

Ulysses and the rent-seekers

The benefits and challenges of constitutional constraints on Leviathan

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Abstract. A constitutionally constrained government may be viewed as an attractive arrangement in that it may limit the rent-seeking behavior by narrowly motivated special interest groups and instead support policies of a Pareto-improving character. However, the introduction of constitutional constraints may themselves turn out to be problematic, since institutional solutions to suboptimal arrangements presuppose that the agents are capable of overcoming problems of the very nature that the solutions are intended to overcome in the first place. This makes it unlikely that general interest promoting constitutional constraints on governments will be successfully adopted.

[A]fter this example of Ulysses, kings often instruct judges, to administer justice without respect of persons, not even of the king himself ... For kings are not gods, but men, who are often led captive by the Sirens' song.

Baruch de Spinoza, *Political Treatise* (1677)

1. Introduction

In recent decades Homer's millennia old story of Ulysses and the Sirens has become a popular and frequently used metaphor for illustrating the importance of institutions, not least constitutional ones (cf., e.g., Elster 1985; Finn 1991: 3ff; Elster 2000; Zakaria 2003: 7 & 250). In one retelling the story goes like this:

The Sirens were sea-nymphs who had the power of charming by their song all who heard them, so that the unhappy mariners were irresistibly impelled to cast themselves into the sea to their destruction. Circe directed Ulysses to fill the ears of his seamen with wax, so that they should not hear the strain; and to cause himself to be bound to the mast, and his people to be strictly enjoined, whatever he might say or do, by no means to release him till they should have passed the Sirens' island.

Ulysses obeyed these directions. He filled the ears of his people with wax, and suffered them to bind him with cords firmly to the mast. As they approached the Sirens' island, the sea was calm, and over the waters came the notes of music so ravishing and attractive that Ulysses struggled to get loose, and by cries and signs to his people begged to be released; but they, obedient to his previous orders, sprang forward and bound him still faster. They held on their course, and the music grew fainter till it ceased to be heard, when with joy Ulysses gave his companions the signal to unseal their ears, and they relieved him from his bonds.¹

* The present paper is intimately related to and draws upon a set of other papers of mine (e.g. Kurrild-Klitgaard 1998; Kurrild-Klitgaard 2001; Kurrild-Klitgaard 2002a; Kurrild-Klitgaard 2002b); I am grateful to those who commented on these papers, in particular Niclas Berggren, Otto Brønson-Petersen, Lars Christensen and Stefan Voigt. All the usual reservations apply.

¹ Thomas Bulfinch, *The Age of Fable or Stories of Gods and Heroes*, here quoted after Zakaria 2003: 7.

When told by constitutional theorists the story is typically used as an illustration of the general point that the adoption of institutional constraints that will limit what actions actors may take down the road, may guarantee that actors do not give into temptations they might otherwise come to regret. Specifically, that it may be preferable to give up some degrees of freedom of action (especially for individuals) in order to be able to realize long-term benefits for all.

When told as such the story is charming, enlightening and fitting.² However, it may also be the case that it just is a little too easy. Why? To answer with another, quite abstract question: What if the solution proposed as the *necessary* solution simultaneously is one, which *cannot* be implemented? Or to phrase it more in the practical terms of the story: What if Circe had not been present to suggest the idea to Ulysses in the first place? Who provided the wax? Could Ulysses force the sailors into using the wax? What if the sirens' song was so loud that the wax was not enough? What if the ropes were not strong enough to tie Ulysses? What if some of the sailors had responded to Ulysses' insistence that he be released? Etc., etc.

The present paper will try to address the underlying problem, which these questions illustrate. In the following we will, first, through the use of arguments from contractarian thought summarize what the proponents of constitutional liberalism generally see as being at least some of the advantages of the imposition of constitutional constraints on government (section 2), then subsequently outline what some relevant examples of such constraints may be (section 3), and subsequently give a logical argument for why constitutional constraints may be difficult or impossible to implement (section 4). Finally, we will discuss whether some constitutional constraints may be easier to implement than others (section 5).

2. The attractiveness of constitutional liberalism's order

One of the most outstanding constitutional thinkers ever, James Madison, formulated what has since been termed the *Madisonian Dilemma*, i.e., that constitutional framers are faced with a tough decision in so far as they, on the one hand, need to empower a government so as to be strong enough to take on the tasks deemed to be necessary, but that they also, on the other hand, simultaneously need to tie the hands of government in such a way that it will not become tyrannical. Madison formulated it as such in a rightly famous passage:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. (Madison, *Federalist* no. 51, in Hamilton, Jay and Madison [1787] 2001: 269)

² It was indeed quite natural for the journal *Constitutional Political Economy* to adopt a logo depicting Ulysses tied to the mast, when the journal was launched in 1990, cf. Brennan and Kliemt 1990. One of the first to connect the story of Ulysses and constitutional design may have been Spinoza.

The tough questions thus become (1) what tasks are considered to be essential to be undertaken by governments, and (2) how to tie the hands of government, including how tightly to tie them. While quite general, the Madisonian Dilemma thus is a challenge closely related to the more specific notion of *constitutional liberalism*.³ In this tradition the ideal constitutional order may, somewhat simplified, be seen to be one where the government is effectively and relatively tightly constrained in what activities it may legitimately undertake. The emphasis, so to speak, is more on the second part of the Madisonian Dilemma than on the first. The underlying premise is that the more that individuals—alone, through the market or the institutions of civil society—are left free to use their persons and property to pursue their own happiness within the constraints of the recognition of similar rights to others, the better the results for society as a whole. On the other hand, if the political system is one where interest groups are permitted to influence government decision-making to such a degree that they are capable of directing decision-making to their own narrow benefit rather than in the general interest, then it will be expected that the results will be harmful to society as a whole. In the following sub-sections this line of reasoning will be elaborated in greater detail so as to highlight the possibilities of constitutional design.

2.1. The contractarian analysis of constitutional costs and benefits

A constitution is a comprehensive set of fundamental rules regulating the relations between individuals in a society through various institutions, and where these rules have consequences for the relative costs and benefits of making choices. Specifically, the design of a constitutional set-up involves choices concerning what may be called (1) *substantial rules*, i.e. rules for the allocation of resources, tasks, etc., and (2) *procedural rules*, i.e. rules for how decisions are to be made (e.g., including the general structure of government, separation of powers, electoral system, etc.).⁴ When making constitutional choices, it is thus decided both what tasks can, must and may not be solved through government action, as well as how future decisions must be made. In fact, the very feature of constitutions restraining what government officials may do is probably *the* defining feature of a constitution (cf. Friedrich 1950: Ch. 7; Hayek 1960: Ch. 12).

One central insight of constitutional economics going back to at least the dilemma identified by Madison is that constitutional arrangements may either support solutions tending to be mutually advantageous or solutions tending to be advantageous for some and harmful for others (or for that sake arrangements which will be harmful to everyone). In order to analyze such welfare consequences of

³ For works in this tradition, see, e.g., Hayek 1960; Buchanan [1975] 1999; Epstein 1995; Barnett 1998; cf. Zakaria 2003.

