

1991

# Constitutional Rights

Dennis Mueller

Follow this and additional works at: [https://ir.lib.uwo.ca/economicsperg\\_ppe](https://ir.lib.uwo.ca/economicsperg_ppe)



Part of the [Economics Commons](#)

---

## Citation of this paper:

Mueller, Dennis. "Constitutional Rights." Political Economy Research Group. Papers in Political Economy, 10. London, ON: Department of Economics, University of Western Ontario (1991).

POLITICAL  
ECONOMY  
RESEARCH  
GROUP

# PAPERS IN POLITICAL ECONOMY

ECONOMICS REFERENCE CENTRE

FEB 15 2000

UNIVERSITY OF WESTERN ONTARIO

**Paper No. 10**

**“Constitutional Rights”**

**Dennis Mueller**

53753001

53754001

53755001

53756001

The Political Economy Research Group was established in the faculty of Social Science at the University of Western Ontario in 1988. Its purpose is to foster scholarship, teaching and interdisciplinary research in political economy, with a focus on:

1. the application of economic models and methods to the study of political processes and institutions,
2. the economic impact of political processes and institutions,
3. the influence of economic factors on the formation of public policy and on institutional change,
4. the politics of economic policy making,
5. the political, social, and economic effects of public policy.

*Co-directors:*

Ronald Wintrobe (Economics)  
Robert Young (Political Science)

*Board of Directors:*

Peter Howitt (Economics)  
B.B. Kymlicka (Political Science)  
John N. McDougall (Political Science)  
Peter Neary (History)  
John Whalley (Economics)

*Staff:*

Jayne Dewar

*For further information:*

Political Economy Research Group,  
Department of Economics,  
Social Science Centre,  
London, Ontario, Canada N6A 5C2  
phone: (519) 661-3877  
fax: (519) 661-3292

ISSN: 1181-7151  
ISBN: 0-7714-1264-9

**Constitutional Rights**

**Dennis C. Mueller  
Department of Economics  
University of Maryland  
College Park, MD 20742**

## ABSTRACT

### Constitutional Rights

The question of what rights would or should be protected by a constitution has not been examined in the public choice literature. Nor has the more general question been addressed of the criteria by which constitutional rights are determined. The closest the literature has come to these questions is in the debate over liberal rights initiated by Amartya Sen (1970a,b; 1976). But here the existence of a right and its nature was assumed from the start, and the debate hinged around the conflict between this right and the Pareto postulate. A systematic examination from a public choice perspective of the origin of constitutional rights and their inherent characteristics has yet to appear. This paper begins to fill this void.

The paper proceeds by first defining rights, and then discussing why they would be included in the constitutional contract. The paper then analyzes the criteria by which rights would be chosen for inclusion in the constitution. The concept of constitutional rights as put forward in this paper is then compared with other notions of rights extant in the literature -- natural rights, moral rights, and economic rights. The paper also takes up the issue raised by Sen, whether constitutional rights, as here defined, can conflict with the Pareto principle.

## Constitutional Rights

Dennis C. Mueller\*

On what grounds does a society decide to protect some rights in its constitution and not others? Why would a community deem it necessary to pass a constitutional amendment to abridge an individual's right to purchase or sell alcoholic beverages, and yet abridge the similar right with respect to drugs having narcotic effects by legislative action? Why would a community protect an individual's right to carry a gun, but not her right to drive a car, when the latter has an arguably greater potential effect on both the welfare of the individual actor, and the welfare of the rest of the community?

The United States Constitution has been amended 16 times in the more than 200 years since its first ratification. The Swiss Constitution has been amended more than 200 times in the 142 years since its first ratification. Why would one country choose to amend its constitution so rarely, another so often?

This paper seeks to shed light on these questions. The perspective is that of citizens agreeing to a constitution that is expected to advance their interests. Thus, the analysis is normative in spirit. We seek to describe the attributes of constitutional rights that citizens would agree to, if they themselves were to write and ratify the constitution. Actual constitutions get written and ratified in many ways and thus can be expected to diverge from the "ideal type" described here. On the other hand, many constitutions have been ratified by a popular vote of the citizens, or would have received a substantial majority, if such a vote had been taken. To the extent that actual constitutions are written to advance the welfare of the citizens, and do (or have in the past) enjoyed widespread popular support, the analysis

presented here should describe the relevant considerations for deciding which rights deserve constitutional protection, and the form that protection should take.

The constitution we wish to describe is a form of contract among the citizens of the polity. We begin, therefore, by describing the nature of contracts.

### I. The Nature of Contracts

Consider first the nature of contracts to facilitate economic exchange. A spot market transaction requires no contract. When I purchase a loaf of bread I give the baker the money, she gives me the bread and the transaction is complete. No contract, implicit or explicit, is involved. But a contract may be required to bring about the sale of all of a bakery's bread production over the course of a year to a chain of supermarkets. Before committing to supply all of its bread to one buyer, the bakery may wish certain assurances as to the number of loaves to be bought and at what price over the coming year. The supermarket chain may wish similar assurances. The normal way in which such assurances are provided in commerce is by means of a contract. Such contracts proscribe the actions each party must or may undertake, contingent perhaps upon certain circumstances, and commonly the rewards or penalties from compliance or noncompliance with the proscribed actions.

The essential difference between the two types of transactions in this example is, of course, that the second involves considerably more uncertainty than the first owing to the importance of the time dimension in its execution. Indeed, contracts exist only in the presence of uncertainty (Fuller, 1981). When describing the characteristics of contracts it is useful to distinguish between two types of uncertainty: uncertainty over the behavior of individuals, and uncertainty over exogenous events (states of

nature) (Radner, 1968; FitzRoy and Mueller, 1984). In the example above, either or both kinds of uncertainty might account for the presence of a contract. The manager of the supermarket chain is uncertain over whether the baker might choose to switch to another customer during the course of the year leaving the supermarket chain without a source of supply. The baker has the symmetric fear that the supermarket chain would switch causing the bakery to lose money because of commitments to suppliers of material and factor inputs. But the contract could also arise because of uncertainty about, say, the price of flour. If the price of flour is volatile, the bakery and supermarket chain may stipulate a formula by which the losses from a rise in its price or the gains from a fall are shared.

Contracts of the first type arise in situations where it is mutually advantageous to place constraints on the future behavior of individuals. Such constraints can be mutually beneficial owing to the characteristics of the interactions in which the individuals are involved and the opportunistic nature of individuals (Williamson, 1975, ch. 2). Contracts of the second type are essentially insurance contracts and can arise whenever risk averse individuals are faced by common risks and uncertainties. Constitutional contracts can have either or both of these properties as we shall now see.

## II. The Nature of Constitutions

We define a constitution as the set of fundamental laws and rules that delineate the civil and political institutions of a society. Most societies throughout history have not had written constitutions, and the United Kingdom is a most famous example of a modern democratic state which functions seemingly well without the aid of a formal, written constitution. But we seek to describe constitutions and constitutional rights from the perspective of individuals trying to advance their interests. Thus we wish to think of

the constitution as a literal contract joined by all members of the polity, defining its political institutions in much the same spirit as Buchanan and Tullock think of constitutions in The Calculus of Consent (1962). The discussion of the previous section suggests that such a constitutional contract will only arise to eliminate uncertainty over the possible opportunistic behavior of members of the polity, or to spread common, exogenous risks and uncertainties faced by the community.

The most commonly assumed setting when explaining why a constitution (social contract) is chosen is the state of anarchy. Thomas Hobbes's (1651) characterization is frequently cited (e.g., Bush and Mayer, 1974; Buchanan, 1975). The argument that rational individuals will seek contractual guarantees of protection from the potentially opportunistic behavior of other individuals in a state of anarchy follows immediately from Hobbes's description of that state, even if it does not follow quite so immediately that the form of contract chosen will be the one Hobbes described.

The social structures that seem to come closest to those described as a state of anarchy by the social contractarians occur in primitive societies. But intragroup rivalry turns out to be far more rare in these communities than Hobbes's depiction of the state of anarchy might lead one to expect (Fried, 1967). Life in a primitive society may be relatively short and by our standards somewhat brutish, but it is nature itself, i.e., the physical environment in which such societies are found, not social life in "the state of nature" that makes it so.

Modern game theory provides an explanation for this phenomenon. Stealing, murder, and the other acts of violence, that one might expect would plague life in a state of anarchy, are all actions that can be characterized as prisoners' dilemmas or similar games (Mueller, 1989a, ch.2). In small

stable groups conflicts of a prisoners' dilemma type can be resolved optimally without the need for formal agreements by each individual independently choosing a cooperative supergame strategy.<sup>1</sup> Formal, explicit agreements to bring about the cooperative solution to prisoners' dilemma games are required only when the group of individuals involved in the game is so large, diverse, and mobile that stable supergame cooperative equilibria do not occur (Taylor, 1976). Thus, the necessity of having formal contracts creating the state as a means of resolving prisoners' dilemmas arises only when the transaction costs of achieving Pareto optimal outcomes by more informal means become too large. As with externalities (Coase, 1960), rationality and self interest suffice to achieve Pareto optimality in small numbers settings. The state, like the firm (Coase, 1937; Williamson, 1975), emerges as an institution for minimizing the transaction costs of resolving prisoners' dilemma and externality conflicts when the number of actors involved is large (Dahlman, 1979; Mueller, 1989a, ch. 2).

A more realistic setting in which to envisage the writing of a constitution than from a state of anarchy is in a political community which already exists, or has existed but under an alternative political structure, e.g. a country victorious in a revolution of liberation, or defeated in an international war. In this setting the boundaries of the polity are known as are the identities of the polity's future citizenry. What needs to be decided is the new set of rules under which the future political, social, and economic life of the country will operate. A set of traditions, mores, and customs will already exist in the community, which guide individual behavior and help the individual to predict the behavior of others. But, except for very small, traditional societies custom alone will not provide a set of rules of conduct that are sufficient for the community's members to achieve

their collective goals. As before the key characteristics determining what rules get written into the constitution will be the uncertainties surrounding future activities in the minds of those writing the constitution, and the savings in transaction costs anticipated from explicitly stating one set of rules versus another. An important component of the constitution of a newly formed democratic state will be, of course, the set of rules defining the political institutions under which the state will operate, e.g., the modes of representation, terms of office, choice of parliamentary voting rule, separation of powers, and so on. These choices will in turn impact the selection of specific rights to be protected in the constitution.

