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Citizens' Sovereignty and Constitutional Commitments: Original vs. Continuing Agreement[1]

by

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1. Introduction

It is often argued that democratic polities, being founded on the principle of the sovereignty of the people, are inherently limited in their capacity to make binding commitments. Since a present parliament cannot effectively bind future parliaments, the argument goes, a commitment made at some point in time "in the name of the people" may be overturned by a parliament representing the respective constituency at a later time.[2] In his "Distinguished Lecture on Economics in Government" the former chairman of the Council of Economic

[1] Paper presented at Public Choice Meetings 2001, San Antonio, Texas, March 9-11.

[2] In their contribution to a conference on "The Binds of Democratic Politics" (The 9th Villa Colombella Seminar, September 6-9, 2000) A. Breton and A. Frascini (2000: 9) note: "It is formally impossible for a democratic parliament to bind successor parliaments. The laws put in place by one parliament can be modified or even repealed by another. That is one implication of popular sovereignty. That fact would seem

Advisors, Joseph Stiglitz, identifies this as a principal source of government failure when he notes: “The problem of commitment stems from the inherent nature of government itself. Government is the primary enforcer of contracts. It uses its monopoly on the legal use of force to create the possibility of private commitment. There is no one, however, whose job it is to guard the guardian. The government cannot make commitments because it always has the possibility of changing its mind, and earlier ‘agreements’ cannot be enforced.”[3]

To be sure, to the argument that, by contrast to private contracting parties within an established legal order, the constituents of self-organized democratic polities have no external enforcing apparatus to which they could turn to give binding force to their commitments, one could respond that democratic politics operates at various levels (e.g. the level of local communes, of states or *Länder* within a federal union, of nation-states, up to the level of multinational arrangements), and that constituencies at any one level may choose to use arrangement at the next higher level to give more binding force to commitments that they wish to make. Thus, for instance, states within a federal union can commit to certain principles through contracts at the federal level, or nation-states can choose to bind themselves through international agreements (such as, for instance, GATT / WTO), thereby raising the costs of revoking the respective commitments in the future.

This is, however, not the line of argument that I wish to pursue here. Instead, the purpose of this paper is to examine some of the more general conceptual and theoretical aspects of the problem of commitment in democratic polities. Approaching the issue from a constitutional economics perspective, I shall look at such commitments as *social contracts* that the citizens-constituents of polities enter into in order to realise mutual gains. The guiding idea is that, just as individuals can realise mutual “gains from trade” through ordinary voluntary exchange-contracts, citizens can use the instrument of *social contracts* to realise mutual gains from *joint commitment*. Benefits from joint commitment can obviously be captured only where, and to the extent that, the ability to commit exists. And it is with the ability to commit that, according to the above noted argument, the principle of the sovereignty of the people seems to be in conflict. The question, therefore, that I shall seek to explore in this paper is whether democratic polities, as self-governing entities, are, indeed, condemned to forego the kinds of gains that a capacity to commit might promise.

The focus of the discussion will be on what may be called "internal" as opposed to "external" commitments , because the "ability to commit" appears to raise less serious issues

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to make commitments to any particular long-term course of action by a succession of governments next to impossible."

[3] J. Stiglitz (1998: 9f.)

in regard to the latter than in regard to the former. Internal commitments, in the sense the term is used here, are commitments that constituents of democratic polities make among themselves, while external commitments are those that constituencies of democratic polities make vis-a-vis third parties. The sovereignty of the people is normally not considered a legitimate excuse for a parliament to revoke commitments to third parties made by previous parliaments. This may, of course, not prevent parliaments from doing so. Yet, theoretical reflection as well as empirical evidence suggest that in international affairs there are often prudential reasons for later constituencies to honor earlier made commitments even if, factually, they could repudiate them.[4] In any case, it is surely with regard to internal commitments that the "ability to commit" poses a more challenging issue.

2. Democracy as a Cooperative Enterprise: The Notion of Citizen Sovereignty

The starting point of my inquiry is the notion that a democratic polity can be viewed “as a cooperative venture for mutual advantage” (Rawls 1971: 84). From this outlook the fundamental defining criterion of a democratic polity is seen not in particular institutional-procedural features, such as general elections or representative governmental institutions, but in the fact that its members or citizens are the principals, owners or sovereigns of the collective enterprise. It is their common interests that the enterprise is meant to serve, and institutional-procedural provisions are instrumental to that principal purpose. Accordingly, institutional provisions in a democratic polity are to be ultimately judged in terms of their suitability to serve that purpose, not in terms of predefined notions of "democratic institutions."

In the most general sense, the fundamental problem that people have to solve in their dealings with each other - or, in grander terms, the fundamental problem of social order - is how to improve the prospects for realising mutual gains, and how to avoid the mutual harm that too easily results from the ever-present temptation to seek one’s own advantage at the expense of others. Economics as the science of gains from trade traditionally focuses on how people can realise mutual gains through voluntary exchange of ordinary goods and services in markets. Yet, as James M. Buchanan has persistently emphasised, the economist’s “gains-from-trade paradigm” can be generalised from its traditional domain,

[4] For instance, most often governments continue to serve foreign debts, even in cases - such as the People's Republic of China - of revolutionary governments that deny the legitimacy of the antecedent governments that incurred the debt.

market exchange, to all kinds of social arrangements,[5] including the realm of political action and of constitutional choice (Buchanan 1979: 27ff.). The general idea is that decentralised market transactions, in their typical form of bilateral exchange, are a most important but not the only kind of social transactions through which participants can realise mutual gains. Rather, the realm of politics can also be looked at from a "voluntary exchange perspective," as an arena where mutual gains can be realised through politically coordinated collective action.

In light of a generalised gains-from-trade paradigm political organisation is seen as a potential instrument for securing mutual benefits. Organising themselves in polities at various levels (communes, states, nations and supra-national formations) is one way in which people can seek to capture mutual gains that could not be secured at all, or not as effectively, by other means, be it through decentralised market transactions or through privately organised collective action, i.e. by organising themselves in "clubs" (Buchanan 1987). The term "public goods" may be used to identify benefits of this kind, benefits that can only be internalised by means of political organisation.