⁴ For this distinction, see, e.g., Buchanan 2000; cf. Hayek 1960: 178. Substantial rules operate directly on the content of decisions; for example, a constitution may specify that certain decisions may not be made (e.g. capital punishment), or that certain decisions must be made in particular situations. Procedural rules operate directly on the way of making decisions, but only indirectly on their content; an example is a requirement of qualified majority in collective decision-making, e.g., among legislators and/or votes when changing a constitution.

alternative constitutional arrangement we may utilize a so-called “state-of-nature” for analytical purposes, such as it has been done since the classical contractarian philosophers such as Hugo Grotius, Samuel von Pufendorf, Thomas Hobbes and John Locke.⁵

A state-of-nature is a representation of a social condition where persons interact in the absence of rules, and subsequently compare this to the interaction where a constitution is in place, and the essence of such a contractarian analysis has been to show that a social condition without any central authority would be so undesirable in terms of some generally accepted standard that everybody would prefer the creation of a political authority. Of the classical contractarians Hobbes and Grotius, e.g., identified “peace,” understood as domestic social order, security of property rights and defense against external aggression, as what today would be termed a “public good”—and one of a quite fundamental kind, since without it most other “goods” would not be possible (at least in the long run). Pufendorf similarly identified the promotion of “sociality,” understood as cooperation and mutual respect for rights, as the “fundamental natural law,” since that was what would enable men to successfully pursue other ends. Finally, Locke identified “justice,” understood as the lack of violations of the individual’s natural right to freely pursue his self-preservation through the use of his property, as a “public good.”⁶ For more contemporary contractarians the over-all public goods are usually identified with wealth or some conception of welfare.

But, these theorists have argued, in a “state-of-nature,” where there is assumed to be nothing to make individuals pursue “peace,” “sociality” or “justice,” etc., other than their own self-interest, individuals will have a choice not between outcomes but between strategies for how to act. In Hobbes’ state-of-nature an individual would have a choice between a strategy of “peace” and one of “war,” and in Locke’s state-of-nature transformed into a state-of-war, he would have a choice between respecting the natural rights of others or of violating these. Let us for the present purposes assume that “peace” or “justice” are synonymous with the respect of established property rights of others; in that case the possible choice-sets of the individuals can be subsumed under two general strategies: Respecting or violating property rights.⁷

This situation may, as it has often been done in recent decades, be illustrated by the use of some simple games.⁸ The matrix in Figure 1 depicts the strategic situation faced by two individuals in a state-of-nature, i_1 and i_2 , and their available strategies, the possible outcomes and the relative preference orderings over these by

⁵ More contemporary philosophers working in the contractarian tradition include, e.g., Buchanan and Tullock [1962] 1999; Buchanan [1975] 1999; Gauthier 1986; Binmore 1994, etc.

⁶ On these points, see, e.g., Hobbes [1651] 1991, Chs. 13-15: 86-111; Pufendorf [1673] 1991, I, Ch. 3, §§7-9: 35-36; Locke [1690] 1988, II, §17: 279.

⁷ Cf., e.g., Pufendorf [1672] 1934, VI: Ch. 4; Locke [1690] 1988, II: Chs. 2-3.

⁸ The first of the games is familiar and widely used in constitutional economics, cf., e.g., Buchanan 1975: 26-28, 64-68; Buchanan and Congleton [1998] 2003: 23; Kurrild-Klitgaard and Berggren 2004. For similar uses of the Prisoners’ Dilemma game to illustrate the fundamental character of the interaction of the state-of-nature, see, e.g., Hampton 1986: 61-63; Kavka 1986: 109-12. Both games used here appear in Kurrild-Klitgaard 2001.

the respective players. Specifically, the two each have the choice between two strategies: To steal from the other (s) or not to steal (s'). This produces four possible outcomes, depending on the combination of individual actions and corresponding to the cells ($a-d$) of the matrix, where the numbers reflect the preference orderings of the individuals, with i_1 's in the lower left corners and i_2 's in the upper right corners, and with 1 being the most highly preferred outcome and 4 being the least preferred.

				i_2
		s'	s	
i_1	s'	a 2	b 4	1
	s	c 1	d 3	3

Figure 1. Interaction in a state-of-nature/rent-seeking without an efficient constitution.

If the costs associated with stealing are less than the resulting benefits, the individual actor's most preferred outcome is where he himself steals, while the other remains passive, corresponding to the outcomes (s, s') and (s', s) for individuals i_1 and i_2 respectively. In contrast, an actor's least preferred outcome is where he himself remains passive while the other steals, i.e., corresponding to the outcomes (s', s) and (s, s') for i_1 and i_2 respectively. Since stealing also carries some costs with it, it is probable that both actors prefer an outcome in which they both remain passive and respect each other's rights (s', s') to one, where they both steal (s, s).

This portrayal of the interaction in a state-of-nature is fundamentally identical to the infamous "Prisoners' Dilemma" game, which in recent decades has become by far the most popular way to illustrate the problems facing individuals in a state-of-nature.⁹ The strategy s strictly dominates the strategy s' , and hence both actors will choose that action and thus produce the outcome (s, s) despite the fact that this outcome is less preferred by both actors than the outcome (s', s') . This is so since the structure of the preferences means, that any individual, who in this situation unilaterally chooses to respect the property rights of others will open himself up to—and be submitted to—predation. It also means that the rational strategy for each individual is to choose not to respect property rights, and to do so no matter what strategy other individuals might choose, and thus that the equilibrium is an outcome, where nobody respects property rights, namely (s, s) in cell d .

⁹ See, e.g., Barry [1965] 1990: 253-54; Tullock 1974: 2, 11-16; Buchanan 1975: 26-28, 64-68, 130-46; Hampton 1986: 61-62, 75-93, 132-39, 225-32; Kavka 1986: 109-13, 124-40, 146-47, 154-56, 245-46; Schmidtz 1991: 57-85. Rawls also uses the Prisoners' Dilemma in order to illustrate the argument for government provision of public goods (Rawls 1971: 269). It is also often used in reviews of contractarian arguments in order to illustrate these, cf., e.g., Green 1988; Kraus 1993.

In other words: Both individuals choose to steal from the other, and the consequence is a sub-optimal outcome for both parties, and this is an equilibrium where no actor will have an incentive to unilaterally change his behavior. We may compare such a situation to the Hobbesian vision of a state-of-nature, where nobody will engage in productive efforts but instead only in mutual exploitation, and where the familiar result is that “life of man” is “solitary, poore, nasty, brutish and short.” (Hobbes [1651] 1991, §62: 88-89).¹⁰

If the interaction between the two individuals is repeated over time, then some mutual recognition of and respect for property rights might evolve as a norm, but with symmetric preference orderings, no external sanctions imposed for violations, attempted utility-maximization and shortsightedness, the interaction will have the character of a single-play game. Specifically, in the absence of any enforcement mechanism it will be irrational for any individual to perform his part of a contractual obligation first.¹¹

This situation may be generalized into the generation of a “war of all against all” for at least two reasons. First, the situation is one common to *all* individuals faced with any human interaction in the state-of-nature, since all action necessarily involves the use of scarce resources and hence property rights in some form. It will in other words not only characterize the interaction of some particular two individuals, but potentially all the interaction of all individuals. Second, any suggested solution to these forms of interpersonal conflicts will itself constitute a collective action problem, because the protection of rights itself is a public good. For while all members of society in principle may agree that they would all be better off if they respected each others’ rights, there is a latent conflict between what is individually rational and collectively optimal when it comes to actually voluntarily providing the public goods of “peace” and “justice.” If for example the securing of “peace” or “justice” is simply seen as the outcome of the individuals voluntarily changing their behavior from violating each others’ rights to respecting these, and if there are no changes in the preferences of the individuals, then the choice-set of the separate individual will nonetheless still be that of the bi-matrix of Figure 1. That is, no individual has an incentive to unilaterally produce the public good, and nobody can trust anyone else’s promises to do so.

2.2. The constitutional solution

In the contractarian literature the standard approach then is to contrast the predicted negative aspects of a state-of-nature with a constitutional solution that stipulates certain rights in the form of what previously was called substantial rules, i.e. rules regulating who are permitted to perform specific action regarding the allocation of resources, and where these are enforced through the application of sanctions (or rewards) in order to encourage respect for the rights. This could, for

¹⁰ See, e.g., Tullock 1974; Buchanan 1975 for some modern statements of this analysis in a public choice perspective. For some reservations as to the universal usefulness of the Prisoners’ Dilemma as a portrayal of a state-of-nature, see, e.g., Kurrild-Klitgaard 2002b.