### III. The Choice of Voting Rule

We envisage the constitution as being written and agreed to by all citizens. Each wishes to choose that set of political institutions that maximizes her expected utility. We shall set aside for the time being the question of how the citizens' preferences are represented in the post-constitutional stage of decisionmaking, and assume either that the polity is sufficiently small so that each citizen can represent her preferences directly as in a town meeting, or that an ideal proportional representation system is employed in which groups of citizens having identical preferences are represented in a parliament in proportion to their size.<sup>2</sup> With the question of representation eliminated, the remaining central issue involving collective decisionmaking institutions is the choice of voting rule.

To illustrate the issues involved, assume that each individual's expected utility from a future collective decision can be depicted as follows.

$$E(u) = [y + ms - (1 - m)t]^a - D(m) \quad (1)$$

All individuals receive the same income  $y$ . To this  $s$  is added if the individual is the beneficiary of a collective action, or  $t$  is subtracted if she is harmed by the collective action. The required majority to pass a collective decision is  $m$ , and  $m$  is also assumed to be the fraction of the population benefiting from the action.<sup>3</sup> Thus,  $y + ms - (1 - m)t$  is the expected income of an individual if an issue passes.

We assume that the benefits and costs of collective action enter an individual's utility function in the same way that income does. This assumption is obviously reasonable if  $s$  is a cash subsidy and  $t$  a tax. But for public goods like defense and highways, the benefits at least may be expected to enter an individual's utility function in a different way. So long as marginal utility is declining in  $s$  and rising in  $t$ , the same analytic results as those derived below would follow. Similar qualitative conclusions would also follow if  $s$  and  $t$  were assumed to vary across individuals, and so we assume they are constant to simplify the discussion.

Since collective action can be either a positive or a negative sum game, we allow  $ms$  to be greater or less than  $(1 - m)t$ . We do assume, however, that  $s$  and  $t$  are related in the following way.

$$t = bs, \quad \text{with } b \geq 0 \tag{2}$$

$D(m)$  represents the costs (basically time) of making collective decisions. It is reasonable to assume that as  $m$  increases, at least beyond some point, decisionmaking costs increase, and at an increasing rate ( $D' > 0$ ,  $D'' > 0$ ) as more and more time is required to reformulate the issue so as to achieve the required majority  $m$  (Buchanan and Tullock, 1962, pp. 68-9, 97-116). Although the time required to find a formulation of the issue that receives the required majority falls as  $m$  declines, the likelihood of

obtaining a cycle increases.<sup>4</sup> Furthermore, once  $\underline{m}$  falls below 1/2, it becomes not only possible that any given issue  $\underline{x}$  that can achieve the required majority  $\underline{m}$  can itself be defeated, but it may occur that  $\underline{x}$  can even lose to  $-\underline{x}$ , i.e., self-contradictory motions may both achieve a winning majority (Mueller, 1989, pp. 55-7). These considerations suggest a jump in the  $D(m)$  curve and a discontinuous drop in the  $D'(m)$  curve at  $\underline{m} = 1/2$ .

To handle the mathematics we must further assume that the argument in square brackets is nonnegative,  $\underline{t}$  cannot be so large relative to  $\underline{y}$  and  $\underline{s}$  to make an individual's expected utility net of  $\underline{D}$  negative. Finally, we assume that  $0 < \underline{a} < 1$ , i.e., that all individuals are risk averse.

Each individual is assumed to be the same except in so far as he is on the winning side of an issue and receives  $\underline{s}$ , or on the losing side and gives up  $\underline{t}$ . Each individual is uncertain over whether he will be on the winning or losing side of any issue and makes the assumption that he has an equal probability of being any individual in the community. Equation (1) thus represents the expected utility of a representative individual at the constitutional stage.

Issues can differ in the relative sizes of  $\underline{s}$  and  $\underline{t}$ , i.e., in the  $\underline{b}$  of equation (2). To find the optimal voting rule for a class of collective decisions with a given  $\underline{b}$ , we maximize (1) with respect to  $\underline{m}$ , and obtain as a first order condition

$$a[y + ms - (1 - m)bs]^{a-1}(1 + b)s - D'(m) = 0 \quad (3a)$$

$$a[y + ms - (1 - m)bs]^{a-1}(1 + b)s = D'(m) \quad (3b)$$

The representative individual at the constitutional stage chooses that voting rule for which the marginal gain in expected utility from increasing the size of the required majority just equals the marginal decision costs of

having to reformulate the issue to achieve this majority. Under the assumptions made,  $D'(\cdot)$  is discontinuous at  $\underline{m} = .5$ , and a range of possible values for  $\underline{b}$  can exist for which (3) is satisfied at  $\underline{m} = 0.5$  (see Figure 1).

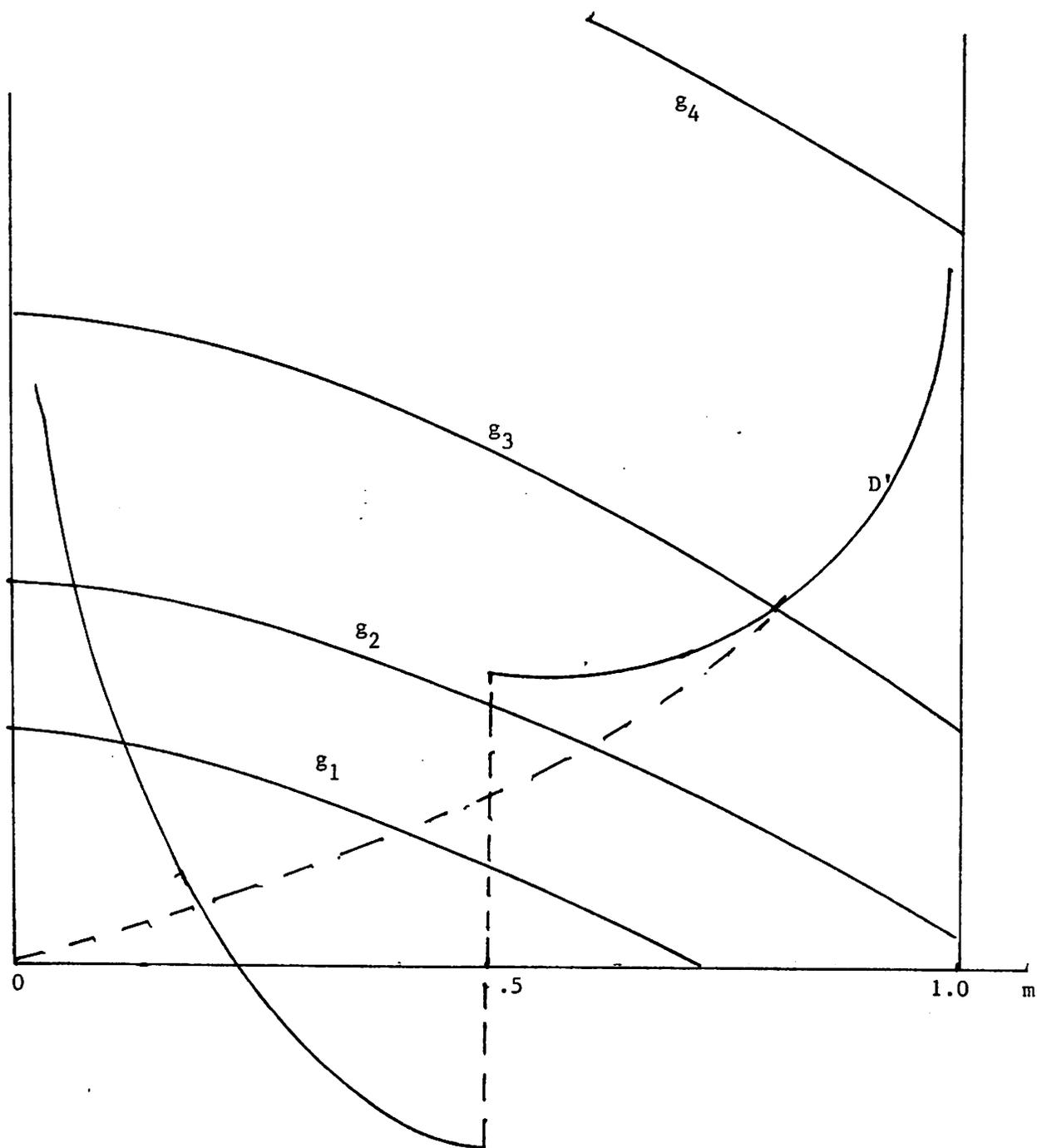
Now consider the effects of changing various parameters of the model. Call  $\underline{m}^*$  the optimal  $\underline{m}$  from (3). It is easy to show that  $\partial \underline{m}^* / \partial b > 0$ .<sup>5</sup> An increase in the size of the loss if one is in the minority relative to the gain if one is in the majority, increases the optimal majority (i.e. shifts  $g$  from say  $g_1$  to  $g_2$ ). For some classes of issues with  $\underline{b}$  sufficiently large, e.g.  $g_3$ , the optimal majority exceeds the simple majority.

Now suppose that  $\underline{b}$  is a function of  $\underline{m}$ ,  $\underline{b} = b(m)$ ,  $\underline{b}' < 0$ . Increasing the size of the majority required to pass an issue reduces both the number of individuals in the minority, and the size of their losses relative to the gains from collective action for those in the majority. Such a possibility might arise with the provision of a pure public good as increases in the required majority entail reformulations of the proposal that both reduce the number of individuals in the minority and the size of their losses. The first order condition for choosing the optimal majority now becomes

$$a[y + ms - (1 - m)bs]^{a-1} [s + bs - (1 - m)b's] = D' \quad (4)$$

Equation (4) is identical to (3b) except for the addition of  $-(1 - m)b's$  in the left hand side term. With  $\underline{b}' < 0$ , this addition raises the value of the left hand side, thus requiring a larger value for  $\underline{D}'$ . In Figure 1, the marginal gain from collective action curve ( $\partial g / \partial m$ ) shifts to the right. If  $\underline{b}$  falls with  $\underline{m}$ , individuals at the constitutional stage will choose a higher optimal majority once they are beyond the point where  $\underline{m}^* = 0.5$ , than they would if  $\underline{b}$  were constant. For some issues the combinations of  $\underline{D}'$ ,  $\underline{b}$  and  $\underline{b}'$  can make the optimal majority be unanimity,  $\underline{m}^* = 1$ .

