Liberal rights and social choices

... there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation.

... there is ... in the world at large an increasing inclination to stretch unduly the powers of society over the individual, both by the force of opinion and even by that of legislation; and as the tendency of all the changes taking place in the world is to strengthen society, and diminish the power of the individual, this encroachment is not one of the evils which tend spontaneously to disappear, but, on the contrary, to grow more and more formidable.

John Stuart Mill

In Chapter 26 we illustrated why individuals might choose to define certain rights to act in the constitution. The existence of these sorts of constitutionally protected rights is often regarded as an essential prerequisite for a free society. Such rights protect the liberty of all citizens and are associated with classic definitions of *liberalism* as put forward by John Stuart Mill (1859). In a short note published in 1970, Nobel prize-winner Amartya Sen (1970b) explored the notion of liberalism from a public/social choice perspective. This note proved yet another impossibility theorem of the Arrow variety, and precipitated a lengthy and often vigorous debate over both the implications of the theorem and the concept of liberalism itself. In this chapter we explore some of the issues raised in this debate. We begin with the theorem itself.

27.1 The theorem

Arrow's theorem states that it is impossible to satisfy four reasonable constraints on the social choice process without making one person a dictator over all social choices (see Chapter 24). Sen (1970a,b) sought to allow each person to be dictator over a single "social" choice, for example, the color of paint in one's own bathroom, and arrived at yet another impossibility theorem.

More specifically, Sen (1976, p. 217) set out to find a social decision function that would satisfy the following property:

> Acceptance of personal liberty: there are certain personal matters in which each
> person should be free to decide what should happen, and in choices over these

things whatever he or she thinks is better must be taken to be better for the society as a whole, no matter what others think.

He formalizes this condition by allowing each individual to be decisive for the social choice over one pair of alternatives, and shows that this condition, unrestricted domain, and the Pareto principle are sufficient to produce a cyclic social decision function (1970a,b). The theorem is remarkable, as in the Arrow case, in that it achieves so much from so few constraints. Neither transitivity (only acyclicity) nor the independence of irrelevant alternatives is involved (but see below).

Sen illustrates his theorem with the following example: a copy of *Lady Chatterley's Lover* is available to be read and the following three social states are possible:

  a. *A* reads *Lady Chatterley's Lover* and *B* does not.
  b. *B* reads *Lady Chatterley's Lover* and *A* does not.
  c. Neither reads it.

A, the prude, prefers that no one reads it, but would rather read it himself than have *B* read it. Lascivious *B* prefers most that prudish *A* read the book, but would rather read it himself than see it left unread, that is,

> for *A*: *c* P *a* P *b*, and
> for *B*: *a* P *b* P *c*.

Invoking the liberal rule to allow *B* to choose whether he reads the book or not results in

> *b* P *c*.

Doing the same for *A* results in

> *c* P *a*.

But both *A* and *B* prefer *a* to *b*; thus, by the Pareto principle,

> *a* P *b*

and we have a cycle.

27.2   Resolving the paradox

27.2.1 *Rights over Pareto*

There are several ways out of or around the paradox, of which we discuss three.

Sen's own preferred solution is to require that the Pareto principle defer to liberal rights in certain situations.

> Let me be "prude" (Mr. *A*) . . ., while you are "lascivious" (Mr. *B*). I would rather not read the stuff by myself (i.e. I prefer c to a), and I would rather you would not (i.e. I prefer c to b), but I decide to "respect" your tastes on what I agree is

your benighted business (while wondering whether "respect" is quite the word), conceding that my preference for c over b be ignored. My dislike of your floating over "muck" was so strong that I would have preferred to read the work myself to stop you from falling into this (i.e., I preferred a to b), but being a consistent kind of man, I notice that, if I insist that my preference for c over a should count as well as my preference, for a over b, then there is not much point in my "renouncing" my preference for c over b. So I may decide not to want my preference for a over b to count, even though the choice over the pair (a,b) is not exclusively your business.

