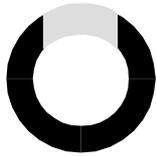


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**CONSTITUTIONAL ECONOMICS AND
ETHICS - ON THE RELATION BETWEEN
SELF-INTEREST AND MORALITY**

VIKTOR J. VANBERG

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1. Introduction

Fundamental to the economic approach to human behavior is the notion that people are motivated by self-interest in the sense that, if faced with a choice among alternative courses of action, they do what, in their view, best serves their own interests. Ethics, on the other hand, is based on the idea that there exist rules of moral conduct, and that people are not permitted simply to pursue their own interests, but are obliged to conform to these rules.

It seems evident that what serves people's self-interest need not always coincide, in fact, often clashes with what they ought to do from a moral point of view. Such conflicts between morality and self-interest are presumably the key reason for the often encountered view that economics and ethics not only have little in common, but that there exists a "categorical difference between the ethical and economic perspective" (P. Ulrich 1996:30).

In what follows, I hope to show that this notion of a "categorical difference" needs to be revised, at least in regard to the kind of economic perspective that has been advanced, in somewhat different but compatible ways, by the research program of the Freiburg School, founded by economist Walter Eucken and jurist Franz Boehm (Eucken 1990; Vanberg 1998 a) as well as by the paradigm of Constitutional Political Economy, initiated by James M. Buchanan (Buchanan 1990; Vanberg 1998b, 1999).¹ The perspective that they share is, to be sure, not entirely novel in economics. It can actually be traced back to Adam Smith's concept of political economy as a "science of legislation," a science that can provide guidance to those who are to choose the rules for a society (Vanberg 1994:5).

Like the political economy of Adam Smith, the constitutional economics approaches of Eucken and Buchanan essentially focus on the development of desirable rules for human coexistence and cooperation, which inevitably brings them into systematic proximity with the domain of social ethics, which is concerned with the moral rules people should observe in their dealings with one another. When it comes to assessing these rules we

¹ On the commonalities between the *Ordnungsoekonomik* of the Freiburg School and Buchanan's Constitutional Political Economy see Vanberg (1988; 1997a).

find that constitutional economics arguments, which refer to individuals' interests, and ethical arguments, being based on criteria of moral desirability, are far more closely related than the common perception of a conflict between morality and self-interest suggests. In fact, what may appear as an irreconcilable conflict at the level of particular actions appears in a different light if we look at the level of rules and relate the question which rules are desirable from an ethical perspective to the question which rules are desirable from the self-interest perspective of the individuals whose coexistence and cooperation is to be governed by them.

2. Action interests, disposition interests, and constitutional interests

Based on a set of conceptual distinctions summarized in the table below, I shall show how, in their respective approaches to the issue of what are desirable rules of human coexistence and cooperation, the constitutional economics perspective and the ethical perspective can be compared to each other. The table distinguishes three levels, at which an ethical and economic perspective can be applied: 1) the level of particular action, 2) the level of individual rules of conduct or behavioral dispositions, and 3) the level of social rules. In columns 1 and 2 the relevant ethical and economic issues are specified for each level. Column 3 refers to the constitutional issue of how to create conditions which make ethics and self-interest compatible.

	<i>Ethical perspective</i>	<i>Economic (self-interest) perspective</i>	<i>Constitutional perspective</i>
<i>Level of particular actions</i>	Which choice of action is morally right?	Which choice of action serves the agent's interests?	Can conditions be created in which the morally right choice always coincides with the agent's interests? (unsolvable problem)
<i>Level of individual behavioral dispositions</i>	Which behavioral dispositions can be defined as ethical?	Which behavioral dispositions serve the agents' interests in the environment in which they live?	Can conditions be created in which adopting ethical dispositions serves the agents' interests? (solvable problem)
<i>Level of social rules</i>	What rules of social conduct are ethically desirable?	Which social rules serve agents' constitutional interests?	Can conditions be created in which the agents' constitutional interests coincide with moral rules? (solvable problem)

The definitions in the table are based on the idea that the key to clarifying the relationship between self-interest and morality, or between economics and ethics, is to distinguish various interest levels. If, as in the table, we distinguish between *action* interests, *disposition* interests, and *constitutional* interests, it should become apparent that, while a conflict between morality and self-interest may be inevitable at the level of particular behavioral choices, this is no longer so when we look at the level of dispositions and social rules, asking the question: which dispositions may serve a person's interest, and under which social rules may a person wish to live? It is easy to envisage specific choice situations where an action that directly serves a person's own interests contradicts what he should do from an ethical point of view. Indeed, it is scarcely possible to envisage a world in which this conflict between morality and self-interest would not exist. Yet, things appear somewhat different at the level of general behavioral dispositions, and very different at the level of constitutional interests.