¹¹ See, e.g., Hobbes [1651] 1991, §68: 96-97. See also Hampton 1986: 62-63.

example, be by specifying and enforcing property rights or relate to the supply of other, supposed public goods, and where the consequence is a situation such as in the matrix of Figure 2. Here the stipulation of rights and the threat of sanctions has raised the costs of stealing beyond the benefits, and the outcome is that both actors most of all prefer the possibility where none of them steals (s', s'), while they least prefer the outcome where they both steal (s, s). Between these two extremes are the outcomes (s, s') and (s', s); if the costs of stealing are sufficiently large, i_1 will prefer the latter to the former, while i_2 will have the opposite preference ordering. In this case the outcome is (s', s'), which is the only equilibrium of this new game, i.e., both individuals will now abstain from behavior producing sub-optimal outcomes. With such a solution, if successful, we may envision the possibility that the mutual recognition of property rights will have positive long-term consequences for all parties, etc.

				i_2	
				s	
i_1	s'	a	1	b	3
		1		2	
	s	c	2	d	4
		3		4	

Figure 2. Interaction after a constitution/rent-seeking with an efficient constitution.

The two situations described here have both been captured in the diagram in Figure 3. Here i_1 's and i_2 's utility have been displayed along the x - and y -axis respectively, so that every outcome may be represented by a set of coordinates for the individual utilities of both actors, while the point q represents status quo. A broken line connects the four points representing the possible outcomes thus constructing the rhomb-shaped figure, which represents the range of possible outcomes of the present game.

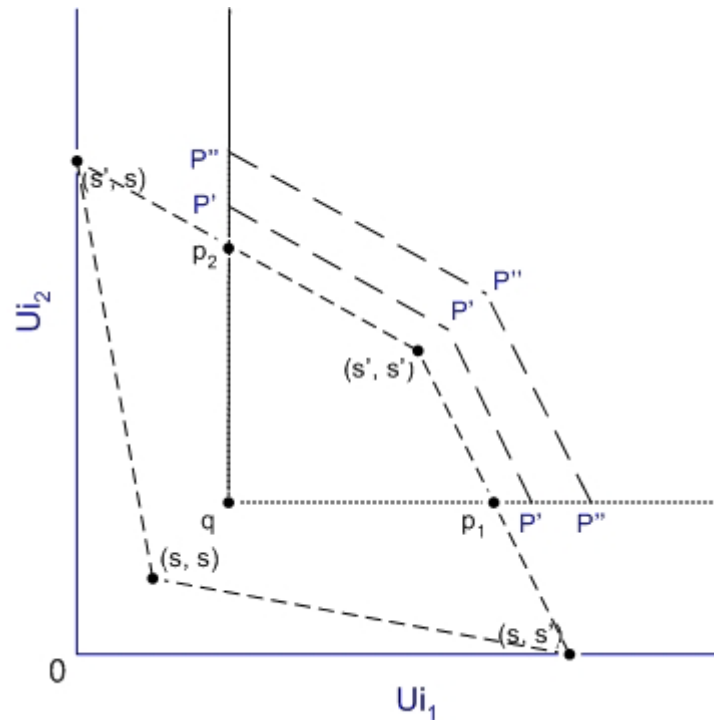


Figure 3. The potential benefits of a constitution.

The dotted lines extending from q represent the lower border for the Pareto set, i.e., that part of the set of possible outcomes, where no individual can be made better off without someone else being made worse off. As long as the two actors remain in a point outside this set, e.g., in the point q or at the point (s, s) , they are in a sub-optimal situation, where they can both become better off.

The institutional challenge is thus to create an arrangement, which may bring the parties to a point on the Pareto frontier—or perhaps, in a longer perspective, to a point on the curves P' or even P'' , which may be seen as representing two potential, more long term Pareto frontiers. However, the problem is to establish just what institutional arrangements will guarantee what outcomes, and what the long-term consequences will be. For while (s', s') is an obvious goal, it is also the case, that—even if consideration is limited to the Pareto set— i_1 will prefer that the end result is as close as possible to his own most favored point (s, s') , while i_2 in contrast will prefer an outcome as close to his ideal point as possible (s', s) . So even though both individuals will be better off at any point to the “North-East” of the lines extending from q , there is still potentially a redistributive conflict as to whether the constitution shall promote outcomes such as, e.g., p_1 or p_2 . What the outcome of such a conflict will be, and whether it will be within the Pareto set at all, will depend crucially on the constitutional arrangement, and this is obviously itself an object for choice.

2.3. *Rent-seeking*

The setting sketched here makes it possible to consider how alternative constitutional arrangements may have different consequences, depending on, e.g., the types of collective goods produced, the decision rules used and the types of rights assigned to individuals. However, for the present purposes we will only look at institutional arrangements that are inefficient when it comes to reaching a socially desirable outcome.

If an institutional solution is produced, which will be able to move a society from a sub-optimal condition to one or more preferable alternatives, it will represent the creation of a welfare gain benefiting all. However, this will also constitute a potential “rent,” i.e., a profit derived from a transfer. If, for example, we consider Figure 3 and assume that the actors find themselves at point q and have the possibility to move “inside” the Pareto set, e.g., to point p_1 or p_2 , there will exist potential benefits to be reaped corresponding to the distance between these points to q .

But where there are rents to be reaped, there will also be *rent-seeking* behavior, i.e., actors with an incentive to invest resources in transferring these rents to themselves (Tullock 1967; cf. Tullock 2005). An example is special interest groups who are willing to invest resources in engaging in organization building, lobbying, bribes, etc., in order to convince legislators, bureaucrats, voters and other special interest groups that as much as possible of the created welfare gain should be distributed to them, e.g., so that the policy becomes p_1 rather than (s', s) .

Such rent-seeking may not only occur, when the actors collectively are faced with a potential or realized welfare gain to be reaped, i.e., when the realm of action is inside the Pareto set. No matter at what point to the left of the contract curve in Figure 3 the status quo is, other than the outcomes (s', s) and (s, s') , at least one player could be made better off and hence would be willing to seek rents.

But the problem with rent-seeking is not only the distributive issue of who gets what, but rather also—as Tullock pointed out—that the process itself may result in welfare losses. Special interest groups will be willing to invest time and other resources in capturing the rents, and this is unproductive; such investments do not create new welfare gains but only transfer resources from one group to another while wasting something on the way.

A further point, when we move beyond the simplified two-person game, is that most likely will be more than one group potentially interested in investing resources in such unproductive activities, and yet others who will be willing to do the same to prevent this from happening. Moreover, for each special interest group willing to invest in seeking rents, or preventing others from doing so, the welfare gains will be reduced, and for that reason the total losses may together be many times larger than the amount of resources redistributed. It is thus possible that any potential welfare gains produced not only will be lost but that the outcome actually will be far outside the Pareto set.

Rent-seeking may thus create a rather unattractive situation, which can be illustrated with the two games previously used to illustrate interaction in a state-of-nature and with a constitution respectively (Figure 1 and Figure 2). Let us assume

that Figure 1 rather than a state-of-nature represents two special interest groups, i_1 and i_2 , which each have the choice between either seeking rents (transfers, subsidies, privileges, etc.) through a political process (s), or alternatively not do so and instead invest the resources in, e.g., production and trade (s'). If the costs associated with rent-seeking are less than the rents to be reaped, the individual group will most of all prefer a situation, where it seeks rents itself and lets the costs be absorbed by others (taxpayers, consumers, etc.), while others remain passive, i.e. (s', s) and (s, s') respectively for two special interest groups. If the special interest group knows that the rent-seeking behavior by others will impose collective costs, it will likely prefer a situation where nobody seeks rents (s', s') to one, where everybody does so (s, s) .¹² This is a situation fundamentally identical to that of the Prisoners' Dilemma, i.e., where the outcome is the collectively unattractive (s, s) .