On a similar ground, you might not want your preference for a over b to count, since you do wish your preference for b over c to count and decide not to want that your preference for a over c should count (since it is my business). But the Pareto preference for a over b is built on counting my preference and yours over a and b (Sen, 1976, 1982, pp. 313–4; case designation altered to conform to our example).

Thus, Sen solves the paradox by assuming that the individuals, although meddlesome in nature, have liberal values that they impose upon themselves so that parts of their preferences "do not count" or receive "different weight." Liberal B might state, for example, that the only choice relevant for him is b or c, and state

> liberal B b P c

while liberal A states

> liberal A c P a.

The social ordering is now transitive with the liberally constrained outcome being the plausible one that B reads LCL and A does not.

Sen chooses to treat the meddlesome preferences of A and B as in some sense their "true" preferences for the purposes of defining Pareto optimality, with liberalism a constraint or weight placed on true preferences. Alternatively, one could regard meddlesomeness and liberalism as both attributes of a single set of preferences with one dominating the other (Mueller, 1996b).

Liberal A might simply state that if B prefers reading LCL to not reading it, A as a liberal is willing to respect that choice so that his ordering of b and c becomes

> liberal A b P$'c$

and likewise for liberal B

> liberal B c P$'a$.

Prudish A would rather not read the book

> for A: c P$'a$

while lacivious B rather would

> for B: b P$'c$.

Combining their liberal preferences over what the other person does and their personal preferences with respect to their own actions, we obtain for both prudish A

and lascivious B:

$$b \, \mathrm{P}'c \, \mathrm{P}'a.$$

If A and B are liberals, they unanimously agree that the best social outcome is for lascivious B to read LCL, and for A not to read it.[1]

Thus, the same outcome emerges if we assume liberalism is a part of a person's preferences or a constraint upon them. Which way one views the problem is an issue of methodological preference (Mueller, 1996b). I enjoy a cigarette after dinner, and always smoke one when I dine alone. But tonight I am dining with you, and you are offended by the smoking of others. I choose not to smoke. Is this choice best described as the unconstrained maximum of my utility function, which includes as arguments both my pleasure from smoking and my displeasure from watching your reaction to my smoking, or as the maximum to my utility function that includes only my pleasure from smoking, but with the solution being derived under the constraint that I not cause you discomfort?

Our first solution to the liberal paradox solves the paradox by assuming that the individuals themselves are willing to behave in such a way as to avoid what would otherwise be a paradox. Were individuals resolutely selfish and meddlesome, a conflict between liberal principles and Pareto optimality would remain. But if both individuals' behaviors (preferences) are controlled by liberal principles, no inconsistency with an (un)constrained Pareto principle arises. The next solution to the paradox relies entirely on the selfish interests of the individuals.

27.2.2 *Pareto trades of actions*

As the original example was posed, it appears as if there is but one copy of the book to read, and the collective choice to be made is over who should read this book. This makes somewhat artificial the presentation of this choice to both individuals, since both cannot decide to read the book at the same time. If there is but one book to read, the decision of who reads it is obviously a collective decision from the start, and cannot be a purely personal matter for both individuals at the same time (see Buchanan, 1996; de Jasay and Kliemt, 1996).

This difficulty can be gotten around by assuming that the book is available to both, and redefining the liberalism axiom to require that each individual is decisive over an element pair (whether he reads *Lady Chatterley* or not) in all possible social states, that is, independent of the other's choice.[2] The decision options can now be illustrated by Matrix 27.1 in which the possibility

d. Both A and B read *Lady Chatterley's Lover*

has been added. Whereas Sen's condition grants A the choice of either row *given that B is constrained to the first column*, the modified liberalism condition gives A

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[1] Resolution of the paradox does not require that both individuals be liberals, but the social outcome can depend on which individual is the liberal, when only one is (Suzumura, 1978; Austen-Smith, 1982).

[2] See Bernholz (1974c); Seidl (1975); Breyer (1977); Craven (1982); Sugden (1985, 1993); Gaertner, Pattanaik, and Suzumura (1992); Buchanan (1996); Fleurbaey and Gaertner (1996); Pattanaik (1996); and Suzumura (1996).

Matrix 27.1.