If a democratic polity can be looked at "as a cooperative venture for mutual advantage" (Rawls), the rules and institutions of democratic politics can, in the sense noted, be looked at as organisational devices that may help citizens-members-constituents to realise mutual benefits. Just as *cooperatives*, as *member-owned* enterprises, are there to promote the interests of their members, democratic polities, as "citizens cooperatives," are there to serve the common interests of their members, the citizens. And just as the organisational rules of ordinary cooperatives can be judged in terms of their capacity to promote the common interests of their respective members, the rules and institutions of democratic politics can be analysed, and compared to each other, with regard to their capacity to enable citizens to realise mutual gains, and to protect them from being exploited by fellow-citizens or by political agents.

The criterion for desirability or "efficiency" implied in such an understanding of democratic institutions may be called *citizen sovereignty*, in analogy to *consumer sovereignty*. *Consumer sovereignty*, as a criterion for judging the efficiency of the market institutions, means that the market process should be institutionally framed in such a way

[5] Buchanan (1977:136): "Economists ... are specialists in exchange ... . When they observe a social interaction, they interpret the results in exchange terms, as possibly emerging from voluntary action. To the extent that results can be fitted into the exchange pattern, economists can infer that *all* parties secure gains, as these gains are measured in terms of the participants' preferences and not those of the observer. ... This explanatory-evaluative task for the economist may be extended from the simplest to the most complex institutional structures."

that consumer preferences are the principal controlling variable governing producer choices. In other words, "consumer sovereignty" requires markets to be institutionally framed in a way that make producers most responsive to consumer wants. By comparison, *citizen sovereignty* means that the political process should be institutionally framed in such a way that citizen preferences are its principal controlling variable, that the "producers of politics," politicians and government bureaucrats, are made most responsive to citizens' common interests. Like consumer sovereignty, citizen sovereignty is a procedural criterion. It cannot be applied to outcomes directly, but only to the processes from which outcomes result. Not by looking at policy outcomes as such can one know whether the criterion is satisfied, but only by looking at how outcomes are arrived at. The extent to which democratic polities satisfy the criterion of citizen sovereignty depends on how well their organisational structure or constitutional provisions can be expected, on the one hand, to enable citizens to realise common benefits and, on the other hand, to protect them from being exploited by other citizens or political agents.

The principle of citizen sovereignty requires that the individual citizens who, at any given time, constitute a democratic polity are the ultimate sovereigns in whose common interests the polity is to be operated. It is, at any given time, with the current members or constituents that the ultimate decision making authority rests and it is in terms of their common interests that the working of a democratic polity is to be justified. Accordingly, the issue to be addressed in this paper can also be stated in terms of the question of whether the principle of citizen sovereignty limits citizens in their capacity to realise potential gains from commitments. - The following sections serve to clarify some preliminary questions relevant to this issue.

3. Mutual Advantage and Voluntary Agreement in Politics

According to the *gains-from-trade paradigm* of ordinary economics, it is the parties' voluntary agreement to market exchanges that allows us to classify such transactions as "mutually advantageous." The economist's standard notion of the "efficiency" of market outcomes is, ultimately, based on nothing other than the presumption that they result from voluntarily agreed-on transactions. In its generalised application to the political realm, the gains-from-trade paradigm equally implies that voluntary agreement is, ultimately, the only

conclusive proof of mutual advantage.[6] Only from voluntary agreement on part of all participants can we safely conclude that politically orchestrated choices are, indeed, advantageous to everybody involved.

The logic of the generalised gains-from-trade paradigm implies that the criterion of mutual advantage and voluntary agreement is extended from market transactions to political action. It is often questioned that such extension can be meaningful. Critics note that even though mutual advantage and voluntary agreement may be the relevant criterion of efficiency for market transactions, applied to the realm of politics they appear too restrictive to be of any practical significance. In essence, a market can be defined as an institutionally framed social arena in which, ideally, voluntary contracting is the only method of interpersonal dealings. The principal function of the institutions that constitute markets is to ensure that only such transactions take place, and only such cooperative arrangements are formed, that are based on voluntary agreement of all parties involved. By contrast, the institutions of democratic politics are clearly not designed to allow only for measures to which all citizens voluntarily agree. Instead, political actions are regularly taken without unanimous approval, by majority vote, and those in disagreement are forced to accept whatever the majority decides. Indeed, it is difficult to see how effective politics should be possible at all if it were restricted to choices voluntarily agreed to by all participants. - If this has to be acknowledged, how can the criterion of mutual advantage and voluntary agreement be applicable at all to the realm of politics?

A way out of this seeming dilemma is to be found in the distinction between unanimity as the ultimate *legitimising principle* for political action and unanimity as a *decision rule* in practical politics. The essential argument on this matter has, of course, been developed by J.M. Buchanan and G. Tullock in their Public Choice classic “The Calculus of Consent” (1962). Unanimity as the ultimate legitimising principle reflects the normative standard that in a “cooperative venture for mutual advantage” ideally only such collective measures should be taken that benefit everybody in the group and that can, therefore, command everybody’s consent.

The difficulty with using unanimity as decision rule within a pre-defined group, such as the constituents of a polity, results from decision-making costs, in particular - but not only

[6] Buchanan (1960: 122): "In a sense, the political economist is concerned with discovering 'what people want.' The content of his efforts may be ... summed up in the familiar statement: *There exist mutual gains from trade*. His task is that of locating possible flaws in the existing social structure and in presenting possible 'improvements.' His specific hypothesis is that mutual gains do, in fact, exist as a result of possible changes (trades). This hypothesis is tested by the behavior of private people in response to the suggested

- due to the temptation for strategic bargaining. Independent of whether or not a citizen would benefit from a proposed policy measure or rule-change, he or she may seek to extract additional advantages from "selling" his or her agreement at the highest possible price. The temptation to seek such strategic gains may prevent projects from being implemented, even though – in the absence of such obstacles - they promise gains for everybody. Recognising this impediment to their prospects of realising mutual benefits through concerted political action, citizens may, with good reasons, voluntarily agree to adopt a less-than-unanimity rule for deciding political matters. For prudential reasons, because of their mutual interest in securing the prospects of realising potential mutual gains through concerted political action, they may also voluntarily agree to adopt institutions of indirect democracy, delegating decision-making authority to political agents. It is the voluntary agreement at the *constitutional* level that legitimises the application of non-unanimous choice procedures at the sub-constitutional level.