The evidently accurate observation that individuals may face conflicts between self-interest and ethical imperatives in particular choice situations, often leads to the rash conclusion that a willingness to put one's own interests last is the sign of moral behavior. If, like this, we assume from the start that morality is a question of *motivation*, there is no point to further investigating the relationship between the economic perspective, which is based on the assumption that behavior is generally self-interested, and the ethical perspective. If morality is defined in motivational terms, an unbridgeable gap between morality and self-interest is created by definition, with the effect that economic and ethical perspectives must seem inherently irreconcilable.

The issue of the relationship between self-interest and morality is only worth exploring if one adopts a *behavioral* view of morality, i.e. a view that does not focus on an action's underlying (and unobservable) *motivation*, but on whether the empirically observable behavior coincides with specifiable norms of ethical conduct (Vanberg 1997b). According to the behavioral view, morality does not require the individual to abandon the pursuit of self-interest, but only to abandon the pursuit of self-interest by immoral means. Although a behavioral concept of morality does not eliminate the potential conflict between self-interest and morality, it does not exclude by definition alone the possibility that self-interested behavior can be moral and vice versa. By insisting on the distinction between the motivation and the factual consequences of human actions, it also alerts us to the fact that non-self-interested or altruistic motivation by no means guarantees a behavior that, in terms of its actual consequences, we would consider morally desirable.

If we regard the function of morality as providing a desirable frame for human coexistence and cooperation, the behavioral concept of morality is surely the more appropriate alternative. According to such a concept, persuading people to abandon self-interest is neither necessary nor sufficient for solving the problem of moral order. Rather, the problem can only be solved by creating structural conditions which induce people to act morally out of their own interest, conditions which reconcile self-interested behavioral *motivation* and ethical behavioral *conduct*.

To be sure, the problem of creating a moral order would in fact be an unsolvable task if conditions first had to be created (row 1, column 3 of the table), whereby - in concrete decision-making situations - the most personally advantageous alternative always coincided with the morally required one. The nature of the problem changes, however, if instead of asking whether, in particular choice situations, it is in the interest of an individual to behave morally, we ask whether it promotes his own interests to be *generally disposed* towards complying with moral rules, i.e. not to calculate in each single case if moral behavior is advantageous or not. The comparison that at this level is of relevance for the relationship between morality and self-interest is no longer concerned with the consequences of single, specific choices, but with the total sum of personal advantages and disadvantages that result from a “moral disposition” over a relevant period of time, i.e. from the general willingness to respect the rules of moral conduct, independently of the specific circumstances of particular choice situations. In other words, the relevant comparison is between the overall pattern of payoffs that results from a moral disposition, compared to the pattern of payoffs a person would experience if she had *other general dispositions* or simply behaved in a discretionary manner in every single case.

In everyday language we refer to behavioral dispositions when we talk of a person’s character. Accordingly, the issue at hand can also be expressed in terms of the question whether - and if so, under which conditions - a moral character can be to a person’s advantage. This, of course, raises the further question of how the implied notion of a “calculus of advantage” can be theoretically defined at the level of behavioral dispositions. Obviously, we can hardly speak of a genuine “choice” between alternative behavioral dispositions (or character traits) in the normal sense in which we speak of a choice between alternative courses of action. Behavioral dispositions are much more the product of subconscious learning processes than a subject of deliberate choice. They can, therefore, not simply be adopted or rejected as a result of a conscious calculation of their advantages and disadvantages, even though a person may, of course, wish to adopt certain dispositions and make efforts to develop the respective character traits. If we assume, as certainly we must, that some kind of “calculus of advantage“ occurs at the level of dispositions, the “accounting” of the advantages and disadvantages of relevant

alternatives at that level must clearly be based on something other than deliberate calculation. In order to allow for such a modified notion of a “calculus of advantage,” the conventional economic model of rational choice will have to be expanded or revised, for instance along the lines of Ronald Heiner’s theory of “rule-governed behavior” (1990). An “economic,” in the sense of interest-based, explanation of moral dispositions developed along these lines would proceed in two steps. The first step would be to explain, as Heiner’s theory does, why rule-following behavior can produce greater long-term benefits than discretionary decisions from case to case. The second step would consist of determining the conditions in which a *moral* disposition can yield greater rewards than potential alternative dispositions (Vanberg 1994, chapters 1, 2 and 3; Vanberg and Congleton 1992).