Figure 1



$$g = a[g + ms - (1 - m)bs]^{a-1} (1 + b)s$$

Thus, a group of individuals gathering to write a constitution to govern their future collective decisionmaking would optimally choose different voting rules for different types of decisions depending upon the relative magnitudes of the anticipated benefits, and their respective decisionmaking costs. Of course, individuals at the constitutional stage will not be able to envisage each and every collective choice that will have to be made in the future, and devise a separate voting rule for each. But it is reasonable to assume that they are capable of anticipating in a general way the different types of collective decisions that the polity will face, and will deem it optimal to define in the constitution different voting rules for different categories of collective decisions. Individual rights represent one such possible category.

#### IV. The Choice of Collective Decision Rule as It Pertains to Rights

The first task we face is to define what we mean by rights.

Definition: A right is an unconditional freedom of an individual to undertake a particular action or to refrain from such an action without interference or coercion from other individuals or institutions.

Comments: One can of course define an action as the act of doing nothing, and one could therefore omit the "refrain from action" portion of the above definition. But I think it is important to make explicit that rights can simply protect one's freedom not to do something, as most conspicuously in the Fifth Amendment to the U.S. Constitution, which protects a person's freedom to remain silent so as not to incriminate oneself.<sup>6</sup>

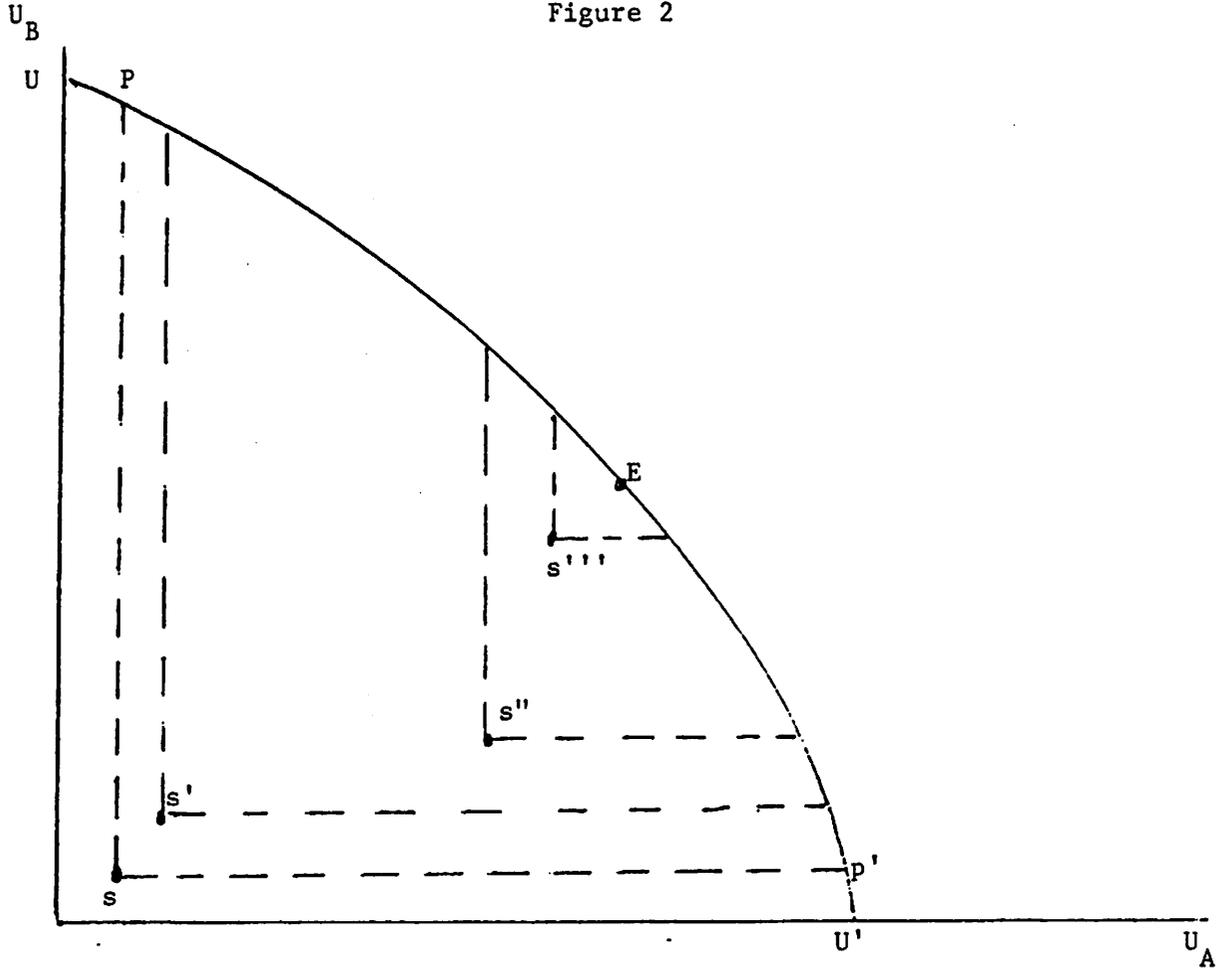
The first observation to be made with respect to including individual rights in the constitution is that there would never be a need to define constitutional rights, if all decisionmaking costs were zero. Individual

rights serve as a kind of constraint on the set of future collective actions and therefore outcomes the community can obtain. Since constrained optima can fall short of and at best equal an unconstrained optimum, a community of rational, self interested individuals would never constrain its ability to make future collective choices if these choices could all be made costlessly.

To see this point more clearly, consider Figure 2, drawn for either a community of two or a community with two groups of individuals each of which has identical tastes. A status quo level of utility,  $\underline{S}$ , exists for  $\underline{A}$  and  $\underline{B}$  at the constitutional stage. If the constitution were written out of a literal state of anarchy, the "initial endowments" of each individual might consist of little more than their abilities to reason and bargain.  $\underline{S}$  might lie very near or on the origin. More realistically, as when a new constitution is drafted following a war or revolution, certain de facto property rights will define the initial positions of all parties, and thus the status quo  $\underline{S}$ . Bargaining at the constitutional stage commences from this starting point and, under the unanimity rule, only those voting rules and other political institutions will be chosen that promise to increase the welfare of all individuals. If  $\underline{UU}'$  represents the set of possible utility levels the community can attain through collective action, then only those political institutions that promise to produce an outcome in the  $\underline{PP}'$  set of points that are Pareto preferred to  $\underline{S}$  are possible candidates for inclusion in a constitution unanimously agreed to by individuals at  $\underline{S}$ .<sup>7</sup>

It is reasonable to assume that, if citizens actually drafted a constitution out of a state of anarchy, they would proceed in stages. Before decisions concerning free markets, the role of the government, and the like could be made, basic property rights would be defined so that citizens would know from what position they bargained--what the initial endowments actually

Figure 2



were. Thus, a sequence of steps might occur with each new agreement shifting the status quo outward from  $\underline{S}$  to, say,  $\underline{S}'$  to  $\underline{S}''$ , etc., until eventually a point like  $\underline{E}$ , on the utility possibility frontier was attained, a point from which no further mutually beneficial improvements were possible.

Of course, a community may fail to reach the potential outcomes along  $\underline{UU}'$  due to information asymmetries, bargaining and decisionmaking costs, and other, real world "transaction costs" that stand between actual, realized utility outcomes and those imbedded in a Pareto optimal ideal. But were such transaction costs not present, the ideal would be obtained. Moreover, the community would not need to pause along the path from the initial status quo to Pareto optimality. No institution other than the unanimity rule itself would be required. If decisionmaking costs are truly zero, the community can function as a continuously convened constitutional convention addressing each new issue and costlessly deciding it to the advantage of all members. With zero decisionmaking costs, points  $\underline{S}$  and  $\underline{E}$  are as one.

To characterize a zero decisionmaking cost assumption in this way is, of course, to trivialize it to the point where it loses its analytic power. Nevertheless, contemplating the full force of zero decisionmaking costs does help in understanding a most fundamental part of the argument. Definitions of rights will enter an optimally designed constitution only as a means for reducing decision costs. A community need define property rights, and other rights and institutions that move it sequentially from  $\underline{S}$  to  $\underline{S}'$  and eventually to  $\underline{E}$ , only if these institutions are essential to the attainment of  $\underline{E}$ . Constitutional rights are a means to the more basic end of advancing the interests of all members of the community. They are not ends in themselves.

Now let us see how rights definitions can help to economize on collective decisionmaking costs, using the apparatus developed in the

previous section. Consider first, a rather trivial right, the right to scratch one's ear. This action involves a small expected gain in utility ( $s_i$ ) for anyone who chooses to undertake the action, and, let us assume, no loss in utility ( $t_i = 0$ ) for anyone other than the actor. Thus it is likely to be one of the class of decisions for which the optimal majority is .5. Indeed, if  $D'$  did not have the sharp discontinuity at  $m = .5$ , but continued to fall along the dotted path (i.e. neither cycling nor the passage of conflicting proposals was possible) the optimal majority would be far below .5.

It seems extremely unlikely if I were to propose that I scratch my ear that anyone would offer a counter proposal. For issues of this type neither cycles nor conflicting proposals seem plausible possibilities. Decision-making costs for the community can be minimized by giving individuals the right to make decisions "for the community" in situations such as these when only their welfare is involved. The nature of the action ensures that if one person is moved to propose such an action, no one else is likely to oppose, and thus decisionmaking costs are minimized by granting the individual the right to "dictate" the outcome "for society" in this limited sphere. Since there are countless millions of actions of this type (I scratch my ear, my hand, my foot ...) too numerous to list specifically in the constitution, the optimal solution will be to cover all with a blanket right to do as one chooses unless specifically prohibited by a constitutional clause or parliamentary law. Transaction costs will be minimized by allowing all actions with some exceptions, rather than by prohibiting all actions with some exceptions.