		B, the lascivious	
		Does not read LCL	Reads LCL
A, the prude	Reads *LCL*	*a*	*d*
	Does not read *LCL*	*c*	*b*

the choice of row regardless of what column B chooses, and assigns the analogous right to B with respect to the choice of column.

Since this new liberalism condition is stronger than Sen's, it obviously does not overturn his theorem. Applying the condition to A, we have

$$(c, b)\, \mathrm{P}\, (a, d)$$

and from B's preference ordering

$$(d, b)\, \mathrm{P}\, (a, c).$$

The intersection of these two choice sets is b, which is Pareto inferior to a. Notice that Pareto-optimal a is the only social state ruled out entirely by the application of this modified liberalism principle.

Although this new liberalism principle does not solve the liberal's paradox, it does suggest a way out of it. Matrix 27.1 is a prisoners' dilemma matrix, and the Pareto-inferior outcome at b comes about from each individual's *independent* decision to exercise his own liberal rights without regard for the externalities that this decision inflicts on the other (Fine, 1975; Buchanan, 1996). A way out of the dilemma, as in the case of other externalities, is to invoke another liberal axiom – all individuals are free to engage in mutually beneficial trades – and allow A and B to form a contract in which B agrees not to read the book in exchange for A's reading it (Coase, 1960). The power to form such contracts requires that the liberalism axiom be redefined to allow an individual either to exercise his assigned right or trade it away, that is, agree not to exercise it.[3]

Sen (1986, pp. 225–8) raises two objections to allowing individuals to trade away their liberal rights to achieve Pareto optimality. First, if A and B have liberal values, they might refuse to form such a contract despite its seeming attractiveness. The inherent intrusiveness of the contract may be such an afront to A's and B's liberal beliefs that they refuse to join the contract, even though they would experience higher utilities if the provisions of the contract were to arise without their having to join it.[4] In this case, the only possible resolution of the paradox is Sen's preferred solution, namely, if liberal values dominate pure selfish preferences. Whether one regards this

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[3] See Gibbard (1974), Kelly (1976), Buchanan (1996), Nath (1976), Breyer (1977), Barry (1986), Harel and Nitzan (1987), Hardin (1988), de Jasay and Kliemt (1996), and Bernholz (1997a).

[4] See also Suzumura (1991, 1996) and Sen (1992, 1996).

solution as a violation of the Pareto principle or a consistent application of it still depends, however, on the methodological choice of incorporating an individual's liberal values into her preferences, or treating them as a constraint upon them.

Sen's second objection to the efficient-Pareto-trades resolution of the paradox is that the needed contract is difficult if not impossible to enforce. Prudish A may feign reading the book but avert his eyes at the juiciest passages. Lascivious B may surreptitiously devour a purloined copy of the book. Moreover, the enforcement of such a contract by even an impartial third party would in itself violate liberal values in a most fundamental way. Consider just how carefully and continuously B would have to be monitored to ensure that he never read the book.

This second objection to the trading solution to the paradox is certainly valid, but in accepting it the paradox in not achieving Pareto optimality becomes less paradoxical. We have seen in our discussion of externalities and public goods in Chapter 2 that Pareto-optimal allocations of resources are always in principle attainable through unanimous agreements among all concerned parties. "All" that stands in the way of reaching these agreements are transaction costs. The failure to achieve potentially Pareto-optimal allocations due to transaction costs does not constitute a paradox. It is a fact of our collective lives. Indeed, one might better describe the resulting allocations as Pareto optimal *given the existence of transaction costs* (Dahlman, 1979).

The costs of making and enforcing a contract to produce the Pareto-preferred outcome a could prevent its realization *even in the absence of liberal rights*. If every decision as to who reads what had to be made as a collective agreement between A and B and neither had the right to do anything on his own, the prisoners' dilemma nature of their preference structure would still provide incentives for both to cheat on the agreement to obtain a. The problem of enforcing such a contract exists with or without the assignment of liberal rights.

27.2.3 *Pareto trades of rights*

The resolution of the liberal paradox discussed in the previous subsection envisages individuals being assigned rights, and contracting away their freedom to exercise their rights or not – individuals *trade away* their freedom to act. Harel and Nitzan (1987) have proposed a resolution of the paradox that allows individuals to trade their *rights* away.