The likelihood that special interest groups will be mobilized and seek rents and will be successful is, *ceteris paribus*, likely to be greater the more asymmetric the rents are, i.e., the more concentrated the benefits and the more dispersed the costs (cf. Olson [1965] 1971). The more they are able to do so, the larger we should expect the resulting welfare-losses to be. This then suggests that societies with constitutional orders that do not constrain governments so as to efficiently prevent rent-seeking may end up going down a road of welfare-losses.

2.4. *The Madisonian balance*

The insights sketched in the previous subsections are not new as such. James Madison early on recognized that behavior where different groups fight it out for a concentrated political power in the absence of constitutional restraints in fact may come to resemble a warlike state-of-nature.¹³ In other words, he recognized that there were potential collective benefits from enforcing order, but also that the creation of that order in itself also makes it possible to produce policies resulting in sub-optimal decisions.

One way of illustrating the reasoning of this Madisonian perspective is through a reformulation of what has been more widely known as the *Laffer curve*, i.e. the notion, named after Chicago economist Arthur Laffer, that government income will not be increasing steadily with increases in taxation levels, but that beyond a certain point higher taxes will lead to avoidance of taxation and reduced activities to such an extent that government revenue actually will begin to decline; in this perspective government revenues may actually peak at lower levels of taxation rather than higher.¹⁴ Inspired by this, the economist and politician Dick Armeij formulated what has subsequently been called the *Armeij curve*, extending this kind of reasoning

¹² This is, however, not a necessary assumption: If i_1 's costs from i_2 's rent-seeking are infinitely small due to a radical asymmetry between collective costs and private benefits, then the payoffs from the two outcomes may plausibly be such that $(s, s) > (s', s')$ rather than the reverse. However, this does not change the outcome; indeed, it only makes rent-seeking even more dominant as an individual strategy and extensive rent-seeking and redistribution more likely as the outcome.

¹³ See Madison, *Federalist* no. 51, in Hamilton, Jay and Madison [1787] 2001.

¹⁴ For a recent restatement and application of the Laffer Curve, see, e.g., Laffer 2004.

to the relationship between government spending (e.g., as percent of total production) and its consequences for income per capita. The reasoning here is that higher levels of government spending in the long run will lead to reduced incentives for production, crowding out effects, etc. (Armey 1995; Vedder and Gallaway 1999: 102-3). We may formulate this even more generally in terms of government intervention as such (including any kind of both regulation and redistribution), i.e., as the hypothesis that some enforcement of property rights, etc., and the production of some public goods, conceivably may lead to increased economic activities, increased incomes, etc., but only up to a certain point. If rent-seeking special interest groups manage to influence government decision-making in such a way that it extends beyond that and becomes more extensive, it will lead to growth retarding policies, etc. Indeed, if all decisions in a society were completely collectivized, individuals would stop having any incentive whatsoever to be productive, and there would—as Thomas Hobbes characterized a quite different social condition—be “no place for Industry; because the fruit thereof is uncertain: and consequently no Culture of the Earth; no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society ...” (Hobbes [1651] 1991, §62: 88-89).

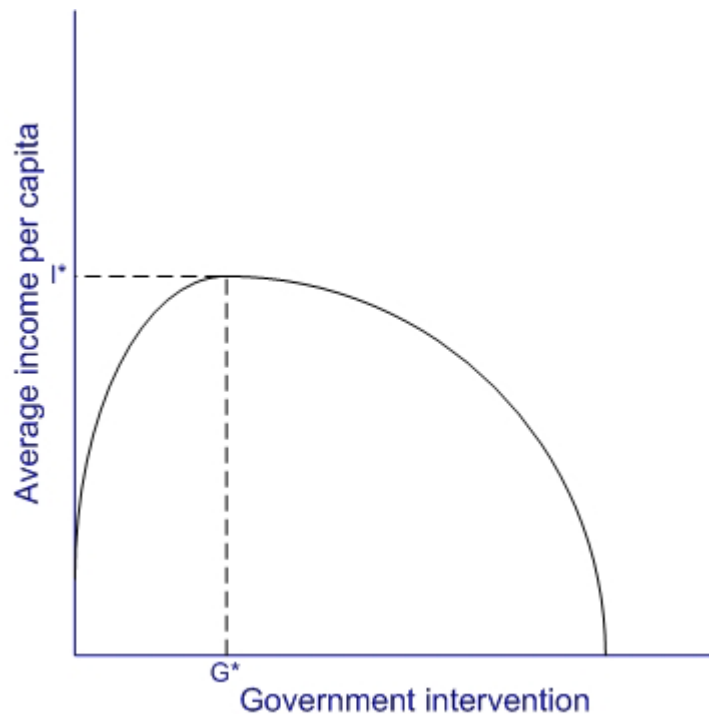


Figure 4. A variation of the Laffer-/Armey-curves: Hypothesized relationship between levels of government intervention and average income per capita.

This logic has been illustrated in Figure 4, where the over-all extent of government intervention (taxes, regulation, etc.) is displayed along the horizontal axis (G), whereas the average income of the citizens (e.g. measured in dollars) is given by the vertical axis (I). If the purpose of collective decision making is to maximize prosperity, then in this scenario the challenge will be to develop a constitutional structure that will bring about collective choices inducing conditions to as close as possible to the point on the curve matching G^*/I^* .

This raises a number of interesting questions, when seen in the perspective of a constitutional liberalism. The first and most important of these are, of course, whether the relationship at all is as hypothesized, and if so how the curve slopes and where it peaks. This is, of course, by no means clear *a priori* but must ultimately remain a question to be estimated empirically. A second interesting question is what *types* of constitutional structures will be able to induce the level of government intervention to reach a point as close as possible to G^* , i.e. what types of constitutional arrangements will be able to effectively constrain governments to such an extent that the most positive consequences will follow. In the following we will briefly consider these two sets of questions.

3. Taming Leviathan?

The previous analysis indicates that if one wants to induce growth and prosperity in a society and to keep taxes low, then a wise strategy would be to seek to constrain governments and anchor liberties severely in the constitutional order. But how to do this? Given the previous points, the obvious question would then be how to construct a constitutional arrangement, which supports a situation between individuals in a society which is more reminiscent of that in Figure 2 than that of Figure 1 and which will permit a society to reach a condition matching the point (s' , s') in Figure 3 or the point on the curve in Figure 4 corresponding to I^* .

In order to consider this, let us again consider Figure 3 and keep in mind the previously made distinction between procedural rules and substantive rules; given this we may distinguish between two types of constraints on government aiming at limiting the power of those acting on behalf of governments to exercise power arbitrarily: *procedural constraints* and *substantive constraints*.

3.1. Procedural constraints

Procedural constitutional constraints are rules that aim at restraining governments and their agents (or does so as a consequence), not by prohibiting or mandating particular actions as such, but by stipulating particular procedures for how to make decisions and do so in a way which will tend to limit how many or what types of actions that are taken (relative to what would be the case without such procedural constraints). Procedural constraints thus function by operating directly on the way of making decisions, but only indirectly on their content.