Exceptions to a broad right to do as one pleases may be optimal when both  $s_i$  and  $t_i$  are positive. The right to do as one chooses need not extend

optimally to the liberty to throw one's trash on a neighbor's lawn or the town square. So long as the number of citizens involved is small, myself and my neighbor, no collective action on the part of the community may be required. My self interest and that of my neighbor can be relied on to achieve a Pareto optimal resolution of the question (Coase, 1960). But in large numbers situations, transaction costs may be sufficiently lowered by reliance on general restrictions on individual action, laws and ordinances against littering, and hired police to enforce them (Dahlman, 1979). With both  $\underline{s}_i$  and  $\underline{t}_i$  greater than zero, and  $\underline{t}_i$  relatively small, the optimal majority for collective decision making will be the simple majority rule. The constitution framers will wish to allow future parliamentary actions taken via the simple majority rule that place constraints on certain types of individual behavior in externality situations.<sup>8</sup>

Now consider an example at the other pole from that of ear scratching. One  $\underline{t}_i$  is very large and some, suppose all,  $\underline{s}_i$  for the rest of the community are very small. Individual  $\underline{R}$  practices one religion and all other individuals in the community practice one or more other religions.  $\underline{R}$ 's religion commands that its followers not comb their hair. The sight of  $\underline{R}$ 's uncombed hair causes all other members of the community some slight irritation. The unhappiness  $\underline{R}$  or any other member of the community would experience if she had to violate one of the commands of her religion is quite large, however.

We confront again an externality situation. But with  $\underline{t}_i$  sufficiently large relative to  $\underline{s}_i$ , the optimal majority equals one. If the community were to make a formal collective decision in externality situations such as this, the optimal voting rule would be the unanimity rule. Requiring that the unanimity rule be used in externality situations of this type is

equivalent to giving R a veto over any collective action another citizen or group of citizens might propose. R could be made to comb her hair only if she willingly agreed to do so, as she might if, say, she were convinced by the rest of the community that their suffering were severe enough, or were offered a sufficiently large bribe.

One possible course of action given the above considerations is for the constitution framers to include restrictions on religious practices among that class of collective actions requiring unanimous agreement. That is, to recognize that such actions can involve externalities and thus require collective action, but, because of the large expected asymmetries in the welfares of those involved, to require that collective action be taken only if the community is unanimous. The person whose religious practice causes an externality must agree to the collective decision, whatever it is, regarding the externality.

The unanimity rule introduces substantial decisionmaking costs of its own, however, and encourages strategic behavior by some members of the community (Black, 1958, pp. 146-7; Buchanan and Tullock, 1962, ch. 6). Moreover, if the expected gains from curbing an individual's action ( $s_i$ ) are generally expected to be quite small, the likely outcome under the unanimity rule will typically be that the individual does not cast her vote with the community. She uses her veto under the unanimity rule to allow her to act in accordance with her religion's dictates. Thus, if the constitution framers anticipate that all, or nearly all, future conflicts over religious practices will involve extremely large  $t_i$ 's for anyone prevented from acting in accordance with a religious dictate, and very small welfare gains for everyone else, they can effectuate the likely outcome from the application of the unanimity rule in these situations by specifically granting each citizen

the right to practice the religion of her choosing. Such a constitutional right would remove restrictions on religious conduct from future parliamentary agendas. A constitutional right to undertake certain actions provides the same protection, with lower decisionmaking costs, as does the implicit veto each citizen possesses under the unanimity rule. The citizen need not exercise the right, so that both potential outcomes from the application of the unanimity rule are possible.

Thus our analysis allows us to provide an answer to a question central to the debate between the Federalists and the Antifederalists over the ratification of the U.S. Constitution--why an explicit enumeration of certain "inviolable" rights in the Constitution was desirable (Rutland, 1985; Storing, 1985). Almost any individual action has the potential of altering some other person's welfare, i.e., of creating an externality. When an action creates a negative externality for a large number of individuals, collective action curbing the individual's right to undertake this action may advance the welfare of the community. For most actions involving an externality, the relative gains and losses will be such that the optimal voting rule for introducing constraints on individuals (e.g. laws against littering) will be the simple majority rule, or some supramajority rule less than full unanimity.

Religious practices, a public speech, a printed book, even the reading of a book<sup>9</sup> can also have external effects, and thus could precipitate some individuals to attempt to initiate collective action to curb the offending individual action. Restraints on individual actions are not likely to be in the community's interests in situations in which the welfare loss upon the individual whose activity is curbed is expected to be quite large relative to the gain experienced by others from such a restriction, however. Explicitly

protecting an individual's right to act in these situations is one way of raising the costs to the rest of the community of trying to curb these actions.

Let us summarize the argument to this point. In the absence of conflict, collective decisionmaking costs are minimized by allowing each individual the right to do as she chooses. Such a right makes each individual a dictator over the "social" choices (whether her ear gets scratched) she can effectuate on her own. So long as conflict does not arise, the right to do as one chooses can extend to writing contracts with other individuals, forming clubs, etc., i.e., situations in which several individuals act as one. To economize on collective decisionmaking costs, the optimal constitution will leave aside a sphere of activities in which individuals are essentially placed in a state of anarchy.

So long as numbers remain small, collective decisionmaking costs probably continue to be minimized even when conflicts among individuals arise by allowing these conflicts to be resolved by the individuals directly involved. Formal restrictions on individual actions are optimal resolutions of conflict only in large numbers situations.

Given the potential presence of conflict among different groups in society, a voting rule which allowed a minority to be decisive for the community, might lead to much cycling and conflicting proposals by opposing minorities. The smallest decisive majority that avoids the latter difficulty is a majority of one half plus one, and thus the simple majority rule is likely to be the optimal decision rule for a wide class of decisions. In effect a large discontinuity in the optimal majority exists between allowing one individual to be decisive over a large class of decisions in which there is no conflict among individuals, and allowing a majority to curb individual

actions that impose externalities on the rest of the community. The optimal majority rises above the simple majority rule as the costs imposed on the individual whose freedom is curbed rise relative to the gains for those who benefit from the restriction on individual action. When the relative costs from restricting individual liberty become sufficiently high, such a restriction becomes optimal only with the consent of the individual whose actions are circumscribed. This explicit consent can be achieved by either requiring a unanimous vote of all citizens to approve any motion to restrict an individual's actions in this area, or by simply granting the individual the unconditional right to undertake this type of action.

#### V. The Choice of Agent

Although we have defined rights to be unconditional, no constitutional right is likely to be truly unconditional. Limits to any right will exist at the boundaries of the definition of a particular action, or when different rights clash. For example, when delineating a right to practice the religion of one's choice, the constitution framers are unlikely to want to protect the right of some religious sect to engage in acts of cannibalism or other forms of human sacrifice. A right to free speech may not be intended to cover the shouting of "fire" in a crowded theatre.

If the constitution framers could envision all "boundary" disputes and rights conflicts of these kinds at the constitutional stage, they could deal with them by stating explicitly the exceptions or limits to each constitutional right. But such omniscience is unlikely. Instead, therefore, it can be expected that the constitution framers will define institutional procedures for settling such boundary questions. Three possibilities come to mind.

First, procedures might be established to reconvene a constitutional convention whenever a dispute arises over the limits of a constitutionally protected right. Here the citizens themselves or their representatives effectively act as a jury. This solution could involve considerable delays in resolving such disputes, and in general would seem to promise rather high decisionmaking costs. But it would have the advantage of maintaining the constitution as a contract to which the citizens of the polity have agreed.

A second way of bringing about direct citizen involvement in the process of clarifying a boundary of a constitutional right would be to put the issue to a national referendum. Here again some nontrivial transaction costs are likely to be present--all citizens must weigh the potential effects of the constitutional change, all must (should) vote. But these costs are arguably smaller than those of a newly convened constitutional assembly.

The third procedure is to appoint an agent to resolve such disputes. Again, two alternatives come to mind. First, if the polity is sufficiently large to warrant representative government, the body of representatives could, under certain constitutionally defined rules, adjudicate disputes over the interpretation of constitutional rights. This procedure has the advantage of having all of the citizens again involved, although more indirectly than say via a referendum, in the process of delineating the boundaries of an individual's constitutional rights. The parliament would, under this procedural option, in effect serve as a constitutional convention. To maintain the consensual nature of the constitutional contract, any alterations in definitions enacted by parliament would ideally be required to achieve unanimous approval. As a practical matter, some supramajority would probably be optimal.<sup>10</sup> Since both sides of the dispute would be represented

in an ideally constituted representative body, resolving the conflict might be time consuming even under a supramajority rule.

To avoid this potential difficulty, the constitution framers may prefer to resort to some part of the judicial system to arbitrate disputes over the limits of an individual's constitutional rights. Such a system will have to be established to arbitrate disagreements between citizens and the state, once the parliament is granted authority to pass laws and ordinances, and a state bureaucracy is created to enforce them. Since arbitration is the raison d'être of the judiciary, it may seem optimal to grant it the authority to arbitrate disagreements over constitutional matters. Were a judge, or a court of judges designated as agent for the citizenry on constitutional issues, it seems obvious that they would desire that the court arbitrate definitional disputes as it believed the citizens themselves would do were they to reconvene as a constitutional convention.<sup>11</sup>

Thus, citizens at the constitutional stage confront a classic principal/agent choice in deciding what procedures to use to clarify definitional boundaries and settle boundary disputes. As in all principal-agent relationships, a tradeoff exists between the savings in time and gain in expertise from having an agent act in behalf of the principals, and the potential loss to the principals from the agent's pursuit of her own goals in conflict with those of the principals. Only if all citizens participate directly as in a newly called constitutional convention or referendum can the citizen be certain that the constitution as clarified remains a contract designed to best serve his interests. Such procedures involve potentially large transaction costs, however. Transaction costs can be reduced by granting authority to a single person (or three or nine) to settle boundary definitions and disputes. But this procedure has the possible danger that

the appointed agent makes choices that do not optimally advance the interests of the citizens.