Such transitions from unanimity to majority decisions and from direct to indirect democracy imply, of course, the possibility that political decisions will be made that are de facto not to everybody's benefit and that would never find the voluntary agreement of all members of the polity. Yet, this does not mean at all that the ultimate normative standard – mutual advantage and voluntary agreement – has been replaced by some other criterion. It simply means that, given the inevitable facts of organised political action, such institutional choices are the best possible way for citizens to advance their common interests. What legitimises the institutions of democratic politics is, in this sense, nothing other than that – among available alternatives – they offer the best balance between prospects for mutual gains and risks of being harmed. As noted above, the proper normative standard against which democratic institutions are to be judged, is whether in their overall working properties they serve the common interests of the respective constituency better than any feasible alternative arrangement. If, as we have to assume, an institutional arrangement that would require unanimity for all in-period choices is less attractive to citizens in its overall working properties than one that allows for non-unanimous choices, it has to be judged inferior in terms of the underlying criterion, i.e. unanimity as a legitimising principle. It is the application of the criterion of mutual advantage and voluntary agreement at the *constitutional level* that carries overriding power here.

Note that, in the context of markets as well as in the political arena, the criterion of mutual advantage and voluntary agreement is properly applied in a comparative sense, not

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alternatives. Since 'social' values do not exist apart from individual values in a free society, consensus or

as an ideal, absolute standard. To say that the market is to be viewed as an arena for voluntary contracting is not to say that all existing arrangements which we may call "markets" do in fact provide an absolute guarantee that coercion and fraud are perfectly excluded and no transactions are carried out, or cooperative arrangements are formed, except they are based on perfectly voluntary agreement of all parties concerned. To be sure, the ideal image of the market as an arena of such perfect voluntariness is far from what we observe in the real world, where market participants are often severely constrained in their “freedom to choose,” by lack of economic power, lack of knowledge, lack of available alternatives etc.. Yet, the finding that existing markets fall short of such an ideal standard is irrelevant for the issue of practical institutional choices. Relevant for this issue is only the comparison between *feasible alternative arrangements*. In this sense, the criterion of mutual advantage and voluntary agreement should not be interpreted as describing an ideal, friction-less world, irrespective of what is attainable in the world in which we live. It is to be applied in a comparative sense, comparing existing market institutions with potential, feasible alternatives in regard to their *relative* capacity to ensure voluntariness in within-market transactions.

The same is true for the institutions of democratic politics. Here as well, the criterion of mutual advantage and voluntary agreement is not to be interpreted in the sense of an unattainable ideal in comparison to which every existing institutional arrangement must inevitably look deficient. It ought to be applied in a comparative sense, as a criterion that allows us to say what counts as an improvement in democratic institutions. Among feasible alternative institutional arrangements those qualify as preferable that offer better prospects to citizens for the realisation of mutual gains and/or better protection against exploitation from other citizens or from political agents.

4. Complex Exchange Transactions and Constitutional Commitments

For the purposes of the present paper it is useful to subdivide the mutual benefits that democratic constituencies may realise through the political process into two kinds, namely, on the one hand, gains from *complex exchange transactions* and, on the other hand, gains from *constitutional commitments*.

By complex exchange transactions I mean organised collective actions that serve to coordinate the contributions of constituents to the production of a good that benefits all

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unanimity (mutuality of gain) is the only test which can insure that a change is beneficial."

members of the polity, but that free-rider problems prevent from being produced privately. Such collective action can be interpreted as “complex exchange” in the sense that, in light of the benefits to be had, the costs of contributing to the production of the good are worthwhile for all members of the constituency, provided everybody else shares in the burden. Under such conditions all parties can benefit from an arrangement that requires everybody to contribute. They “exchange,” so to speak, conditional commitments to contribute – i.e., promises to pay one’s share on the condition that all others do so as well - and political organisation is the instrument to implement such a complex transaction that generates benefits to all parties involved. The transaction is similar to an ordinary market exchange in that each participant receives a benefit in return for a contribution. Its difference lies in the fact that the “give and take” occurs not in decentralised bilateral transactions between trading parties, but requires simultaneous co-ordination of the contributions of all members of the benefiting group.

By constitutional commitments I mean organised political action that serves to define and enforce the “rules of the game” to which the members of a polity are subject. By jointly committing to suitable rules, i.e. by mutually agreeing to submit to the discipline of such rules, all members of a polity may be able to realise gains that could not be had if they were not so unconstrained. The typical instance of such cases are social-dilemma situations in which individually rational, unconstrained choices generate a pattern of outcomes inferior to what would result if all participants were appropriately constrained in their choices. Unlike the previously described complex exchange transactions, constitutional commitments are not about orchestrating citizens' separate contributions to a particular common project. Instead, they are about defining the general terms, the rules of the game, under which the members of a polity are to operate in the future. And the benefits participants expect from such constitutional commitments are not derived from specific anticipated outcomes, but are the overall benefits that result over time from having the continuing process of interaction and co-operation bound by suitable constraints.

Constitutional commitments, in the sense the term is used here, can be said to be always concerned with defining rules of the game. They can be distinguished, though, in terms of the kinds of rules they are about. In particular, along the familiar distinction between private and public law, one can distinguish between, on the one hand, commitments to rules that are to govern the interaction and co-operation of citizens in their private capacities and, on the other hand, commitments to rules that are to govern their interrelations as members of the organised polity. The latter are constitutional rules in the

more narrow, everyday sense of the term “constitutional.” They are the rules that define the terms of membership in a polity.