To see what is involved, assume again that there are two individuals, A and B, and four possible states of the world:

x. A eats an apple, and B does not eat an apple
y. A eats an orange, and B does not eat an orange
z. B eats an apple, and A does not eat an apple
w. B eats an orange, and A does not eat an orange

A prefers eating an apple to eating an orange, and prefers seeing B eat an orange to B's eating an apple. That is, A's preferences are

for A: x P y P w P z

B's preferences, on the other hand, are

> for *B*: *w* P *z* P *x* P *y*.

As with Sen's theorem, a person *i* has a liberal right to decide between the two states of the world (u, v), if $\{u \ P_i \ v\} \rightarrow \{u \ P \ v\}$, and $\{v \ P_i \ u\} \rightarrow \{v \ P \ u\}$. Each person assumes that all states of the world, which she is unable to control by exercising her preassigned rights, are equally likely. Under this assumption, a right over the pair (x, z) is more valuable for *A* than a right over the pair (x, w), since *A* prefers *w* to *z*. If *A* has the right to decide between the $(x - z)$ pair, she can make sure that her least preferred state of the world does not occur. Thus, each person can be viewed as having preferences defined over the assignment of rights. If then, we allow individuals to exchange these rights, they may be able to achieve superior outcomes – they may be able to avoid the liberal paradox.

To illustrate, assume that *A* is initially given the right to decide the (y, w) pair and *B* the (x, z) pair. *A* can decide whether she eats an apple or *B* does. *B* gets to decide who eats the orange. *A* prefers *w* to *z*, and thus prefers the right to decide (y, z) over (y, w). *B* prefers the right over (x, w) to (x, z). *A* and *B* swap *w* for *z*. This results in the new pairs of rights (y, z) for *A* and (x, w) for *B*. This assignment is still not optimal, however, and *A* and *B* now trade *y* for *x* giving both the right to choose between their most and least preferred outcomes, that is, for *A* (x, z) and for *B* (w, y). *A* gets to eat an orange, *B* an apple. Harel and Nitzan extend the definition of liberalism to allow for the possibility of trades such as these, and establish conditions under which this modified definition of liberalism is compatible with the Pareto principle, unrestricted domain, and the absence of cycles.[5]

It should be noted, however, that such trading of rights *cannot* get around the problem inherent in Sen's *Lady Chatterley* example. Assume again that *A*'s and *B*'s preferences are as follows:

> for *A*: *c* P *a* P *b* P *d*
> for *B*: *d* P *a* P *b* P *c*.

Assign *A* the right over the (b, d) pair and *B* over (a, c), that is conditional on *B*'s reading the book, *A*, the prude, can choose to read it or not; conditional on *A*'s not reading it, *B* has the right to read it or not. *A* would like to trade his right over *b* for either *a* or *c*, but *B* prefers the right over (a, c) over either (a, b) or (b, c). No trade is possible.

Note also that *A* and *B* cannot *both* exercise their rights over their assigned pairs of states of the world, since only one of the four states is possible.[6] *A* cannot choose not to read the book, while *B* selects that they both read it. *One* person's right must take precedence over the other's. Thus, one of the actors must be selected as the

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[5] See, however, the critiques of Breyer (1990) and Seidl (1990).

[6] This difficulty does not arise in Harel and Nitzan's formulation of liberal rights, as our apple and orange example illustrates. More than one state of the world is possible, and thus meaningful assignments of rights can be made.

social dictator even without invoking the Pareto principle.[7] This feature of Sen's *Lady Chatterley* example arises because of his assumption that individuals have rights over the choice of *states of the world*. We next consider this assumption in greater detail.

27.3   Rights over social states versus rights over actions

Sen set up the paradox by formulating the question as a problem of *social* choice. As with Arrow's impossibility result, the question is one of choosing a *state of the world*, whereby state of the world we mean a complete description of the position of everyone in society: *A* is wearing a blue shirt and reading *LCL*, and *B* is wearing a white shirt and is also reading *LCL*. It is natural in this context to define rights in terms of individual choices over states of the world.