## VI. Constitutional Rights and Majoritarian Democracy

The nature of constitutional rights as described here sheds light on a puzzle that has troubled jurists--the seeming inconsistency of a system of constitutional rights protected by the courts and majoritarian democracy.<sup>12</sup> If democracy means carrying out the will of the people as expressed through their elected representatives using the majority rule, is it not antidemocratic to allow the courts to thwart the will of the people by declaring certain acts passed by a majority of elected representatives invalid because the court deems that they violate a constitutionally protected right?

If constitutional rights were delineated following considerations of the type discussed here, then the sole purpose in defining them would be to assure that the will of a minority could triumph over that of the majority. All rights would be defined only where the potential of conflict exists because of externalities associated with the actions in question. The whole purpose for defining a right in this externality situation would be so that any conflicts arising from the externality could not be resolved by a simple majority vote. The will of the people, as expressed at the time the constitution was drafted, would have been to protect an intense minority from the majority by effectively requiring the use of the unanimity rule in these particular externality situations. The potential for conflict with the majoritarian principle must always exist where rights are defined in the constitution, for if that potential did not exist there would be no need to define them.

Given the nature of constitutional rights it is easy to see why dissatisfaction with judicial resolution of rights disputes arises. The resolution of such disputes must often involve disappointing either a majority of citizens or an intense minority.

#### VII. The Choice of Constitutional Rights

When weighing the costs and benefits from each potential definition of a constitutional right, different societies can be expected to arrive at different definitions. A society composed of people, who are all members of the same religion, may fail to protect the right to practice a different religion, the right to found a new religion, and the like. It may simply never occur to those writing the constitution in such a society, that anyone would ever choose to practice any other religion, or that a conflict would ever arise among individuals or between an individual and the state over this issue. On the other hand, the anticipated conflicts stemming from religious beliefs and practices of those residing in a country with a diversity of religious groups, and especially one formed by large numbers of individuals who have fled religious persecution in other countries, may lead them to protect quite explicitly in the constitution the rights of individuals to practice religions of their choice.

A society that has historically had a free market system may fail to protect its market institutions explicitly in the constitution, or the rights which accompany such institutions, it being implicitly understood by all that post-constitutional economic institutions will continue to involve free markets. On the other hand, if the constitution were to be written following a revolution that overthrew a socialist regime with the purpose of instituting a free market system, uncertainty on the part of those writing the constitution over the future political viability of this system might be

great. In this society the constitution drafters might reasonably choose to spell out in considerable detail the rights of individuals that are required to sustain free markets.

The uncertainties surrounding an individual's position vis-à-vis the state will depend, of course, to a considerable degree on the rules defining the operation of the state, and upon the expectations of those writing the constitution as to how the state will operate under these rules (Buchanan, 1975, p. 73). As noted above, if the drafters of the constitution were to require that all decisions by the parliament be made under the unanimity rule, there would be no need to include any protection of individual rights against the state in the constitution.<sup>13</sup> The veto power granted each individual, or his representative, by the unanimity rule would be the only protection of rights an individual would need. More generally, the larger the majority required to pass laws restricting individual freedom, the less need there is to protect individual rights in the constitution. Thus, the nature and number of rights optimally defined and protected in the constitution will depend on the chosen majority for parliamentary action. Similarly, if our ideal system of representation were not instituted, and citizens could go effectively un- or under-represented in the parliament, they would wish to protect individual rights against state actions more specifically.

We conclude that there is no reason to expect that all societies choosing a set of political institutions to embody into a constitution will choose to define a single, common set of individual rights. The choice of rights by a particular society will depend upon the specific uncertainties for their society envisaged by the framers of the constitution, and upon their judgments with respect to the relative transaction costs of reducing

future conflict by defining certain constitutional rights. The optimal choice of rights is also dependent on the mode of representation, the parliamentary voting rule, and the other political institutions established in the constitution. Thus, the selection of individual rights for explicit protection in the constitution will depend inherently upon the characteristics, history, and anticipations of its drafters (Buchanan, 1975, p. 87). Moreover, the set of rights that is optimal for a particular society can be expected to change over time as its characteristics change.

#### VIII. The Evolution of Rights

If asked to consider the issue, the framers of the U.S. Constitution might well have thought that the Constitution's protection of religious freedom should allow an individual to refuse professional medical treatment for herself and her children, if her religion forbade medical treatment and instead demanded that one seek help in the case of illness from God through prayer. Such were the probabilities of recovering with the help of a professional physician versus with the help of prayer at the end of the 18th century, that the Constitution framers might reasonably have thought that the expected gains to society from interfering with religious practices of this sort did not offset the expected cost to those individuals, who would be forced to violate the commands of their religion.

But refusing medical treatment for some illnesses at the end of the 20th century can be expected with high probability to result in death. Individuals convened to draft a new constitution for the United States today, if asked, might choose to constrain, say, a parent's right to refuse medical treatment for her child in certain situations from protection under a religious freedom clause, just as cannibalism and other exotic religious rights of human sacrifice would not be intended for inclusion now or 200

years ago under the protection of a religious freedom clause. Over the last 200 years, views regarding the welfare loss imposed upon those who would be denied the right to purchase and consume alcoholic beverages, and upon the rest of the community from such actions appear to have shifted to and fro, just as they vary considerably across countries. A constitution that would maximize the expected welfare of a society would need to evolve over time to reflect the changing beliefs, preferences, and expectations of the community. The framers of the original constitution would wish to address the question of how the constitution gets rewritten over time.

The task of rewriting definitions of rights resembles that of delineating the boundaries of such definitions, as do the procedural options. (1) A new constitutional convention can be periodically convened to reconsider and redefine, if necessary, the set of rights protected in the constitution. (2) A fairly continuous process by which the citizens directly amend the constitution through national referenda can be established as part of the original constitution. (3) An agent--like the courts--can both refine and redefine the original statements of rights in the constitution.

The choice from among these options may also affect the form in which the definitions are originally stated in the constitution. If the third option for redefining rights is relied upon, for example, very broad definitions of rights are likely to be optimal. A right protecting each citizen from "cruel and unusual punishment" inflicted by the state could easily be enacted on the basis of the kind of externality calculations described above ( $\underline{t}_i$  is very large relative to  $\underline{s}_i$ ). But the original constitution writers cannot envisage all forms of punishment that will ever be invented, or future citizen attitudes toward crime and punishment. Thus, a broad (vague) prohibition will allow considerable latitude for the agent to

redefine the specific punishments prohibited over time. On the other hand, if the constitution can be amended by referendum, the citizens can list explicitly those punishments that are prohibited. If uncertainty over the constitutional status of a newly invented form of punishment exists, that uncertainty can be resolved by referendum. Thus, in choosing among these options and variants thereon, the constitution framers will have to weigh (i) the costs imposed on the community from having anachronistic definitions of rights, (ii) the transaction costs of redefining rights under the three proposals, and (iii) the agency costs involved with the third option. Once again no one of these three options is necessarily optimal for all societies, and the choice of option will in turn affect the optimal form of definitions of rights included in the constitution.

#### IX. Constitutional Rights versus Natural Rights

The list of conceptualizations of rights extant in the literature is long--natural rights, civil rights, political rights, individual rights, liberal rights, legal rights, economic rights, positive rights, negative rights, moral rights--to name but a few.<sup>14</sup> Our notion of constitutional rights emerging out of a contractarian agreement among rational, self-interested individuals differs from many of these. To further illustrate the properties of these constitutional rights, we shall contrast them with some other rights concepts in common usage, beginning with natural rights.

The notion that individuals have "natural rights" has a venerable history in both political philosophy and political history. Although considerable ambiguity surrounds the term, it is presumably meant to imply certain rights every individual possesses or ought to possess in a society owing to the nature of man and the nature of human society, e.g., life, liberty, and the pursuit of happiness. Such an interpretation suggests that

natural rights are absolute rights, and thus implies a fundamental conflict between the notion of natural rights, and the inherently relativistic concept of constitutional rights developed here. Let me defend the present conceptualization of constitutional rights.<sup>15</sup>

Consider "life" as a natural right. It is certainly plausible that any society would draft constitutional rules that are protective of individual lives in some way. But will its citizens agree on a single set of rules for protecting an individual's natural right to life? One could imagine one community choosing to protect an individual's right to life by forbidding the state from executing a person regardless of what crime the individual had committed. But another community might believe that the threat inherent in the death penalty is a sufficiently strong deterrent to certain crimes endangering other lives that it chooses not to forbid the state from punishing these crimes by death. How a society chooses to protect the right of its citizens to life, and thus in practice what this right means, will depend on the views of members of society regarding the sources of threats to life, and the efficacy of the various possible means of minimizing these threats. If these views differ across societies, as they most certainly do, then so too will the definitions of constitutional rights--or their judicial interpretations--as they pertain to the protection of individual lives.

Since the definition of a right implies the liberty to commit or refrain from committing an action, no constitution that defines any rights can fail to protect some liberty. Once again, however, when one drops below this level of generality one expects to find, and does, considerable variations in the specific liberties societies choose to protect and how they protect them. Thus once one pushes beyond a most general and vague definition of "natural rights" and attempts to determine specific statements of rights that would

actually be written into a constitution, these statements can be expected to differ from society to society.

#### X. Constitutional Rights and Moral Rights

For many observers, the concepts of natural and moral rights would appear to draw their justification from considerations other than those of a rather pragmatic kind, as we have assumed. David Lyons, for example, draws a clear distinction between moral rights and legal rights (1982, pp. 108-9), and emphasizes "that merely legal rights have no moral force" (1982, p. 113, emphasis in the original). Constitutional rights as defined here would, presumably, be regarded as part of the class of legal rights that lack moral force.

It is difficult for economists to analyze concepts like natural or moral rights if these rights are presumed to be defined independent of the interests of the individuals involved, given our reliance on rational, self-interest as the fundamental behavioral postulate. If an individual thinks of freedom as a moral right, and thus opposes involuntary slavery, then it is tempting to think of this individual as preferring a world without involuntary slavery to one with it. If we can conceptualize individuals as having preferences over moral issues like slavery, and are willing to assume that these preferences, like other preferences, follow certain axioms which we associate with rational behavior, then it is a short step to demonstrating that individuals have preference orderings defined over these issues. We are then, also, well on our way to being able to describe individual choices as revealed preferences, and analyze individuals as if they were making these choices by maximizing a utility function.