As members of a polity citizens may seek to realise mutual gains from constitutional commitments in both spheres, by agreeing to changes in the rules for the private arena as well as by agreeing to changes in the rules for the public arena. And the political process is the vehicle through which both kinds of commitments have to be orchestrated. Stated in terms of the game-metaphor, there are two principal ways in which people can realise mutual gains. They can seek to exploit opportunities for mutual advantage in playing a given game, i.e. a game defined by specific rules. And they can seek to realise mutual gains from playing a better game, better for all parties involved, by adopting more adequate rules. The gains from trade that ordinary economics is concerned with are the mutual gains that people can realise in playing the “market game,” through voluntary transactions that they engage in, in their private capacities. What I referred to above as the mutual gains from complex exchange, are the gains that citizens can realise in playing the “game of politics,” by concerted action aimed at producing common benefits. The gains from constitutional commitment are the mutual gains that people can realise by managing to play a better game, be it by defining and enforcing more conducive rules for the private realm, be it by improving the rules of politics.

In order to see in what ways the distinction between the two kinds of "political agreements," namely complex exchange transactions and constitutional commitments is of relevance to the theme of this paper, it is useful to look at the role of original agreement in the social contract model of politics.

5. Original and Continuing Agreement

In the tradition of social contract theories, the models of constitutional choice behind a veil of uncertainty or ignorance, as advanced in James M. Buchanan’s and Gordon Tullock’s “Calculus of Consent” (1962) and John Rawls’ “Theory of Justice” (1971), are based on the premise that what legitimises a constitutional regime is the voluntary agreement of all parties involved. There are two aspects of the veil-model that are noteworthy.

Its primary function is to specify conditions of constitutional choice that foster impartiality, conditions that induce the parties involved to compare alternative rules in terms of their general working properties, unbiased by partial interests. In other words, the veil-model is meant to describe general conditions under which potential interests in

privileges are filtered out (because the parties cannot predict with sufficient reliability whether they will be among the beneficiaries or not), and under which self-interested actors are, instead, motivated to opt for rules that are in their *common constitutional interests*. In fact, the veil model can be said to specify, in a stylised way, conditions that help constituents to find out what their common constitutional interests are. To utilise the lessons of the model for practical purposes would mean to submit the process of constitutional choice to procedural constraints that promise to serve that very purpose: To increase the prospects for constituents' common constitutional interests to come to prevail.

In addition to its primary function the veil-model tends, however, also to focus attention on the *original* agreement on which rule-regimes are based, thereby suggesting that the issue of legitimacy is essentially a matter of original voluntary consent. It is this latter aspect that is of particular significance in the present context since the issue of whether there is a conflict between the "sovereignty of the people" and the ability of democratic constituencies to commit has obviously to do with the ability of later constituencies (or parliaments) to revoke "original agreements" entered into by earlier constituencies (parliaments).

The critical question of whether the focus on *original* agreement can provide an adequate answer to the issue of the legitimacy of ongoing political arrangements has often been raised in discussions on the social contract tradition, at least since David Hume's essay "Of the Original Contract" (1963 [1741/42]). Hume's critique focused on the issue of whether for established polities the notion of an original contract, voluntary entered into by their founding members, is more than a myth, and whether an original agreement, even if there ever was one, can bind future generations. Apart from these classical objections, there are, however, other reasons to doubt whether original voluntary consent can provide sufficient legitimacy to an ongoing political regime, even in cases where such original agreement can safely be assumed, and where current members and original contractors are identical.

What is of relevance here, is a critical difference - corresponding to the previously drawn distinction between *complex exchange transactions* and *constitutional commitments* - between *transaction-agreements* on the one side and *constitutional agreements* on the other.[7] As noted above, political organisation can provide citizens with these two instruments for realising mutual advantages. Like ordinary, bilateral exchange transactions

[7] The following analysis has in many respects affinities to the literature on the "economics of contracts," associated, among others, with the name of O.E. Williamson (e.g. 1985). It is, however, not the purpose of this paper to discuss such affinities.

in markets, the complex exchange transactions in politics can be looked at as contractual schemes that specify in advance the contributions that the contracting parties promise each other to make, and from which they all expect to reap a net benefit. In case of such transactions, whether they occur as trades in markets or as complex exchanges in politics, it is the initial agreement, based on expected payoffs, that legitimises the transaction as "mutually advantageous." In such cases the nature of the deal requires that the original agreement keeps its binding force until the transaction is completed. Where the give and take in ordinary exchange, or the multilateral contributions in complex political exchange are *simultaneous*, no problem arises.[8] Where trade – either simple or complex – is not carried out simultaneously, but where the nature of things requires some parties to move first while others contribute their share later, problems may arise because the latter may be tempted to renege on the original agreement. For obvious reasons, if transaction-agreements are to serve their purpose, the binding force of the original agreement must be protected against such opportunistic reneging. Otherwise, nobody would be willing to be the first mover in non-simultaneous exchange transactions, making it impossible to realise any potential gains that such transactions promise.[9]

Matters are significantly different, though, in case of constitutional agreements. The purpose of such agreements is not to specify the respective contributions that the parties to a simple or complex exchange transaction promise to make. It is, instead, to define the terms of an ongoing relationship, the rules of a continuing cooperative arrangement. Just as in the case of exchange transactions, the original agreement of the contracting parties to constitutional contracts is motivated by expectations of future gains. But such gains are not expected from the completion of a common project. They are expected from the different quality that the mutual commitment to constraining rules provides to the ongoing cooperative venture. By contrast to transaction-agreements, the point of constitutional

[8] Parties to a transaction may, ex post, regret to have agreed to it, after they find their expectations disappointed. Yet, such ex post regret cannot undo the ex ante legitimacy of the transaction. There is a constitutional rationale for treating voluntarily entered transaction-commitments as binding, irrespective of ex-post regret: Playing a game that does not allow ex post regret to undo previously agreed-on transactions is more advantageous to all players involved than playing according to rules that would entitle dissatisfied parties to return to the status quo. Or, stated in a less apodictic manner: To provide a constitutional rationale for not allowing ex-post regret to invalidate previous transaction-commitments would mean to show that it is in the common constitutional interest of the members of the respective constituency to insist on the binding force of "original agreements," because the working properties of the game so defined are overall more attractive than the working properties of the alternative game.