Returning to Sen's original formulation of the *LCL* example let us define *a*, *b*, and *c* as social states, such that in

   a.   *A* reads *Lady Chatterley's Lover* and *B* does not.
   b.   *B* reads *Lady Chatterley's Lover* and *A* does not.
   c.   Neither reads it.

A is decisive over (a, c) and *B* is decisive over (b, c). That is to say, *given that B is not reading LCL, A* can choose whether or not to read it, and *given that A is not reading LCL, B* can choose whether or not to read it.

When rights are defined over social states, they are always *conditional*. Since social state *b* is a complete description of *all* of the attributes of the environment and actions of individuals in situation *b*, giving someone a right to select *b* or *c* must be conditional on everyone in society doing what they are described as doing in the definitions of *b* and *c*. If *B* somehow manages to get a hold of *LCL* and read it, *A*'s right to choose whether to read the book or not becomes of no consequence, since it is contingent on *B*'s not reading it. The conditional nature of rights, and the presence of option *c* in both *A*'s and *B*'s assigned rights is what bothers Buchanan (1996) and de Jasay and Kliemt (1996). If *A*'s right is contingent on *B*'s not reading the book, how can we say that *B* is free – has the right – to read the book or not?

Gaertner, Pattanaik, and Suzumura (1992) point out that this way of formulating liberalism or liberal rights runs counter to most intuitive notions of rights, namely, that *A* is free to read *LCL* or not *independently* of what *B* does. Rights are *unconditional* freedoms to act. This more intuitive notion of rights can be best captured by adopting a game theoretic approach, and defining rights as choices over *admissable actions*. In the two-person case, think of *A* as the row player and *B* as the column player. In the normal form of the game, *A* confronts a matrix containing *n* possible actions on his part, a_{Ai}, and *B* confronts the same matrix containing, say, *m* possible

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[7] Breyer (1996) criticizes Buchanan (1996) and de Jasay and Kliemt (1996) for thinking of liberal rights, as defined by Sen, as entitling individuals to make choices *for society*. Instead, Breyer claims that they are to be interpreted as a guide for the social planner, who is charged with choosing the optimal social state. This alternative interpretation does not remove the difficulty, however, since the assignment of rights to both *A* and *B* forces the social planner to favor one of the two persons over the other.

actions on her part, a_{Bi}. If A and B are the only two persons in the society, then the natural way to think of rights is to assume that A has a right to undertake some a_{Ai} or not to do so, with B having a similar right to some action a_{Bj}. If both of them choose to exercise their rights by undertaking the actions a_{Ai} and a_{Bj}, then the social state defined by the joint pair of actions (a_{Ai}, a_{Bj}) results. Neither A nor B has chosen this social state, however, nor does either have a right to choose it. Each is empowered only to choose one attribute of the resulting social state, namely, his action in it. As we illustrated with the prisoners' dilemma matrix in the previous section, when liberalism is defined in these game-theoretic terms, it remains possible to construct examples in which the social outcome – the intersection of each player's strategy choice – is not Pareto optimal.[8]

Which way of conceptualizing rights is better? The answer to this question depends in part on the nature of the conditions included in the social-state description of rights, and in part on our intuitions as to what the word "rights" connotes. In many contexts our intuitions will normally imply an unconditional freedom to act, as say in choosing what book to read or what color shirt to wear. In others, a conditional right may seem more appropriate. X has the right to kiss Y, conditional on Y's being willing to be kissed by X.[9]

Sen (1996) accepts that treating liberalism as conferring rights to choose actions rather than social states often comes closer to capturing commonly held notions about rights, but goes on to maintain that our reasons for defining or defending rights also sometimes arise out of a concern for the *consequences* of the actions, which in turn depend on the characteristics of the social state that arises when each person chooses a particular action. He gives the following example:

> When John Stuart Mill (1859) discusses the liberty of people of different faith to eat pork, while guaranteeing the liberty of non-Muslims to eat pork (Mill 1859, pp. 152–5), problems can arise because of a person's not knowing what each particular cooked dish consists of. In making sure that the rights of Muslims and non-Muslims are being respectively realized, we have to go beyond simply giving each person the freedom of action. The emergence of the right outcome will be important for the fulfillment of liberty in this case ...
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> (Sen, 1996, p. 158)

Thus, in this example Sen is emphasizing that the Muslim's ability to exercise his right not to eat pork is contingent in an important way on his knowing the content of the foods placed before him.