If moral rights derive from moral principles, and these principles in turn cannot be linked to individual preferences, and are not consistent with

the basic axioms of rational behavior, then rather obviously our ability to analyze and predict individual behavior using our normal analytic tools will be seriously hampered if not destroyed. In particular, we cannot predict how the definitions of rights a community chooses will change following certain objective changes in the community, as we can if these rights are defined to advance the interests of all members of the community. Presumably, the desired moral rights will change if the moral principles from which they are derived change. But if the latter are totally exogenous to our analytic framework, so too are the former.

Compliance with the terms of contractual agreements can resemble a prisoners' dilemma. While all participants benefit if all maintain their commitment to the contract--that is why they joined--some may enjoy an advantage if they can break their commitment without all others doing so. Rational, self-interested individuals, when joining a contract, will wish to establish institutions and sanctions to ensure that all parties to the contract maintain their commitments over time.

Mores are a part of the set of institutions a community uses to maintain compliance with the implicit social contract that joins its membership. Promise keeping is a part of most, if not all, ethical systems.<sup>16</sup> If an individual adheres to promise keeping as an ethical principle, then she will regard honoring the rights defined in a constitutional contract, to which she is a party, as the morally correct thing to do. The unanimous agreement out of which a constitutional contract arises gives moral weight to the provisions of that contract, which is to a considerable degree independent of the reasoning of the individuals in reaching the agreement.<sup>17</sup>

The moral commitment inherent in the unanimous agreement at the constitutional stage may also carry over to those legal rights enacted as

parliamentary statutes in the post-constitutional stage. If unanimous agreement has occurred on the method for electing representatives to the parliament and the voting rule to be used by the parliament, then it would seem that the individual in joining the constitutional contract has committed herself to honor all legal rights defined by parliamentary action, regardless of whether her own moral position is represented by the winning majority's view or that of the losing minority. The ethical legitimacy of these legal rights defined by the parliament stems not from their having received a winning majority of votes in the parliament, but from the unanimous agreement in which the individual took part that created the parliament and granted it the authority to define legal rights using a particular voting rule.<sup>18</sup>

Any society that holds certain moral views in common may, of course, choose to incorporate these views into the constitution. Indeed, the constitution might be interpreted as a reflection of at least some of the ethical principles of the community. A clause banning involuntary slavery would, under the interpretation of constitutional rights put forward here, indicate that the constitution framers anticipated that the injury (welfare loss) inflicted on those opposed to slavery would generally be far greater than the gain of those in favor. These gain and loss calculations may in turn reflect considerations regarding the impact of slavery on the physical health of the individuals who would be enslaved, on the social health of the community, or upon its spiritual health. All citizens need not agree on a single justification for protecting certain rights in the constitution for agreement on the definition of these rights to come about, however. Once they are embodied in a contract to which all individuals have agreed, the agreement itself will morally obligate any individual, who holds promise keeping as an ethical principle, to adhere to them.

It is also likely that there are principles and definitions of rights, to which some individuals are morally committed, but are not shared by all of the community. These will not become a part of the constitution. Thus while all rights defined in the constitution will be rights to which every individual is committed, all rights, which an individual thinks ought to be protected by the constitution, will not necessarily be part of it. Areas of ethical importance to an individual will be left undefined by the constitution.

Ronald Dworkin (1977) has argued that when an individual's conception of moral rights conflicts with a society's definitions of legal or constitutional rights, the individual is justified in exercising his moral rights. Moreover, Dworkin argues that the courts in judging such transgressions against the law should give weight to the individuals' moral rights. This position is difficult to defend in the contractarian framework in which we have approached individual rights.

The reason contracts exist is to reduce uncertainty about the behavior of others. Constitutional contracts and parliamentary laws from which they derive can serve this purpose. The individual knows he can speak out on an issue and not be sent to jail. But if the courts sometimes fail to enforce a law or protect a constitutional right (obligation), because they think that to do so would violate some moral right of another individual, they reintroduce uncertainty about future behavior. An individual cannot predict whether some judge in the future will rule that her exercising of her constitutional right violated another individual's moral right, and judge the latter to supercede the former.

Such balancing of moral or natural rights against constitutional and legal rights can be defended if the sole purpose of the law is to make the

(morally) just decision in each case, to punish the morally guilty, not simply those who have technically broken the law. But when a single, well-defined moral code does not exist for a community, such exercising of judicial discretion adds unpredictability to the legal system. The individual never knows when a law or her constitutional right will be "trumped" by someone else's moral right. Such unpredictability thwarts the basic purpose of the constitutional contract--to reduce uncertainty over future behavior--and of the law and its enforcement to reduce future crime.

The possibility that individuals will disagree over fundamental issues of rights and morality, brings to question the assumption that has underlayed our discussion up until this point, that the constitutional contract has been unanimously joined. We turn to this question now.

#### XI. The Importance of Unanimity over Constitutional Rights

The arguments of the previous section illustrate the importance of achieving unanimous agreement among members of the polity on the definitions of rights and other provisions included in the constitution. If all citizens have literally agreed to the content of the constitution, then this agreement adds moral force to the constitution's provisions, and thereby strengthens the commitment of individuals to comply with these provisions.<sup>19</sup>

We have suggested two procedures by which active participation of citizens in the constitution drafting and amendment process could take place: (1) periodic constitutional conventions drawing upon a fully representative assembly of citizens,<sup>20</sup> and (2) amendments put directly to the citizens in the form of referenda. The potential cost of not periodically renewing the contractual agreement among the citizenry on the specific provisions of the constitution is a weakening of the sense of obligation among the citizenry to abide by the constitution. The provisions of the constitution become

increasingly out of touch with the polity's social and economic structure. The political institutions defined by the constitution are increasingly recognized to be inferior to an alternative set of institutions, given the current knowledge and mores of the citizenry. The citizen feels less loyalty toward the constitution, and thus less responsibility to uphold it and abide by its provisions, because (1) the constitution does not define a set of institutions and rights to which the individual would today agree if given the opportunity, and thus does not command his support due to its inherent justness and efficiency, and (2) the point in time in which agreement to its provisions occurred is so remote, that the citizen does not feel that he in any meaningful sense (e.g., through the actions of his ancestors) participated in the process creating it. The same sort of alienation from the definitions of rights and constraints on individual behavior can arise when these definitions are altered over time by judicial decree, if the citizen feels that his views are not fairly represented by the judges, who possess the authority to alter the interpretation of constitutional provisions, or if the citizen objects to the constitutional provision that grants the judiciary this authority, and would oppose such an institutional arrangement, if given the opportunity at a convention or via referendum, today.

When such alienation occurs, the constitution fails to accomplish its fundamental objective of minimizing the transaction costs of reaching agreements and resolving conflicts in the post-constitutional society. The existing political institutions as defined in the constitution do, of course, determine the way in which the current political process operates. The existing definitions of rights determine the boundaries at which judicial and legislative haggling takes place. But, if these institutions and boundaries

are inferior to those that could and would be agreed to today, if they do not command the respect and voluntary compliance of today's citizenry, then they will fail to achieve the objective of minimizing the resources expended to resolve conflicts and to reach mutually beneficial collective decisions.

But what happens if no consensus is possible over a particular definition of a right? How binding can any set of constitutional institutions be if they have not emerged out of consensus?

Given the impracticability of literal unanimity on almost any issue with groups above some fairly minimal size, these questions pose a significant challenge to a contractarian interpretation of constitutions. We make several observations in response to them. First, the long run nature of constitutional provisions does introduce uncertainty over future outcomes and should help to reduce disagreements among citizens over optimal constitutional structures thereby producing greater consensus as Buchanan and Tullock (1962, pp. 77-80) assert.<sup>21</sup>

Second, the original constitution, at least, is a package of institutions, not a single, potentially divisive issue. As such it contains greater scope for compromise and consensus. If some citizens object to some parts of the constitution, then other parts may have to be tailored to win their support, as occurred with the addition of the Bill of Rights to the United States' Constitution. The alternative of not having a set of political institutions for achieving the collective goals of the community should be sufficiently unattractive to encourage agreement on some compromise package of constitutional provisions. Note that this consideration favors the first of the three procedures for modifying the constitution over time. It may be easier to agree to a whole new package of constitutional provisions

than to a single change, since the formulation of an entirely new package opens up more opportunities for compromise.

Finally, it must be stressed that consensus should not be thought of as a 0/1 state variable like pregnancy. A constitutional contract can have more or less consensual support. Of course, once constitutional provisions can be enacted over the opposition of some members of the community, the possibility arises that these members will be discriminated against. Moreover, they may not feel bound by constitutional rules to which they did not consent, and thus pose a noncompliance threat to the community. But discriminatory actions against 49 percent of the community can in general be expected to result in greater welfare losses than against 10 percent. Noncompliance with constitutional rules by 49 percent of the community poses a greater threat to the viability of its political institutions than does noncompliance by 10 percent. The greater the majority required to ratify the initial constitution or any change in it, the fewer future conflicts and lower future decisionmaking costs one should anticipate. All of the benefits from having citizen agreement on the provisions of the constitution do not disappear as soon as one citizen's consent is not forthcoming.

## XII. Economic Rights as Constitutional Rights

Over the last generation the concept of "economic rights" has appeared with increasing frequency in discussions of ethical and constitutional questions (e.g., Shue, 1985). The notion here is that a constitutionally protected right (liberty) requires not only the freedom to act, but in some cases the capacity to act. That one is free to purchase food and medical protection to sustain life is of little consequence if one lacks the economic resources to do so. There are two arguments for why "economic rights" such as these might be agreed to by citizens at the constitutional stage.

Consider a situation in which an individual requires a life saving operation but cannot afford the cost. Were the community to vote on providing the operation through a small tax on all other members, only a small degree of altruism on the part of a majority of taxpayers would be required for the proposal to pass under majority rule. If the constitution framers anticipate that they would rarely if ever vote to deny a citizen funds for life saving medical care, the community can economize on future collective decisionmaking costs by providing citizens with a constitutional guarantee to medical attention of this type.