Procedural rules generally speaking, as well as procedural constraints in the sense just outlined, are plentiful in most constitutional orders, and in fact it is difficult to imagine any constitution worth the name that does not impose procedural constraints of some kind. Even an absolutist constitution granting all ultimate decision-making power to one person or one body will typically have some rules that stipulate who can make what decisions when; for example, autocrats will often be indirectly limited through rules governing their succession, just as an almost unlimited parliament such as the British has numerous rules of procedure regulating its procedures.¹⁵

However, the types of constraints typically associated with a constitutional liberalism are those constraints, which introduce various forms of *veto players* into a constitutional structure. A veto player is an individual or collective actor whose agreement is necessary for changes in the status quo, i.e. an actor who can veto collective decisions under certain circumstances (cf. Tsebelis 2002). If we consider Figure 3 such a procedural rule may be seen as being one that requires that the preferences of some agent (or agents) are taken into consideration when making a decision, thereby making that agent a veto player; for example that q is the status quo and that i_2 is the decision-maker but that she will need to get consent from i_1 in order for decisions to come into effect. In that case policies outside the Pareto-set will be prevented from being adopted, even if closer to (s', s) than q . The consequence of introducing more such veto players into a constitutional set-up is, first and foremost, that the set of feasible outcomes become limited to Pareto-improving moves. In practical terms, such constitutional veto players may, for example, be more chambers in a parliament, a supreme court or constitutional court with the power of judicial review, a president with veto powers, a requirement that certain types of decisions must be submitted to a referendum, etc.¹⁶ It is widely accepted that larger number of institutionalized veto players will serve to induce stability and promote Pareto-improving outcomes (Hammond and Miller 1987).

Another type of procedural constraints is where a *separation of powers* takes place, and where authority is granted to some individuals with regard to making decisions within certain spheres of collective decision making. Examples of such are, e.g., a horizontal separation of powers within a government (e.g., between a legislature and an executive) or a federal structure with a vertical separation of powers between units in a hierarchy. In this case the constraint does not come in the form of inducing exclusively Pareto-improving relationships but rather by dividing the realm of social choice into separate domains.

In addition, there are a vast number of other types of procedural constraints, which do not fit neatly into categories, e.g., “sunset” provisions for when existing legislation will expire, legislative term-limits regulating the number of terms that

¹⁵ Cf. Kurrild-Klitgaard 2000; Kurrild-Klitgaard 2003.

¹⁶ Not all veto players in a political system are necessarily constitutional veto players. For example, in a parliamentary system a coalition partner in a government coalition may be a veto player, but will not be a constitutional veto player since the party’s position is not stipulated by the constitution.

politicians may be elected to serve, requirements of super-majorities in parliamentary decisions or referendums, etc., etc.

3.2. *Substantive constraints*

Substantive constitutional constraints on governments are rules that seek to limit what governments may legally do by explicitly stipulating what they may not do. Substantive constraints thus work more specifically on the content of the policies, rather than simply on the procedures; as such they are more explicit and perhaps less open to reinterpretation, but they also require external backing to a degree, which, say, a more or less self-enforcing separation of powers will not need.

Most constitutions developed since the 18th century contain substantive constraints of some sort and to some extent. Substantive constraints may operate either at the micro-level or macro-level. Examples of the former are rules stipulating that certain actions cannot be done with regard to individuals; these are, e.g., “negative” rights such as traditional liberties (e.g., private property rights, freedom of contract, freedom of exchange, freedom of thought, etc.). Examples of substantive constraints at the macro-level are rules that stipulate that certain conditions at group level must or cannot be fulfilled. These too may be very wide in scope and include legislative out-put (e.g. restrictions on the amount of laws passed in a year), fiscal policies (e.g. limits on taxes, spending, or in increases in these, balanced budget requirements), etc.

3.3. *Some empirical observations*

In recent years a number of studies have investigated the potential relationships between on one hand the extent of the presence of one or more political institutions (e.g. the extent of democracy) and on the other hand such macro-phenomena as prosperity, distributions of income, etc. The almost universal and unanimous verdict has been that governments that respect the liberties of its citizens tend to do better on almost all accounts. This seems to be the case both at the level of the fundamental political institutions (e.g. property rights, rule of law, separation of powers, etc.) and at the more intermediate level of the policies adopted within such a framework and further influencing welfare and prosperity (e.g., monetary policies, trade policies, etc.) (For surveys, see, e.g., Lane and Ersson 2000; Holcombe 2001; Scully 2001; Kurrild-Klitgaard and Berggren 2004).

But if that indeed is the case, then why are not more states adopting more tightly constrained governments? That is, how about implementing such constitutional constraints? It would in fact seem to be the case that all experience goes the *other* way, i.e., that constitutional constraints on governments are generally loosened over time rather than tightened, while in contrast constitutions have come to be used still further to mandate the use of government power. In fact, systematic studies show that it is a systematic tendency that more recent constitutions are longer than older constitutions, not because they are more restrictive but because they loosen up and expand the tasks of government (Montenegro 1995; Kurrild-Klitgaard 2001).

It seems as if governments and the people living under them only want to listen to the Sirens—or at least only read Madison as suggesting the empowering of government while forgetting that men are not angels.

4. The constitutional problem of guarding the guardians

The answer to the question of why so few constitutions contain features that otherwise seem so attractive may lie in what could be termed “the contractarian paradox,” which, in essence, is that the very features which may seem attractive about constitutional constraints is what also makes them unlikely to be implemented.¹⁷

4.1. *The contractarian paradox*

In recent decades a renaissance has occurred for the political theory of contractarianism, such as outlined in section 2, first and foremost due to the works of John Rawls, James Buchanan and Gordon Tullock, David Gauthier, et al. (Buchanan and Tullock [1962] 1999; Rawls 1971; Buchanan 1975; Gauthier 1986). In this movement contemporary theorists have given new life to the old tradition by employing modern analytical tools, e.g., those of micro-economics and game theory, such as it has been done explicitly in the case of the theories of Thomas Hobbes,¹⁸ and such as summarized here.

In our outline of the contractarian reasoning it was shown that a situation where rules are enforced will be preferable to one, where they are not, but in fact the argument of political contractarianism usually goes much further than that. A general version of the argument could be seen to go like this: Rational individuals in the state-of-nature will realize that significant public goods will only be produced if they simultaneously give up their ability to violate the rights of others and do so by empowering an institution with a monopoly on the use of coercive force so as to make it possible to enforce solutions.

Hobbes, for example, argued, that every individual in “the natural condition of mankind” guided by reason will come to realize the “fundamental law of nature,” which is, “to seek Peace, and follow it,” and accordingly, as the second law, “be willing, when others are so too, as farre-forth as for Peace, and defence of himselfe he shall think it necessary, to lay down this right to all things” (Hobbes [1651] 1991, §65: 92). Accordingly each individual in the state-of-nature must make a covenant with every other individual, in which it is mutually promised to give up the right of self-defense by relinquishing that and all other rights to a political authority to be created, either stipulated in each covenant or chosen by a majority. The political

¹⁷ See Kurrild-Klitgaard 1998, where parts of the present section derives from; cf. also Kurrild-Klitgaard 2002b.