27.4 Liberal rights and obligations

All protections of rights to act imply obligations for the rest of society passively to allow these actions. My right to read a particular book depends on everyone else not trying to take this book from me, not gouging my eyes out, and most importantly in

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[8] See also discussion by Nozick (1974, pp. 165–6).

[9] See Sen's (1992) discussion of examples of rights to sing with a group or have uncovered hair in public.

the context of constitutionally protected rights, not passing laws that ban the book's publication or my reading of it.

In some of his examples, Sen seems to want to go beyond such *passive* notions of obligations not to interfere with an action, when it is protected by a right, to a more *active* notion of social obligations. In the Muslim example Sen seems to be implying that society has an obligation to provide the Muslim with information about food content to ensure that his act of eating has the desired consequence. This more active interpretation of rights leads directly to what many have called "economic rights" – providing people with not only the freedom to undertake certain actions, but also the resources to act. Returning to the reading example, one might argue that the freedom to read what one wishes is meaningless unless one can afford to buy books, and thus that society is obligated to couple rights of free speech with, say, public libraries so that the poor have access to books. The freedom to read what one wishes is meaningless if one is blind and of modest means, and thus society is obligated to couple rights of free speech with subsidies for the publication of books in braille, or perhaps society must hire people to read aloud to the blind. In the religious context, this might imply society's building a mosque for the Muslim to worship in, if none exists. In situations like these, the objective sought in defining a right is contingent in a nontrivial way on specific elements in the *social state*, and these attributes of the desired social state may imply certain active obligations for society.

Although most people will agree that a right to eat what one chooses is of little value to a person who cannot afford food, many will at the same time balk at the notion that all rights to choose actions imply specific, active obligations for society. Each of us might feel that X is at liberty to travel to the moon, if she so chooses, but we will object to having to pay for a rocket to improve her chances of completing the journey safely. How does a society determine which rights to act require active involvement by society, and which only warrant passive nonintervention? One way to proceed is obviously to try and determine the benefits for the actor and costs imposed on the rest of society. This takes us into the kind of *welfarist* analysis of constitutional rights in which we engaged in Chapter 26. We close this chapter by applying that analysis to the question of liberal rights.

27.5   Constitutional rights and liberal rights

The literature on the liberal paradox treats both the assignment of rights and the preferences of individuals as exogenous. The desirability of enforcing the assigned rights is taken for granted, and given the assumed preferences a paradox ensues. From whence come these rights, however? If they are embedded in the constitution, how was it possible that these individuals ever agreed on the definition of rights?

To see the problem consider again the apple and orange example, but assume that both individuals have identical preferences, and both prefer eating an orange to an apple. Then no trade of rights occurs. The person assigned the right to decide who eats the orange will select herself. Moreover, *no unanimous agreement on the assignment of rights* at the constitutional stage will be possible, without

invoking some form of veil of ignorance that conceals the future identities of the individuals.[10]

Once we think of rights as being themselves the subject of social choice, as in a constitution, then the questions arise in the context of the *LCL* example, of whether individuals with meddlesome preferences, like the prudish *A* and lascivious *B*, would ever define a right to read a book of one's choosing, knowing that books like *LCL* sometimes appear, or conversely, if a society is sufficiently liberal to protect in its constitution the right to read what one chooses, is it likely to contain persons with the meddlesome preferences, which give rise to the paradox? More fundamentally, we might ask if rational, self-interested individuals were to write a constitution would they define rights to act that would lead to Pareto inefficiencies?

