
 - (1979), Personal Utilities and Public Judgements: Or What's Wrong with Welfare Economics?, in: *Economic Journal* 89, 537–58, repr. in Sen (1982), 327–52
 - (1982), *Choice, Welfare and Measurement*, Cambridge
 - (1992), Minimal Liberty, in: *Economica* 59, 139–59
- Sugden, R. (1985), Liberty, Preference and Choice, in: *Economics and Philosophy* 1, 213–29