¹⁸ This has been done, though with slightly different emphasis and somewhat different conclusions, by, e.g., Kavka 1986: Chs. 3-6; Hampton 1986: Chs. 2-3, 5-6; Taylor 1987: 125-63.

authority thus created has the obligation to secure internal and external peace and is unconstrained.¹⁹ In a related, but somewhat different way, Locke argued that political authority is justified as a remedy for an efficient and just enforcement of property rights by the restraining of violence. But since injustice may also occur under an unconstrained and sovereign political authority, this can only be created by consent and only and solely by giving up those rights, which are necessary for the achievement of this goal.²⁰ Pufendorf similarly saw the institution of political authority as necessary for securing and further increasing the already created socially beneficial institutions; if “sociality” is not so secured, there is a risk, that the seeking of self-preservation by individuals will endanger it. Pufendorf therefore envisioned that individuals in the state-of-nature voluntarily will form a two-stage social contract, whereby it is decided to institute political authority and what form it shall have.²¹

Of contemporary political contractarians Buchanan (1975) has similarly outlined a strictly logical social contract process also consisting of two stages (or levels), whereby individuals out of consideration of their own utility-maximization are seen as unanimously agreeing on the assignment of property rights and provision of public goods, first and foremost the protection of rights.²² While this is not intended as an accurate description of what goes on, Buchanan at least implies that such an analysis captures sufficiently much of what goes on in reality so as not merely be a normative theory of how rules are to be evaluated.

So, what unite these contractarian theories is, despite their differences, that the purpose of the social contract is to create political authority, since it is assumed, that the institution of a organization with the ability to enforce solutions will mean a more efficient provision of some otherwise problematic public goods as (“peace,” “justice,” “welfare,” etc.), and this is what was attempted to be illustrated by the bi-matrix in Figure 2. Here the political authority created by the social contract has succeeded in imposing sanctions upon those, who do not respect the property rights of others and thus successfully changed the preference orderings of the individuals so as to induce them to cooperate. Accordingly there now is a unique equilibrium, which is identical to the collectively preferred outcome in the Prisoners’ Dilemma-like state-of-nature, i.e., (s', s') in cell *a*. Accordingly, the argument of political contractarianism broadly conceived, may be summarized as done by the propositions in Table 1.²³

¹⁹ See Hobbes [1651] 1991, especially Chs. 14-15. Grotius’ position was close to Hobbes’, but much less developed, see, e.g., Grotius [1625] 1901: 63-68.

²⁰ Cf. Locke: The “great and chief end . . . of Mens uniting into Commonwealths, and putting of themselves under Government, is the Preservation of their Property.” (Locke [1690] 1988, II, §124: 350-51). For other central passages, see Locke [1690] 1988, II, §15: 278; §95: 330-31; §99: 333.

²¹ On these points, see especially Pufendorf [1672] 1934, VII: Ch. 2; Pufendorf [1673] 1991, I, Ch. 3, §7: 35.

²² For Buchanan’s somewhat abstract and complex scheme, see Buchanan 1975: 17-73.

²³ This presentation owes much to Schmitz 1990: 95; Schmitz 1991: 8.

Table 1.

(P1) If political authority is necessary to enforce a supply of solutions to public good problems, then rational individuals will consent to the creation of political authority.
(P2) Rational individuals in a state-of-nature will not cooperatively supply solutions to public good problems.
(P3) Political authority is necessary to enforce a supply of solutions to public good problems in a state-of-nature.
Therefore
(P4) Rational individuals in a state-of-nature will consent to create political authority to enforce a supply of solutions to public good problems.

The argument contained in these propositions is, at least in essence, very typical of what is at least implicitly central in contemporary versions of political contractarianism, be they explanatory or justificatory, and assuming that the consent is hypothetical or actual (whether explicit or tacit). In explanatory versions of political contractarianism the inference will be, that the historical origin of existing states can—at least in some sense—be explained as the outcome of such a process, i.e., that the move from a state-of-nature without government to a condition with government can be explained through the contractual creation of political authority.²⁴ Similarly, in justificatory versions of political contractarianism the inference will typically be that political authority is justified, because it can be seen as being the outcome of what rational individuals freely *would* consent to.

However, there are several problems inherent in using the Prisoners' Dilemma analogy outlined here in a political contractarian context. We shall not treat these problems here, but neither shall we claim that the Prisoners' Dilemma is the only way to model the interaction of the state-of-nature, or even necessarily the best.²⁵ For while several theorists have had important things to say about these questions, and while these are highly relevant for the question of the general applicability of the Prisoners' Dilemma, it is not the problem that we want to address. Rather than to try to show that political contractarianism is wrong in modeling the interaction of the state-of-nature as something similar to a generalized version of a two-person single-play Prisoners' Dilemma, we shall simply take the assumption that this *is* a valid procedure for granted and then proceed to show, that this, nonetheless, *itself* poses a much deeper problem for political contractarianism. For while political

²⁴ See, e.g., North 1981: Ch. 3. Whether the consent in question has been actual (be it expressive or tacit) or hypothetical is not necessarily assumed to be important; what is posited as important is that the origin of states may be modeled “as if” consent *had* been given.

²⁵ There may indeed be good reasons for why it should not be seen as being adequate, and for why the provision of public goods in a state-of-nature should rather be seen as constituting such milder collective action dilemmas as, e.g., the games called “Chicken,” “Assurance,” or “Battle of the Sexes”. See, e.g., Taylor 1987: 18-19 & 31; Hampton 1987; cf. also Ellickson 1991. If the character of the state-of-nature is not quite as bad as envisioned in the Prisoners' Dilemma-like scenarios, then the creation of the centralized political authority may not necessarily be the optimal solution. Cf., e.g., Moselle and Polak 2001; Grossman 2002; Kurrild-Klitgaard 2002b.

contractarians have labored hard to explain the disadvantages of the lack of cooperation in the state-of-nature and the advantages of cooperation made possible by the creation of political authority, they have spent little or no time addressing the very important question of how it can be possible to reach the cooperation necessary for the creation of political authority itself. Yet, political contractarianism, when it is based in a modeling of the Prisoners' Dilemma, will necessarily fail in what must be its most important pursuit, namely to *simultaneously* explain, how the state-of-nature can be so problematic as to make the creation of political authority necessary but *not* so problematic as to make this impossible.²⁶

The potential existence of such a problem has already under various labels and to varying extents been identified by some theorists, particularly as it may apply to arguments in favor of government enforced solutions to public good problems and similar situations resembling other two- or *n*-person Prisoners' Dilemmas.²⁷ But while the possibility of such a problem has been identified, it has in my opinion neither been given the attention it deserves, nor been explicitly related to its full potential implications for political contractarianism.²⁸ However, a political contractarianism based on the use of Prisoners' Dilemma reasoning is faced with what could be called the "Prisoners' Dilemma of the Prisoners' Dilemma," but which here is perhaps best described as a *Contractarian Paradox*.²⁹

The problem can potentially take two forms, which, however, seem to be but different sides of the same underlying problem and both stemming from the same line of reasoning, namely the assumption in the Prisoners' Dilemma-like version of the contractarian argument where the players are not just handicapped in their communication but *incapable* of communicating, imposing mutual sanctions, etc. To see this one may consider the argument given by the propositions (P1), (P2), (P3) and (P4), as well as their logical alternatives (P1'), (P2'), (P3') and (P4') of Table

²⁶ Cf., e.g., Schmitz 1990: 93-94; Hampton 1986: 74-79, 136-37; Green 1988: 147-48; Kraus 1993: 11, 17-18, 38.

²⁷ Of contemporary theorists some speak of a "paradox" of the "public goods theory of the state" (Kalt 1981: 577-84), while others describe the "problem of supply" of public goods and the possible existence of "second-order collective dilemmas" (Bates 1988: 394-95; Ostrom 1990: 42-43). The treatments of the problem closest to the present are those of Hampton 1986; Green 1988; Cowen and Kavka 1991, of which the first and the last try to solve the paradox. In an elaborate treatment Green 1988: 122-57, in contrast, uses the paradox to reject political contractarianism. Green presents the paradox in a way quite similar to the present, i.e., he identifies implicitly what is here termed the "necessity problem" and the "possibility problem" and speaks of a "Prisoners' Dilemma Dilemma" and of a potential "string of higher-order PDs." Hampton has in her reconstruction of Hobbes' argument pointed toward a similar problem in Hobbes' account of the character of the state-of-nature and the institution of absolute sovereignty (Hampton 1986: 69-79). Cowen and Kavka 1991: 1-2 speak of a possible "circularity problem" in the public goods argument for government intervention and supply of public goods. For somewhat related discussions, see also, e.g., Taylor 1987; Hampton 1987; Narveson 1988: 139-40; Schmitz 1988; Schmitz 1990. I have myself treated the paradox briefly in Kurrild-Klitgaard 1994; Kurrild-Klitgaard 1997; Kurrild-Klitgaard 1998.