The same outcome is also possible, however, if individuals are not altruistic. Note that the situation just described has the characteristics that we have identified as leading to constitutional rights. If the individual in question is prevented from undertaking the action, i.e. from having the operation, a very high cost ( $\underline{t}_i$ ) is imposed upon her. If she undertakes the action, a small cost ( $\underline{s}_i$ ) is imposed on all other members of the community in the form of the tax to pay for the operation.

To induce rational, narrowly self-interested individuals to assign rights in these situations, they must be uncertain over whether they will be the recipients of  $\underline{t}_i$  or  $\underline{s}_i$ . The constitution could guarantee individuals access to basic medical care, an education, a minimum income level, if the individuals joining the constitutional contract were uncertain over whether they (their descendants) would be the ones who were too poor to procure the goods guaranteed by the constitution.<sup>22</sup>

We have already emphasized that contracts exist because of uncertainty. The traditional definitions of rights as liberties to undertake or not undertake actions are most easily envisaged as arising due to uncertainties over the future actions of other individuals. The other form of uncertainty

mentioned above, uncertainty over future states of the world, i.e. whether an individual will be rich or poor, could give rise to provisions in the constitution resembling the kind of economic rights that have been proposed.

At any point in time all individuals face uncertainties that could adversely affect their future economic well-being. To mitigate the possible negative effects of these uncertainties they purchase a variety of forms of insurance, i.e. they sign insurance contracts. But it is conceivable that individuals at the constitutional stage when contemplating the future uncertainties facing their society will choose to mitigate the adverse economic effects of at least some of these common uncertainties through provisions written into the constitutional contract. In so doing, they would transform a part of their constitution into a form of social insurance contract.<sup>23</sup> In Switzerland old age pensions are part of the constitution. In the United States, both social security and unemployment insurance have arguably achieved quasi-constitutional status, by which I mean that they are not programs that are in danger of repeal by narrow majorities in Congress. Both would undoubtedly receive substantial majorities for continuance in some form, if brought before the citizens in a national referendum.

Each polity differs somewhat in its level of economic development, its economic institutions, and thus in the nature and extent of the economic uncertainties facing it. Each differs in the strength of the "work ethic" in the community, the relative importance of individualism and group solidarity as community values, the weight given to ethical arguments such as those of Rawls favoring redistribution. Each polity can be expected to differ, therefore, in the amount and form of any economic guarantees written into the constitution, and in any conditions placed upon their receipt. Optimally

defined economic rights, like all other constitutional rights, will vary from one polity to another, and in any one polity over time.

### XIII. Can Constitutional Rights Conflict with the Pareto Principle?

To further clarify the nature of constitutional rights it is useful to juxtapose them against yet one more conceptualization of rights, namely Sen's (1970a,b) interpretation of liberal rights. For Sen the idea of a liberal right implies that "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" (Sen, 1976, p. 217). Sen shows that in some situations the exercise of such liberal rights can lead to the "paradox" of violating the Pareto postulate.

One's first reaction to the question posed in the title of this section is that there cannot be any conflict, since we have assumed that all rights defined in the constitution have been agreed to unanimously. But, Sen shows that the unilateral exercising of the liberal right to read what one chooses by individuals can lead to outcomes which are not Pareto optimal, as when a prudish individual and a lascivious one would both prefer that the prude read a sexually explicit book like Lady Chatterley's Lover to the outcome when each exercises his liberal right to read the book or not to read it (the latter leading to only the lascivious individual reading it).

The situation as Sen describes it in this example is obviously one involving an externality, the thought that the lascivious person is reading the book makes the prude worse off. Several observers have suggested that the Pareto inefficiency caused by this externality could (should) be eliminated in Coasian fashion by the two individuals agreeing to "trade" their liberal rights, i.e. by the prude agreeing to read the book "in

exchange" for the lascivious person's agreeing not to read it (Gibbard, 1974; Kelly, 1976; Buchanan, 1976; Nath, 1976; Breyer, 1977; Mueller, 1989a, pp. 400-6). Sen (1976, 1982, 1986) has objected to this way out of the paradox, however, arguing (1) that the transaction costs of enforcing such an agreement would be prohibitive, and (2) that even if they were not, to enforce such an agreement would in itself be an extreme violation of liberal rights.

Given that an externality is involved, the situation Sen has described resembles that which we have assumed in our discussion of constitutional rights. By the arguments developed above, a community of utility maximizing individuals would agree to protect an individual's right to read a book of his choosing, only if (1) it felt that the utility loss to an individual denied the right to read a book would generally be very large relative to the utility gain to other members of the community from this denial, and (2) the decisionmaking costs of resolving every externality conflict of this type under the unanimity rule were thought to be prohibitively high. Now this latter condition is similar to Sen's first objection to the trading of liberal rights as a way to avoid the paradox. A proposed trade, if it could be carried out would, if put to a vote of the entire community, receive unanimous support. What stands in the way of Pareto optimality in both cases are transaction/decisionmaking costs. But a move can be defined as Pareto optimal only net of the costs of making it inclusive of transaction and decisionmaking costs. Thus, it seems doubtful if the situation Sen describes (the prude reads the book, the lascivious neighbor does not) can be legitimately described as a violation of Pareto optimality. If it occurs, it is because transaction costs prevent the two individuals from effectuating a trade of their rights. But, even if it could be so described, the

description would be appropriate only in a short run sense. In the long run rights which are defined to enhance the welfare of all members of the community can never stand in the way of this objective. If a particular definition of rights always or on average blocked Pareto optimality, rational citizens would not unanimously agree to include it in the constitution.

We conclude that, in the long run, there cannot be a conflict between constitutional rights and Pareto efficiency. A society of rational, egoistic individuals will define constitutional rights so as to minimize the transaction costs in achieving Pareto optimality when individual actions could stand in the way of that outcome. Any given definition of rights may produce situations which are Pareto inferior to the situation that would have arisen under a different definition of rights. But this inefficiency must be balanced against the gains made in other situations where the achievement of Pareto optimality has been facilitated by the chosen definition of rights. It is this kind of balancing of transaction costs under alternative definitions of rights that the writers of the constitution must undertake, and their unanimous agreement on a particular definition of rights guarantees the long run Pareto optimality of these rights.<sup>24</sup>

Once again we can note that different societies will calculate the relative transaction costs involved in different social interactions differently. A society of meddlesome individuals like the two in Sen's example will agree on a different and most probably less liberal set of rights than would a society made up of D. H. Lawrences and Bertrand Russels. A society composed of a population all of which belonged to the same religion, and whose membership believed that the health of the society rested on the health of the religion, might decide to exclude explicitly books

attacking the country's religion from any constitutional rights protecting book writers, publishers, and their readers.

#### XIV. Conclusions

Much of the writing on rights presumes that there exists but a single set of rights, whose existence and character is either self-evident or capable of revelation to all upon proper reflection. Conceptualizations of rights of this type are like ethical principles and are often discussed and analyzed in a similar manner. The lack of consensus among philosophers of ethics as to a single set of ethical principles tends to belie the presumption that a single set of natural or moral rights exists. Nor does any other category of rights stand out as a possible candidate for a designation of rights that could be universally accepted.

In this paper I have concentrated on the nature of those rights that would be included in a constitution unanimously agreed to by members of a polity. Constitutions are social-political contracts defining the rules under which the polity will operate, and the rights and obligations of the citizens vis-à-vis one another and the state. These constitutional contracts arise to reduce uncertainty over how individuals and the state will behave in the future and thereby to reduce the transaction costs of achieving Pareto optimality in the various game-like social interactions individuals encounter. Constitutions can also be designed to spread exogenous risks faced by all members of the community, and thus to serve as societal insurance contracts.

We have argued that, in the absence of decisionmaking costs, citizens would never define constitutional rights. All collective decisions could be made costlessly and instantaneously using the unanimity rule. The veto each individual possesses under the unanimity rule would be the only protection of

rights that the individual would ever need. Rights, like the institution of government itself, emerge as a way to reduce the transaction and decisionmaking costs of making collective decisions.

The transaction costs required to achieve Pareto optimality in a particular context can be expected to differ from one community to another depending on the customs, traditions, and mores of the community; its choice of economic and political institutions; the size and heterogeneity of the community, and still other factors. Thus different communities will choose to delineate and protect different rights. Constitutional rights are inevitably relative in nature, relative to both the characteristics of the community and the other elements of the constitution. No single definition of rights is likely to be optimal for all communities for all time.

An important implication of this conclusion is that a society can be expected to alter over time the set of rights defined in its constitution as its characteristics change (Buchanan, 1975, p. 77). Indeed, a society might optimally institutionalize a process for reviewing and revising the definitions of rights protected in its constitution.

Perhaps unintentionally, the Founding Fathers of the United States opted for the third of the three procedural options to redefine and clarify the boundaries of constitutionally defined rights, which we discussed. The Constitution contains broad definitions of rights, and the task of amending the definitions of rights protected by the constitution to adjust for changes in the country's economic, social, and political characteristics has been largely carried out by the Supreme Court. While this method of updating the Constitution's definitions of rights does prevent them from becoming hopelessly out of date, it has failed to build the kind of support for the new definitions of rights that would exist if they had arose from a wider

consensual agreement in the society. The bitter debates and clashes among citizens over civil rights, criminal rights, and abortion illustrate the point. The result of these conflicts has been a loss of respect among some parts of the community both for those rights that have been newly defined by the Supreme Court, and for all other actions of the Court. The only way to avoid this outcome is to adopt one of the alternative procedures to review and amend the Constitution periodically. Although these procedures may appear to involve greater decisionmaking costs, they have the potential for building consensus over the newly formulated definitions of rights, new definitions that are required by changes in the social, economic and political environment, and which reflect the current values and ethical views of the community. Without such a consensus the Constitution cannot serve its function as an institution for reducing the costs of collective decisionmaking and the transaction costs involved in mitigating conflicts among citizens as each strives to advance her own welfare.

## FOOTNOTES

\*I wish to thank the Thyssen Foundation of Cologne, West Germany, for financial support.