[9] Again, stated in constitutional terms, playing a game that would allow for such reneging would be less attractive for all players involved than playing according to rules that make original agreements to non-simultaneous exchanges binding until the transaction is completed.

commitments is not a mutual promise to contribute one's share to a joint venture, *it is a mutual promise to submit to certain rules in ones' ongoing dealings with each other*.

My principal conjecture is that, because of the differences between transaction-agreements and constitutional agreements, in case of the latter it is not the original agreement alone that can carry the burden of providing legitimacy to the ongoing constitutional arrangement. Instead, normative significance must be assigned to the *continuing, ongoing* agreement to the terms of the arrangement. Only such ongoing agreement can count as relevant indicator of whether the terms of the *ongoing arrangement* are, indeed, mutually advantageous to all parties involved. In case of transaction commitments the original agreement by which the respective obligations of the contracting parties are specified is all that counts. It is only the inclusive package of obligations that makes the deal advantageous to all parties involved, and it is only their trust in the completion of the package that can motivate parties to non-simultaneous trades to move first. Continuing agreement, as opposed to original agreement, can, in such cases, not play a meaningful normative role. By contrast, constitutional commitments are based on the expectation that an ongoing relationship can be more advantageous to all parties involved if all respect certain agreed-on rules of the game. The original agreement reflects the parties' anticipation that they will, indeed, benefit from the arrangement. It can, however, not be meant as an unconditional promise to submit indefinitely to a rule-regime, even if it should turn out not to be to one's advantage. As I shall argue in more detail below, it must be viewed as a promise to comply with the agreed-on rules as long as the other parties are equally willing to submit to them, and as long as the game defined by these rules is, indeed, advantageous to all parties involved.

Requiring that commitments be honoured that were originally made in transaction-agreements is a necessary precondition for realising gains from non-simultaneous trade. Requiring persons to comply with rules that they have agreed to, as long as they play the game, is a necessary condition for realising the mutual gains that can be had from joint commitments to suitable rules. This is quite different, though, from requiring persons to continue to play a game the rules of which they no longer consider advantageous. To be sure, disagreement with rules that were originally agreed to cannot be a legitimate excuse for cheating on the rules, i.e. for non-compliance. But, on the other hand, original agreement cannot be claimed to continue to provide legitimacy to a constitutional arrangement that is no longer considered advantageous by parts of the constituency.

6. Opportunism and Re-Negotiation

For the reasons discussed in section 2, at the operational level the decision-making procedures in democratic polities must allow for non-unanimous choices, even if democratic polities are to be seen as cooperative ventures for mutual advantage, and even if voluntary agreement is the relevant criterion of mutual advantage and, therefore, the ultimate criterion of legitimacy. That is to say, feasible democratic institutions will inevitably fall short of guaranteeing that only those decisions are generated by the political process that promise advantages for all parties involved.[10] Such inevitable "imperfections" of democratic politics as an enterprise for mutual advantage could be a reason for suspecting that the “ability to commit is not a feature of democratic politics." Changing majority coalitions could cause commitments made by one parliament to be overturned by a later parliament. Or other shortcomings of actual processes of collective decision-making in reliably implementing citizens' common interests could be responsible for such reneging on earlier commitments. This is, however, not the aspect of the issue that I want to examine here. Instead, I shall concentrate on the question of whether the “sovereignty of the people” - i.e. the fact that constituencies at any particular time are “sovereign,” and can turn over commitments made by previous constituencies - is in and by itself the reason for the presumed “inability to commit.” Leaving aside problems that may be generated by the above mentioned “imperfections” in collective choice procedures, my focus is exclusively on the issue of whether an inability to commit follows, indeed, as an inevitable consequence from the permanent option to re-negotiate that is implied in such sovereignty. In other words, my concern here is only with the question of whether the power of parliaments to revise previously made commitments would render democratic constituencies incapable of realising mutual benefits from workable (internal) commitments, even if there were no imperfections in collective choice procedures that prevent parliamentary choices from reliably reflecting the genuine common interests of the current citizenry.

Joint commitments, either as transaction-agreements or as constitutional agreements, are instruments by which citizens can realise mutual advantages. The benefits from such commitments are made possible by the fact that the parties involved simultaneously accept constraints on their behavior. Imposing such constraints on one's own behaviour is a price

[10] Within the open set of feasible democratic institutions we will, of course, find differences in this regard, and we can compare different institutions in terms of their capacity to promote those interests that all citizens have genuinely in common.

one is willing to pay if the advantages from doing so exceed the costs. At the time parties voluntarily enter a joint commitment, they all expect to gain from the arrangement. Yet, in an uncertain and changing world committing to constraints on one's future behaviour involves the risk that what initially looked like an advantageous arrangement may later on turn out different. For certain kinds of commitments, such as insurance schemes, dealing with an uncertain future is the very purpose of the arrangement, and for such commitments to serve their purpose original agreements must obviously be binding in a sense that serve that purpose.[11] For other types of commitment, however, the uncertainty of the future may be incidental and not intrinsic to the arrangement. Parties to such commitments may legitimately wish to be protected against ex-post-regret by requiring a re-negotiation option and, thus, making their continued cooperation contingent on their *continuing* agreement to the terms of the arrangement. It can only be because of the expected costs of such protection that they may prefer to forgo the option to re-negotiate and to be bound by their original agreement alone.