²⁸ Buchanan is one of the few to explicitly discuss a similar problem in relation to constitutional design, see Buchanan 1980.

²⁹ I have elsewhere called this the "Prisoners' Dilemma of the Prisoners' Dilemma" (Kurrild-Klitgaard 1994; Kurrild-Klitgaard 1997).

2.³⁰

Table 2.

Proposition	Negation
(P1) If political authority is necessary to enforce a supply of solutions to public good problems, then rational individuals will consent to the creation of political authority.	(P1') If political authority is necessary to enforce a supply of solutions to public good problems, then rational individuals will not consent to the creation of political authority.
(P2) Rational individuals in a state-of-nature will not cooperatively supply solutions to public good problems.	(P2') Rational individuals in a state-of-nature will cooperatively supply solutions to public good problems.
(P3) Political authority is necessary to enforce a supply of solutions to public good problems in a state-of-nature.	(P3') Political authority is not necessary to enforce a supply of solutions to public good problems in a state-of-nature.
Therefore	
(P4) Rational individuals in a state-of-nature will consent to create political authority to enforce a supply of solutions to public good problems.	(P4') Rational individuals in a state-of-nature will not consent to create political authority to enforce a supply of solutions to public good problems.

The problems of this line of reasoning come into effect, once two implicit assumptions—which indeed quite often are claimed explicitly in political contractarianism—are realized: That political authority itself, according to the argument, must be a public good, and that the cooperative supply of the public good (the consent to create it) hence itself may constitute a collection action dilemma. This must necessarily be so, since it is both assumed that the existence of an enforcing political authority is a necessary prerequisite to overcoming public good problems (P3), yet also that this can be created cooperatively (P4). Given that this is the case, then the first version of the problem comes into action, when it is argued that rational individuals in the state-of-nature *cannot* overcome public good problems (P2). If that is the case, then they cannot, as concluded in (P4), cooperatively create political authority either, which is—at least implicitly—assumed to be a public good itself (P3). This is what we might call *the Possibility Problem* of the social contract.

The second version of the problem occurs, if on the other hand it is argued, that rational individuals in the state-of-nature actually *can* create political authority (P4). If that is the case, then public good problems can be overcome cooperatively without being enforced, i.e., (P2'), and hence there is no need for political authority. This we might, on the other hand, call *the Necessity Problem* of the social contract.

The essence of these two problems is thus that since, on the one hand, (P2) \rightarrow (P4'), then (P4) cannot be true, while, on the other hand, since (P4) \rightarrow (P2'), then (P2) cannot be true. There are, at least, two important implications, which follow as corollaries to the two sides of the Contractarian Paradox. First, if political authority *can* be created cooperatively (P4), then it cannot itself be a public good, as assumed (P3), i.e., (P3'). Rather it must be the case that it is something different, namely

³⁰ Notice that (P1), (P2) and (P3) \rightarrow (P4) is what is usually argued in political contractarian arguments, such as already outlined. It is, however, *not* claimed here that (P1'), (P2') and (P3') \rightarrow (P4'); these do not constitute an argument but are merely considered to be the corresponding logical negations of the propositions (P1), (P2), (P3) and (P4).

some form of a private good, although possibly of a bundled character. But, secondly, if the political authority really is a public good, then it cannot be created cooperatively for the purpose of supplying solutions to public good problems but must be created non-cooperatively. The Contractarian Paradox may now, in short, be summarized as such: If a social contract is necessary, then it is not possible; but if a social contract is possible, then it is not necessary.

4.2. *An extension: From social contract to constitutional design*

The argument in favor of the existence of a paradox in contractarian reasoning put forward in the previous subsections might be seen as simply armchair philosophizing, i.e., as something irrelevant for what goes on in the real world. However, it should take little reflection to appreciate that this is not so, and that this indeed is the reason why there are so few of those good solutions. After all, what is quite often done in the discourses and processes of constitutional design is exactly to reason in a manner following the contractarian logic summarized in of Table 1 and the left side of Table 2: First a problem of a collective good nature is identified, and then an institutional solution is posited, while little effort is directed towards identifying whether the solution proposed (1) is the optimal one or (2) is possible at all.

An illustrative historical example of such reasoning being used in actual constitutional design is that of the US founding fathers. Specifically, in the rightly famous *Federalist* no. 51 Madison writes so brilliantly about the necessity of separation of powers, but then falls into the trap—or uses the strategic trick—to infer that this will be desired by rational actors:

Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit. In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as *in a state of nature*, where the weaker individual is not secured against the violence of the stronger; and as, in the latter state, *even the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government* which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be gradually induced, *by a like motive, to wish for a government which will protect all parties*, the weaker as well as the more powerful. (Madison, *Federalist* no. 51, in Hamilton, Jay and Madison [1787] 2001: 271; emphasis added)

What Madison does here is exactly to commit the logical fallacy identified in the previous discussion. But perhaps the important point to note is that the situation he and his co-founders were in was not exactly one resembling a Prisoners' Dilemma.

4.3. *An example: Legislative term-limits*

The points made in the two previous subsections may be illustrated by a specific case, namely the attempts at institutionalizing so-called “term limits” in US political process, i.e., to introduce limits on the number of (usually consecutive) terms that politicians may serve in office.

The term limit phenomenon has roots deep in US political history, but it burst into modern prominence in the early 1990s, when a very broad based campaign pushed the proposal high on the political agenda—in fact, so high that it was supported by a majority of the voters and became one of the key elements of the Republican Party’s “Contract With America” in 1994. Since the early 1990s a number of organizations have with considerable success worked for the introduction of term limits for local and state offices. The same has been sought at the federal level: through restrictions imposed at the state level for representatives elected for the federal level (which however was struck down by the Supreme Court as unconstitutional, since it is not for the states to impose limits on the term lengths of federal politicians), and through a proposed constitutional amendment. Furthermore a number of politicians signed pledges to voluntarily limit themselves to only two terms in office.

The basic reasoning of the term limits movement has been one clearly reminiscent of a Ulysses-style contractarian solution to a perceived collective action problem, as illustrated by these passages written by two proponents:

[Members of Congress] frequently engage in pork-barrel politics. Many bring home pet projects that benefit their constituents and, as a consequence, their own chances for reelection. In addition, representatives use myriad taxpayer-funded perquisites to spread their messages and enhance their visibility. Incumbents also are able to help their constituents with various problems that they may encounter with the federal bureaucracy. Such help, known as constituent service, is made necessary by the increasing size of government and can significantly increase an incumbent’s approval rating. ... [Imposing] term limits on members of Congress would ensure that party leaders and committee chairmen would not become part of a permanent ruling class. ...

Term limits would dramatically change the incentives of the political system. If the seniority system was eliminated, more potential citizen-legislators would be inclined to seek office. There are many people who care about their government and would be willing to spend a few years in Washington fixing it, if they believed that career legislators—party leaders and committee chairmen—did not completely control the agenda.