The theory of constitutional rights presented in Chapter 26 provided an explanation for why rights to act might be singled out for explicit protection by rational individuals seeking to maximize their expected utilities at the constitutional stage. Explicit protection is called for when the action is expected to provide a great increase in utility for the actor, but at the same time may generate a negative externality of sufficient strength to induce some individuals to attempt to prohibit the action through collective action. Explicit rights protection bars future majorities from attempting to ban the action. Publishing and even reading certain books have led to efforts to ban these activities in many countries, and one can anticipate that they would arise again with respect to certain books. If from behind the veil of ignorance one believed that the utility gains from reading and publishing books were generally much greater than any utility losses that these activities imposed on third parties, one would support a free-speech clause in the constitution to protect these actions.

Although some of the examples in the literature on the liberal paradox, like the original one involving *Lady Chatterley's Lover*, relate to actions that are typically explicitly protected in constitutions, others, like the choice of tiles in the bathroom, the color of one's shirt, whether one sleeps on one's back or not, relate to actions that are never *explicitly* protected in constitutions. The theory of constitutional rights would explain why these actions are not explicitly protected by their being highly unlikely to generate sufficiently strong negative externalities to induce future efforts to ban them. Not anticipating that a future majority would ever try to ban people from wearing blue shirts, the writers of the constitution choose not to protect this action explicitly.

If we assume that individuals act in their enlightened self-interest when they write a constitution, and that liberal rights are collectively agreed upon at the constitutional stage by the individuals who will later exercise them, then there cannot be a conflict between liberal rights and an *ex ante* application of the Pareto principle. A constitutional contract unanimously joined by all citizens must be Pareto optimal. The unrestricted preference domain assumption implies that we cannot assume that situations like that described in the example involving *Lady Chatterley's Lover* will never arise, however. When they do, a possible conflict between each person's exercising her right to read what she wants to read and the Pareto principle cannot

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[10] Breyer (1990) emphasizes the problem of agreeing to the initial assignment of rights.

be ruled out. If, for whatever reasons, those involved are unable to circumvent the Pareto inefficiency through Coasian contracts, a Pareto inefficiency may survive. Those who propose that liberal values *ought* to prevail over welfarist calculations can applaud this outcome. Those who steadfastly defend welfarism can, on the other hand, still take some solace from the knowledge that such Pareto-inefficient situations are likely to be rare, if those who wrote the constitution correctly identified the categories of actions that should be protected by the explicit definition of rights.

Thus, there does not appear to be a fundamental inconsistency between the existence of rights to undertake certain actions and the assumption that individuals make collective decisions with the goal of maximizing their utility. Conflicts between the exercise of liberal rights and the Pareto principle will occur under this interpretation in only exceptional cases. An advantage to this way of viewing rights is that it allows us to incorporate them into our rational actor models of collective decisions without having to modify the basic premises upon which these models rest. Moreover, we have both a normative theory of rights, based on their contractarian nature, and a positive theory to the extent that self-interested individuals participate in the process of defining rights.

Amartya Sen and some of the other participants in the debates over liberal rights appear to prefer treating rights as principles that cannot be derived from a utility-maximizing calculus. Rights and the Pareto principle can under this interpretation come into conflict, and when they do, Sen at least would favor having the exercise of a right override the Pareto principle. Although this approach has some advantages insofar as it provides clear prescriptions with respect to the correct social choices to be made whenever rights are clearly defined, it gives us no indication as to where rights come from in the first place. Is the choice of one's shirt color a protected right? Is it on an equal footing with reading a book of one's choice, or praying as one wishes? From whence do such rights arise? The existing literature on liberal rights does not give us any answers. The constitutional political economy approach developed in Chapter 26 provides one explanation for and characterization of rights. This theory does not place rights above the Pareto principle, however, but rather makes them a consequence of its application at an earlier stage in the collective decision process.

Bibliographical notes

Sen's original six-page note posing the liberal paradox has spawned an immense literature. Sen (1976) surveys the results up through 1976. Wriglesworth (1985) also surveys the terrain. Pattanaik (1997) reviews the literature along with that concerning the Arrow theorem. The September 1996 issue of *Analyse & Kritik* is entirely devoted to the topic.

For an optimistic statement concerning the potential for embedding liberal values in a set of democratic institutions, see Riley (1985).