It is important clearly to distinguish between tow separate issues, namely the re-negotiation issue that is at stake here and the opportunism issue that has been the main theme of the previous section. Re-negotiation is a matter of changed perceptions of the advantages that the original agreement promises. Opportunism, i.e. the temptation to cheat on an agreement, is about exploiting opportunities to escape one's obligations in a joint commitment, even if there is no reason to re-evaluate the terms of the agreement itself. Re-negotiation is about the ex post wish to have entered a different agreement, opportunism is about incentives to cheat on an existing agreement. In any agreement involving non-simultaneous contributions there are incentives for parties who are to contribute later to take advantage of those who had to move first. These incentives have nothing to do with a re-evaluation of the terms of the agreement in light of new information. They can already be anticipated at the time the original agreement is made, and they are entirely independent of whether or not the agreed-on arrangement continues to be advantageous for all parties involved.

To allow for opportunistic behaviour is obviously in fundamental conflict with the very purpose of entering into joint commitments. It is the mutuality of obligations that makes the arrangement mutually advantageous, and no party can be allowed to escape its obligations without offsetting the balance of costs and benefits. If the incentives for opportunism cannot be sufficiently controlled, such commitment will not be workable and

[11] See footnote 12.

may not be entered into in the first place. By contrast, the interest in taking precautions against ex-post regret, and the wish to be able to re-negotiate an agreement in light of relevant new information or significant changes in circumstances, are perfectly legitimate concerns that are not per se in conflict with the purpose of seeking to realise mutual gains through joint commitments. The relevant question is whether and how such concerns can be accounted for without defeating the very purpose that a joint commitment is meant to serve. In this regard, there is again a critical difference between transaction-agreements and constitutional agreements.

7. Re-Negotiation in Transaction-Commitments and Constitutional Commitments

Even though the wish to be able to re-negotiate a commitment in light of unanticipated new information or changes in relevant circumstances is a legitimate concern, in case of transaction-agreements it is apparently difficult to separate such legitimate concern from opportunistic attempts to escape the obligation to fulfil one's part of the bargain. In non-simultaneous complex exchange transactions illegitimate opportunism can easily be camouflaged as a legitimate interest in re-negotiation, and in the absence of a reliable method for telling them apart, allowing for ex-post re-negotiation could easily render transaction-agreements unworkable. Furthermore, even if they could be separated, allowing for legitimate re-negotiation would introduce uncertainties that may deter parties that have to move first from entering into joint commitments that would be mutually beneficial in the absence of such uncertainty. For these reasons, in order to secure the prospects of realising potential gains from transaction-agreements, all parties may well find it in their common constitutional interest to operate under a rule that excludes re-negotiation options from such agreements, even though they anticipate that there will be occasions where they would, for legitimate reasons, wish to have such option.

The same reasoning does, however, not apply to constitutional agreements. Such agreements are not about promises to make pre-specified contributions to a joint project. They are about joint commitments to submit to common rules of the game, rules that are expected to constrain the participants' behavior in mutually beneficial ways. One may describe a constitutional agreement as an "exchange of commitments" in the sense that accepting rule-constraints on his own behavior is the price each participant is willing to pay in exchange for the benefits he expects from the fact that all others are likewise

constrained. Yet, different from exchange transactions, in such "exchange of commitments" the problems discussed above for non-simultaneous transactions do not arise. Problems of opportunism, in the sense of "cheating," are present, of course. But they are not about attempts to exploit the vulnerability of parties who had to move first with their contributions. Instead, in constitutional arrangements the equivalent to opportunism would be attempts to take advantage of the continuing rule-compliance of other participants while allowing oneself to act unconstrained. Here, opportunism is not a matter of non-simultaneity, it is about violating rules while others continue to comply.

Because of the noted differences from transaction-agreements, and by contrast to the latter, in constitutional agreements the opportunism-issue and the re-negotiation-issue can be clearly separated. Opportunism is about cheating on agreed-on rules. Re-negotiation is about changing agreed-on rules. While in non-simultaneous transactions an attempt to evade one's obligations to contribute can be camouflaged as a desire to re-negotiate the terms of the deal, in constitutional commitments such ambiguity does not arise. Or, more precisely, in constitutional arrangements issues of meeting one's current obligations within a given set of rules can be unambiguously separated from the issue of whether participants may wish to change these rules with regard to their future dealings. Obviously, re-negotiation cannot be allowed to be used as an instrument for escaping obligations that arose within an existing, agreed-on set of rules. Otherwise, the incentive to camouflage opportunistic cheating as re-negotiation would make constitutional agreements unworkable in which critical inter-temporal imbalances in benefits and costs must be expected to arise among participants.[12]

The different role that re-negotiation can be allowed to play in constitutional commitments as opposed to transaction-commitments accounts for the previously noted difference in the significance that must be attributed, respectively, to ongoing agreement and to original agreement in the two kinds of commitment. Due to the difficulties in separating opportunistic behavior from legitimate re-negotiation, transaction-agreements could hardly serve their purpose if re-negotiation were allowed. It is in the common constitutional interest of potential contractors to regard the original agreement to a transaction as binding until the deal is concluded, and not to allow ex-post regret or lacking ongoing agreement to provide an excuse for re-negotiation. The rationale for this is that

[12] This is, for instance, the case for constitutional arrangements that have insurance characteristics. Where participants promise each other to mutually insure certain risks, the wish to renegotiate cannot be allowed to serve as an excuse for not meeting one's obligation to pay when the need arises. This does not mean, of course, that the participants may not legitimately seek to renegotiate the terms of the insurance arrangement prospectively, with regard to future periods.

potential contractors have good reasons to assume that the prospective costs of allowing for re-negotiation, namely the foregone mutual gains from transaction-commitments that are not made because of the risks of re-negotiation, most likely exceed the expected benefits.