Once in office, it is likely that citizen-legislators would behave much differently than those currently in power. Since they would have little desire and, indeed, no opportunity to spend their lives in Congress, citizen-legislators would have no incentive to pursue activities—such as pork-barrel spending, constituent service, and regulating campaign finance—that, as one of their principal effects, entrench legislators in office. Moreover, term limits would do much to overturn Washington’s “culture of spending,” as James Payne has put it, and thus shrink the federal bureaucracy. The benefits of such a change are clear. (O’Keefe and Steelman 1997: 1 & 19)

There are some theoretical arguments and some empirical evidence to support such a view—more junior legislators do tend to vote in a more fiscally responsible way³¹—and the momentum was so significant that it was believed in the mid-1990s that term limits might be implemented at the federal level, especially after the Republicans took over control of Congress. However, nothing really came of it: A bill proposing limits of six terms for members of the House and two terms for

³¹ See Steelman 1998. However, empirical evidence for the consequences of legislative terms limits is not unequivocal, cf. López 2003.

members of the Senate (i.e., in both cases 12 years) came to a vote in the House of Representatives 29 March 1995, after the Republicans had gained a majority in the 1994 mid-term elections. But due to vehement opposition from Democrats and lukewarm support from leading and senior Republicans the bill went down to defeat. What is significant is that it was almost exactly the legislators who would have been restricted, who were opposed; senior representatives voted almost 2:1 against term limits, while junior representatives were in favor (Steelman 1998). Even more illustrative is that many of those who had pledged to retire from their elected offices suddenly felt that they had good reasons to stay on. For example, following the 1998 mid-term elections, many of those who had been elected in 1992 and 1994 as term-limit backers, and who had promised to serve only six or eight years, subsequently reneged on their promises.³²

5. So when and how (if at all)?

The problem outlined here has not gone completely unnoticed in the literature; it has indeed, as indicated, often been acknowledged as being a logical problem. However, very little work has been undertaken with regard to the problem's possible implications for constitutional design. In the contractarian-inspired tradition of constitutional economics it does indeed often seem to remain the case that the analysis takes the road of first presenting an analysis of what is conceived as being a problem, then posits a possible constitutional solution to that problem, but largely ignores a discussion of what the potential problems in regard to actually implementing that solution would be. But doing so would—given the previous points—seem to indicate that whatever is proposed as a solution either is insufficient at constraining Leviathan or stands little or no chance of being realized. The fate of the term limits campaign is one illustration, while another is that of budget deficits; the latter are seen as problematic and come into being because legislators are unwilling to commit themselves to fiscally responsible policies; yet for that very reason it is unlikely that the same legislators should agree to limit spending by, say, adopting a constitutional amendment enforcing balanced budgets.

However, the real challenge—at least when seen in the perspective of constitutional liberalism—seems to be to find constitutional constraints, which simultaneously are effective in restraining governments *and* possible to have implemented. So do such solutions exist? And are there times and occasions where they seem to be more easy to implement than others? In the following we shall very briefly add a few cursory observations on these issues, based more in anecdotal reflections than in systematic studies but which nevertheless hopefully may serve to highlight the subject.

First of all, it would seem that many of the most path breaking instances of constitutional reforms, where decisive steps were taken to constitutionally limit governments, were taken in times of crisis, whereas constitutional reforms taking

³² See, e.g., “Some Term-Limits Backers Want to Stay,” *USA Today* 3 December, 1998.

place in “ordinary” times seem more often than not to work in the direction of loosening the constraints on government. This certainly seems to have been characteristic of all the “great” constitutions usually praised by constitutionalist-liberals, e.g., the British Glorious Revolution (1688), the American Revolution (1776), the European “bourgeois” revolutions (1848), etc., and it also seems to apply to some of the minor constitutional changes often heralded as limiting governments, e.g., the passing of Proposition 13 in California. In such cases it would seem that the severity of a crisis made it possible to get a sufficient number of decision-makers to be perceptive to new ideas. Similarly, Mancur Olson has pointed out that there are good reasons to believe that larger crises, such as caused by defeat in a war, may shake up the political system to such an extent that consolidated interest groups are destabilized in their rent-seeking pursuits that it may open up for more general interest promoting policies (Olson 1982). It seems in other words that there is something about crisis-situations, where a country is inflicted with severe financial, political or social problems that make it relatively easier to get the public and the decision-makers to accept drastic reforms. Of course this is not to say that *all* constitutional reforms implemented in times of crisis serve to constrain governments; that, obviously, is not the case (cf., e.g., the Russian revolution of 1917, the German Nazi take-over in 1933-34, etc.), and in fact crisis situations have often been used to expand government activity (Higgs 1987). However, it would seem to possibly be the case that some form of crisis is at least a crucial facet of an environment in which constitutional constraints are implemented, albeit certainly not a sufficient cause.

Second, it seems occasionally to be the case that constitutional reforms aiming at restraining governments may succeed in being implemented if there are special interest groups whose narrow, strongly asymmetric interests *coincide with the general interest*. In such cases, the special interest groups who might benefit from the policy change may be willing to invest time and resources in funding and otherwise supporting efforts to have the institutional changes made (cf. Buchanan 1979). Historically it has often been business interests, who have been instrumental in the support for implementing institutionalized policies of free trade, lower taxes, etc. Indeed, the entire US Constitution—as liberal, constitutionalist and general interest oriented as it is often seen as being—may very well be explained with reference to the relatively narrow economic interests of those who were present at the time of decision (McGuire and Ohsfeldt 1989; cf. Beard [1913] 1935).

Finally, it seems to be the case that constitutional reforms limiting governments require some degree of *political entrepreneurship*, i.e., some individuals who are willing to take it on themselves to invest time and resources in organizing collective action, be it intellectual (in the form of articulating the ideas) or political (by promoting the articulated ideas).³³ Constitutional changes requires that some individuals are willing and able to act as the new John Lockes and Thomas Paines, but also as the new Earls of Shaftesbury and James Madisons.

³³ On the relevance of political entrepreneurs for organizing collective action, in politics and elsewhere, see, e.g., Frohlich, Oppenheimer and Young 1971; Frohlich and Oppenheimer 1974; Kurrild-Klitgaard 1997.

So, let us return to the example of Ulysses and the Sirens. The situation itself was a crisis, which made Ulysses and the sailors receptive to the knowledge and ideas suggested by Circe, and Ulysses, who owned and commanded the ship, had an asymmetric high interest in solving the institutional problem—and did so in an entrepreneurial way. Also, there were not so many men on the ship that they could not communicate beforehand or that the transaction costs of doing so were prohibitively high. However, it was a particular situation, and had the circumstances been different, the song of the Sirens might have been too difficult to come up with a solution to.

6. Conclusion

There are good reasons to believe that constitutional liberalism, i.e., the constitutional imposition of constraints on governments, may play an important role in supporting policies that will result in generally attractive consequences, first and foremost economic growth and freedom. But we have also shown here that the very general attractiveness of such a constitutional order makes it unlikely to be achieved. Special interest groups, whose influence over governments are supposed to be tied by constitutions, are unlikely to support the continuation or implementation of constitutional constraints on government which will limit their own potential for seeking benefits for themselves.

So is all hope lost? That could easily seem to be the conclusion. After all, the grand constitutional revolutions of history only seem to occur ever so rarely, and many a constitutional revolution would seem to have loosened rather than tamed Leviathan. On the other hand, it would seem odd for the constitutionalist-liberals to conclude that super-human forces are driving change in one and only one direction, and that there is nothing we can do about it.

One lesson would, as indicated, also seem to be that constitutional changes might occur, which can move institutions in a direction consistent with a constitutional liberalism, *if* ideas can be articulated that will seem to be able to resonate with sufficiently powerful interest groups. The greatest challenge for the constitutionalist-liberals is thus to ensure that when the Pandora's Box of constitutional reform is opened up, that there will be some useful ideas available for inspiration.

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