1. Taylor, 1976; Axelrod, 1984. For a prisoners' dilemma supergame account of how rights might emerge out of anarchy, see Lomasky (1987, pp. 65-75).
2. If groups of citizens with identical tastes do not exist in the polity, i.e., no two individuals have identical tastes, no "ideal" system of representation is possible short of all citizens representing themselves. For discussion of how such ideal representation can be achieved, see Tullock (1967, ch. 10), and Mueller (1989).
3. The fraction of the population that benefits from a collective action is of course always greater than or equal to the fraction required to pass the issue. The two fractions will be positively related, however, so that nothing is lost in the analysis by assuming that they are equal, and simplicity is gained.
4. See references cited by Mueller (1989, p. 81).
5. Call  $[y + ms - (1 - m)bs]$ ,  $\underline{x}$ , and the left hand side of (3)  $\underline{z}$ . Then the sign of  $\partial m^*/\partial p$ , where  $p$  is any parameter in  $\underline{z}$ , is the same as the sign of  $\partial z/\partial p$ . From text equation (3), we then have
$$\partial z/\partial b = -a(a - 1)x^{a-2}(1 + b)(1 - m)s^2 + ax^{a-1}s > 0$$
so long as  $0 < a < 1$ .
6. Although all rights need not be thought of as actions, there are some analytic advantages in so doing. See Kavka (1986, pp. 297-8).
7. For further discussion of this kind of collective decisionmaking at the constitutional (social contract) stage see Buchanan (1975, pp. 38-73).
8. James Coleman (1990, pp. 334-41) also emphasizes the link between defining constitutional rights to act in certain ways, and the

externalities these actions generate.

9. See Sen's (1970a,b) infamous example.
10. Lacking a written constitution, the British Parliament functions as a constitutional convention when it takes up constitutional matters. Its procedures differ from the ideal ones described here, however, in that constitutional-type acts and ordinary acts of Parliament require the same, simple majority.
11. For an alternative view as to the proper role of judges on rights issues, see Dworkin (1977, ch. 5).
12. See discussion by Bickel (1962) and Ackerman (1984, pp. 1013-31).
13. One can define individual rights with respect either to the state (i.e. all other individuals acting collectively or through their agents), or to other individuals acting alone. Even with a unanimity rule in the parliament, there might be some scope for defining in the constitution the rights of private individuals vis-à-vis one another, although with zero bargaining costs all interpersonal conflicts of this type would be optimally resolved also, a la the Coase theorem.
14. For discussions of some of the various concepts of rights, see Hayek (1960, pp. 13-4, 19-20); Lyons (1982); Tarcov (1985); Hamlin (1986, pp. 52-7, 102-9).
15. For a discussion of basic (i.e. natural) rights that argues that they too are relative, see Lomasky (1987, pp. 101-5).
16. Lyons (1982, p. 108) mentions "promise keeping" as a moral action.
17. Indeed, individualism is a more attractive normative postulate upon which to construct a contractarian ethics, as I have recently attempted to demonstrate (1989b). In that essay I also demonstrate that this individualistic-contractarian ethics is actually inconsistent with "naive" forms of utilitarianism that see social institutions as being

chosen to maximize some social welfare function that aggregates individual utilities.

18. See discussion by Hart (1961, pp. 97-107).
19. Compliance was one of the important goals Rawls hoped to achieve from the unanimous agreement to the social contract in the original position (1971, pp. 112ff., 344-8).
20. Although this suggestion will strike many readers as rather novel, it is a proposal once advanced by Thomas Jefferson (1816).
21. Rawls (1971) argues that consensus on the attributes of the social contract will be achieved as a result of a self-imposed uncertainty over future positions that occurs when individuals voluntarily place themselves in an original position of equality behind a veil of ignorance.
22. For a discussion of welfare rights that bears some resemblance to the argument put forward here, see Lomasky (1987, pp. 85-100).
23. Buchanan and Tullock (1962, ch. 8) argue that the uncertainties inherent in the setting in which the constitution is written will lead individuals acting in their own self interest to include redistributive provisions in the contract. Rawls (1971) argues that individuals ought to assume that they are uncertain about what their future economic positions will be when choosing redistributive principles to include in a hypothetical social contract to which they all agree. Any society of individuals who were persuaded by the arguments of Rawls, or analogous arguments like those of Harsanyi (1955), would choose for ethical reasons to include certain economic guarantees into the constitution.

24. In several places Sen has criticized "welfarism" and other utilitarian constructs, and it would seem in some of his discussions of liberalism that he believes that liberal principles, as stated in the quote of his above, should be based on nonutilitarian/nonwelfarism criteria. As noted in our discussion of moral rights in Section VIII, it is difficult to contrast our utility-based concept of constitutional rights with nonutility-based constructs. It would also seem, however, that once one derives a justification for a right independently from the utilities (welfare) of members of the community, the appearance of a conflict between the exercising of this right and a principle like Pareto optimality, which is directly linked to individual welfare levels, is not particularly paradoxical.

## REFERENCES

- Ackerman, Bruce A., "The Storrs Lectures: Discovering the Constitution," Yale Law Journal, 1984, 93, pp. 1013-72.
- Axelrod, Robert. The Evolution of Cooperation, New York: Basic Books, 1984.
- Bickel, Alexander, The Least Dangerous Branch, Indianapolis: Bobbs-Merrill, 1962.
- Breyer, F., "Sen's Paradox with Decisiveness over Issues in Case of Liberal Preferences," Zeitschrift fu"r Nationalökonomie, 1977, 37(1-2), pp. 45-60.
- Buchanan, James M., The Limits of Liberty: Between Anarchy and Leviathan, Chicago: University of Chicago Press, 1975.
- \_\_\_\_\_ "An Ambiguity in Sen's Alleged Proof of the Impossibility of a Pareto Libertarian," mimeo, Blacksburg, 1976.
- Buchanan, James M. and Tullock, G. The Calculus of Consent, Ann Arbor: The University of Michigan Press, 1962.
- Bush, W.C. and Mayer, L.S., "Some Implications of Anarchy for the Distribution of Property," J. Econ. Theory, August 1974, 8, pp. 401-12.
- Coleman, James S. Foundations of Social Theory, Cambridge: Harvard University Press, 1990.
- Dahlman, C.J., "The Problem of Externality," Journal of Law and Economics, April 1979, 22, pp. 141-62.
- Dworkin, Ronald, Taking Rights Seriously, Cambridge: Harvard University Press, 1977.
- FitzRoy, Felix, R., and Mueller, Dennis C., "Cooperation and Conflict in Contractual Organizations," Quarterly Review of Economics and Business, Winter 1984, 24, pp. 24-49.
- Fried, Morton. The Evolution of Political Society, New York: Random House, 1967.
- Fuller, Lon L., "Human Interaction and the Law," in Winston, Kenneth L., ed., Social Order, Durham: Duke University Press, 1981, pp. 211-46.
- Gibbard, A., "A Pareto-Consistent Libertarian Claim," J. Econ. Theory, April 1974, 7, pp. 388-410.
- Goldwin, Robert A., and Schambra, William A., "How Does the Constitution Secure Rights," Washington: American Enterprise Institute, 1985.
- Hamlin, Alan P. Ethics, Economics and the State, New York: St. Martin's Press, 1986.

- Harsanyi, J.C., "Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility," J. Polit. Econ., Aug. 1955, 63, pp. 309-21, reprinted in Arrow and Scitovsky [1969, pp. 46-60].
- Hart, H.L.A. The Concept of Law, Oxford: Clarendon Press, 1961.
- Hayek, Friedrich A., The Constitution of Liberty, Chicago: University of Chicago Press, 1960.
- Hobbes, T. Leviathan, London, 1651. Reprinted in The English Philosophers, New York: Modern Library, 1939, pp. 129-234.
- Jefferson, Thomas, "Letter to Samuel Kercheval," July 12, 1816, reprinted in A. Koch and W. Peden, eds., The Life and Selected Writings of Thomas Jefferson, New York: Modern Library, 1944, pp. 673-6.
- Kavka, Gregory S. Hobbesian Moral and Political Theory, Princeton: Princeton University Press, 1986.
- Kelly, Jerry S., "Rights Exercising and a Pareto-Consistent Libertarian Claim," J. Econ. Theory, Aug. 1976, 13, pp. 138-53.
- Lomasky, Loren E. Persons, Rights, and the Moral Community, Oxford: Oxford University Press, 1987.
- Lyons, David, "Utility and Rights," Nomos, 1982, 24, pp. 107-38.
- Mueller, Dennis C., "The Social Contract and Collective Choice," in Karl W. Roskamp, ed., Proceedings of 1978 IIPF Congress, Paris, Cujas, 1980, pp. 55-67.
- \_\_\_\_\_, Public Choice II, Cambridge: Cambridge University Press, 1989a.
- \_\_\_\_\_, "Individualism, Contractarianism, and Morality," Social Justice Research, March 1989b, 3, pp. 1-19.
- Nath, S.K., "Liberalism, Pareto Principle and the Core of a Society," University of Warwick, 1976.
- Radner, Roy, "Competitive Equilibrium Under Uncertainty," Econometrica, January 1968, 36, pp. 31-58.
- Rutland, Robert A., "How the Constitution Protects Rights: A Look at the Seminal Years," in Goldwin and Schambra, 1985, pp. 1-14.
- Sen, Amartya K., Collective Choice and Social Welfare. San Francisco: Holden-Day, 1970a.
- \_\_\_\_\_, "The Impossibility of a Paretian Liberal," J. Polit. Econ., Jan./Feb. 1970b, 78, pp. 152-7.
- \_\_\_\_\_, "Liberty, Unanimity and Rights," Economica, Aug. 1976, 43, pp. 217-45.
- \_\_\_\_\_, Choice, Welfare and Measurement, Cambridge: MIT Press, 1982.

\_\_\_\_\_, "Foundations of Social Choice Theory: An Epilogue," in Elster and Hylland, 1986, pp. 213-48.

Shue, Henry, "Subsistence Rights: Shall We Secure These Rights?" in Goldwin and Schambra, 1985, pp. 74-100.

Storing, Herbert J., "The Constitution and the Bill of Rights," in Goldwin and Schambra, 1985, pp. 15-35.

Tarcov, Nathan, "American Constitutionalism and Individual Rights," in Goldwin and Schambra, 1985, pp. 101-25.

Taylor, Michael J., Anarchy and Cooperation, New York: Wiley, 1976.

Williamson, Oliver E., Markets and Hierarchies, New York: Free Press, 1975.