By contrast, the purpose of constitutional commitments is not obstructed by allowing for re-negotiation. Potential contractors can very well realise the mutual benefits to be had from joint commitment to constraining rules, and at the same time seek protection against ex-post regret by allowing for prospective re-negotiation of the terms of the arrangement. To be sure, what has to be excluded is that re-negotiation can be used as an instrument to escape current obligations, obligations that already arose under agreed-on rules. But to require that such current obligations are honored is different from requiring that participants continue to accept rules that they no longer consider to their advantage. The benefits expected from joint constitutional commitments are the *ongoing* benefits that participants expect to realise from the fact that they are all bound by common rule-constraints. These benefits are generated continuously, and the arrangement qualifies as "mutually advantageous" only so long as all parties continue to benefit. (This is in contrast to transaction-agreements where only the inclusive package of contributions, from the first move to the concluding act, is to be judged advantageous by all parties, and where stages in between need not at all meet that standard.) When parties to an open-ended constitutional agreement come to the conclusion that, counter to their initial expectation, the agreed-on arrangement is no longer beneficial to them, there is no reason why they should not seek to re-negotiate the terms for their future dealings with the other parties, or, if re-negotiation is not a promising option, why they should not terminate the contract. The purpose of constitutional commitments, namely to capture the ongoing benefits from mutual constraints, is compatible with allowing participants to re-negotiate the rules for future periods or to exit from the arrangement (provided, of course, obligations previously incurred under the arrangement have been met).

What does the above argument imply for the issue of whether the "ability to commit is a feature of democratic politics"? It is useful to consider this issue separately for the two kinds of commitments that have been contrasted here. As far as transaction-commitments are concerned, the fact that a future parliament may revoke a commitment made by a present parliament may seem to suggest that the ability to commit is in doubt. Yet, closer inspection shows that for internal transaction-commitments, i.e. commitments that constituents have made among themselves, the sovereignty of future constituencies does

not *per se* pose a problem. If, as noted above, for our present purposes we disregard potential deficiencies of the political process in implementing citizens' common interests and, instead, assume that these interests are properly reflected in policy choices, it is not clear why the sovereignty of future constituencies should come into conflict with the ability of constituents to enter into effective transaction-commitments among themselves. If a later parliamentary decision, revoking or reneging the original commitment, were to be used by part of the constituency in order to escape its own obligations and to exploit the first-mover disadvantage of other citizens, the latter will find their interests violated and will object. Such a decision can pass only, if the political process allows for decisions to be made that do not reflect common interests of all citizens, but advance the interests of some at the expense of others. To the extent that this is so, the "ability to commit" is obviously limited. But this is not because future constituencies are sovereign in their decisions, but because the political decision making process allows parts of the constituency to exploit others. In other words, there is no per-se-conflict between the sovereignty of the people and the ability to realise mutual benefits form transaction commitments.

As far as constitutional commitments are concerned, the fact that future parliaments can revoke past parliamentary choices - again: disregarding potential deficiencies of the political process in reflecting citizens' common interests - does not appear to cause any problem either. For constitutional commitments *ongoing* agreement is the relevant criterion of mutual advantage and legitimacy. Accordingly, current constituencies are the proper judges on whether or not an existing constitutional arrangement can still be said to be mutually advantageous to all parties involved, and lacking agreement on this issue signals that reforms may be necessary in order to justify the claim that everyone benefits. Parties to a constitutional agreement who find that their interests are no longer sufficiently accounted for can legitimately ask for re-negotiation or, if that does not appear promising, decide to terminate the contract or to opt out of the arrangement.

8. Constitutional Arrangements: Ongoing Agreement and Strategic Bargaining

The foregoing discussion has focused on one particular reason why contracting parties may wish to exclude a re-negotiation option, namely the difficulty reliably to separate between cheating on a commitment and legitimate re-negotiation of the terms of a commitment. As was argued, such separation is particularly difficult in transaction-agreements, but much

less so for constitutional agreements. In case of the latter, the issue of honoring current obligations that arose within previously agreed-on rules - such as obligations resulting from an insurance contract - can be clearly separated from the issue of re-negotiating the term for future dealings. The cheating-issue can, therefore, not be used as an argument against relying on *ongoing* agreement rather than original agreement as the relevant criterion of legitimacy in constitutional contracts. This does not mean, of course, that allowing for re-negotiation and relying on continuing agreement may not interfere in other respects with the purposes of constitutional agreements. In fact, even if the cheating issue is not of significance, problems may arise because of difficulties reliably to separate legitimate interests in re-negotiation from strategic bargaining.

Joint constitutional commitments are mutually advantageous if all parties to the contract expect payoffs in excess of their expected costs. A constitutional arrangement is mutually beneficial if all parties realise gains from participating that exceed their opportunity costs. The ultimate test of expected mutual advantage in joint commitments is voluntary original agreement. The ultimate test of mutual benefits in constitutional arrangements is continued voluntary agreement to the terms of the contract. If it were not for reasons of strategic bargaining all constitutional commitments that promise gains for all participants should be able to find voluntary approval, and all constitutional arrangements that generate positive net-payoffs for everybody involved should enjoy continued voluntary consent. Yet, the interest in “selling” their agreement at the highest possible price may induce parties to strategically withhold or withdraw their consent, even though the terms of the respective constitutional commitment or arrangement are beneficial to them. Such strategic behaviour may prevent potential mutually advantageous commitments from being concluded, and it may threaten the stability of mutually beneficial constitutional arrangements.

To be sure, the likelihood of strategic bargaining to occur and to obstruct mutually beneficial agreements varies with certain contingencies. Two aspects appear to be of particular significance, namely, first, that *original* agreements are less threatened by strategic bargaining in *self-selected* as opposed to *pre-defined* groups, and, second, that *ongoing* agreement is less vulnerable to strategic behaviour in arrangements from which participants can easily opt out. It is instructive to compare democratic polities to private voluntary associations along both dimensions.

The distinction between self-selected and pre-defined groups concerns the question of whether the principal beneficiaries of a prospective commitment can be defined

independently from their actual participation in the commitment. If a group of beneficiaries can be identified prior to the reaching of an agreement, it is, in the terminology adopted here, pre-defined. For example, residents around a lake can be considered a pre-defined group with regard to commitments that are intended to make for a cleaner lake. In such groups parties may be tempted to withhold their agreement for strategic purposes, in the hope of negotiating more advantageous terms. By contrast, a group is “self-selected,” in the sense the term is used here, if there are no pre-defined beneficiaries, if only those who join the commitment can expect to benefit. For example, participants in an economic venture, recruited from an open pool of potential candidates, can be regarded as a self-selected group with regard to commitments that promise to make the joint venture economically successful. In such groups there is much less opportunity for strategic bargaining since any party seeking privileged treatment can be substituted by some other candidate from the pool. - Compared to private voluntary associations, the constituencies of polities are, obviously, much more of the nature of pre-defined groups. Potential mutually beneficial commitments are, therefore, more likely to be obstructed by strategic bargaining in politics than in the private arena.

The difference between self-selected and pre-defined groups is of relevance with regard to the issue of initial agreement to a joint enterprise. Strategic bargaining is the less of an obstacle to reaching an agreement the more the group of prospective contractors shares the characteristics of a self-selected group. With regard to the issue of ongoing agreement within constitutional arrangements the critical factor is to be found in the second of the above-mentioned aspects, i.e. the ease with which parties can terminate their participation. Ongoing agreement is less likely to be obstructed by strategic bargaining in constitutional arrangements the greater the ease with which participants can opt out from such arrangements or, in other words, the more the respective group of contractors shares in the characteristics of a voluntary association.

Ongoing agreement to a constitutional arrangement can be expressed in two ways, by continued participation (non-exit) and by "voice," i.e. verbal approval. Correspondingly, disagreement can be expressed by exit and by voiced disapproval. There is an interesting asymmetry involved here: Voiced approval can ordinarily be considered a reliable indicator of voluntary agreement, except for cases where, because of intimidation or other special circumstances, incentives for "preference-falsification" (Kuran 1995) may be present. Voiced disapproval, however, cannot ordinarily be trusted to be a reliable indicator of factual disagreement, in the sense of reflecting a legitimate re-negotiation

interest, because it may be used for strategic purposes. On the other hand, by contrast to voiced approval, continued participation cannot be generally considered a sufficient indicator of voluntary agreement, because with high exit costs continued participation may not indicate much more than a lack of accessible alternatives. Exit, however, can obviously be regarded as a truthful indicator of disagreement since it cannot be used for strategic purposes. To be sure, the *threat of exit* may be used to bargain for better terms within a constitutional arrangement. Yet, threatening with exit means to use *voice*. Actual exit obviously means to give up any ambition to improve one's position within a constitutional arrangement.

In private voluntary associations continued participation can be viewed as a reliable indicator of ongoing agreement to the terms of the arrangement, the more so the easier it is for participants to opt out. As long as parties continue to participate in the presence of easily accessible alternatives, they can be presumed to consider the arrangement advantageous to them, even if they voice dissatisfaction. To be sure, exit of dissatisfied (and entry of new) participants cannot be the only mechanism for voluntary associations to deal with dissent and to maintain ongoing agreement. Because in a changing world parties may legitimately wish to re-negotiate the "social contract" of a common enterprise of which they want to remain a part, voluntary associations must be able to respond to such interests if they are to be able to adapt and to survive. And participants in voluntary associations may, of course, be tempted to use the re-negotiation option for strategic purposes, to seek to achieve privileged terms for themselves. Yet, under conditions of low cost exit, re-negotiation is of limited effectiveness as a tool for strategic bargaining. To the extent that attractive alternatives are easily available to them, other participants will be unwilling to make unwarranted concessions and will resist strategic re-negotiations. Such conditions are favorable for separating legitimate re-negotiation from strategic bargaining.

Compared to private voluntary associations, opting out is typically more costly in case of polities. Accordingly, there is much more room for re-negotiation to be used for strategic purposes. And, securing ongoing agreement is a much more delicate matter in politics. Yet, even if their differences to voluntary associations are in part inherent to the very nature of political entities and, therefore, unavoidable, there is considerable room for giving polities more of the qualities of voluntary associations by suitable institutional and organisational reforms that make for lower exit costs. Without going into details here, it may suffice to mention that competitive federalism, in its territorial and functional forms, is an important instrument for that purpose (Frey and Eichenberger 1999; Vanberg 2000).

9. Conclusion: Citizens Sovereignty and the Ability to Commit

In order to function ideally as "cooperative ventures for mutual advantage" democratic polities would have to be able to identify and implement reliably measures that promise benefits to all citizens, and exclude measures that harm the interests of some or all citizens. Practically feasible institutions of political decision-making fall necessarily short of that unattainable ideal. They "err," more or less, on both sides: They miss out on implementing measures that would be beneficial to all citizens, and they allow for measures to be taken that violate the interests of citizens. Alternative political institutions can be compared in terms of the risks with which they allow the two "errors" to occur, and from the citizens' perspective those institutions are preferable that bring the two risks in the most favorable balance.

The focus of this paper has been on the issue of whether the sovereignty of democratic constituencies limits their ability to commit. Since there are obvious benefits to be had from workable commitments, an inability to commit would mean that democratic constituencies were inherently incapable of realising such benefits. And, short of giving up the principle of citizens sovereignty, there would hardly seem to be an institutional remedy available for this inherent defect. - I have sought to argue that there is no reason for such pessimistic conclusion to be drawn. The principle of citizen sovereignty and the ability to commit are, I submit, compatible. In particular, the requirement, implied in the principle of citizen sovereignty, that *ongoing* agreement is to be regarded as the relevant standard of legitimacy of constitutional arrangements is perfectly compatible with the ability to commit. What is necessary for ongoing agreements to be a workable foundation for constitutional commitments is that legitimate re-negotiation can be separated from cheating on commitments and from strategic bargaining. In democratic polities such separation is possible.

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