3. Moral order and consensual constitutional interests

The crucial point in the distinction between the level of behavioral choices and the level of general behavioral dispositions is the following: It is noticeably easier to create and sustain a moral order if one is not dealing with “*homines oeconomici*,” who in every single instance choose the most personally profitable course of action, but with rule-following individuals who, even though they do, indeed, pursue their own interests, do so on the basis of general behavioral dispositions which they have found to work to their overall advantage. It would go beyond the scope of this paper to discuss the issue of what kind of learning process is required to process information on the relative benefits of alternative behavioral dispositions.² What matters here is that the conditions which render it profitable for rule-following agents to possess *moral* dispositions (row 2, column 3 of the table) are far easier to create than conditions that ensure that for discretionary case-by-case maximizers the most profitable course of action generally coincides with what is morally required. To be sure, the potential conflict between morality and self-interest continues to exist at the level of general behavioral dispositions, since moral dispositions are by no means always “rational,” in all kinds of environment. However, the problem of creating an environment in which people can be “rationally”

² A most instructive discussion of this issue can be found, for instance, in J.H. Holland (1995: 41ff.).

moral is a solvable problem.³ Indeed, it is a problem that every society must solve if a moral order is to be sustained.

The relationship between morality and interests appears in yet a different light if we turn to the third level, i.e. the level of social rules, and examine people's *rule* or *constitutional interests*, i.e. their preferences with regard to the "rules of the game" that they wish to see enforced in the society in which they live. One can meaningfully speak of constitutional interests only in relation to specific, definable communities or social units, which a person belongs to and where she can want certain rules to be enforced. People are generally affiliated to a variety of overlapping groups or communities, each one internally governed by specific rule systems (formal and/or informal): these range from the family and private associations, various kinds of polities at the sub-national, national or supranational level, to the largest group of all, i.e. the world community. For each of these units, we can ask which general rules reflect the constitutional interests of its members.

As regards the constitutional interests that people hold in their various groups, associations or communities, a distinction of key significance in the present context is that between *consensual* constitutional interests and interests in *privileges*. When people consider which rules serve their own interests, the first to spring to mind are likely to be rules that grant them some privilege or other, i.e. offer special personal advantages. And, as far as they are in a position to choose and enforce social rules without considering the interests of other members, we should expect self-interested individuals to be tempted by their interests in privileges. Interests in privileges are by their very nature non-consensual. They may be enforced by means of fraud or coercion, but are no basis for a constitutional order to which all participants can voluntarily agree, with a clear understanding of their own interests.

In contrast to non-consensual interests in privileges, *consensual constitutional interests* aim at rules that are desirable and acceptable to all parties involved. The key contention of this article can be stated as follows: the informed constitutional interests shared by all

³ See Vanberg (1994: 51ff.) for a discussion of the (seemingly paradoxical) question: "Can it be rational to be *always moral* if it is *not always rational* to be moral?"

members of a group or community define the very rules which, from an ethical perspective, are morally desirable for that group. The adjective “informed” is added in order to account for the fact that the relationship between the enforcement of specific social rules and the resulting pattern of outcomes may be complex and not immediately obvious, and that, because they are not fully aware of the real relationships, people may be prompted to endorse rules they would reject if they were better informed about their factual working properties. What must be assumed to be of normative significance, therefore, is their informed agreement.⁴

Just as the question of which rules are the subject of consensual constitutional interests can be meaningfully discussed only in relation to specified groups, the question of which behavioral rules qualify as moral rules can, according to the interpretation proposed here, properly be answered only if we specify the relevant group of reference. The (group-) relativity of morality implied in such a notion is of less impact than it may first appear. It implies no limitation or restriction whatsoever with respect to what one may consider the relevant level of moral commitment, be it a local community or humankind. It only requires that one specifies with regard to what group or community a rule is claimed to qualify as a moral rule. How the appropriate reference group is to be defined depends on the nature of the issue one is interested in.

The argument that rules reflecting the consensual constitutional interests of all members of a group correspond to the rules that are morally desirable for that group, must be understood in a dual sense. On the one hand, it is meant as a proposed definition, i.e. it implies that the term morality can thus be meaningfully interpreted and expressed in operational terms. On the other hand, it is meant as the empirical hypothesis that both our general understanding of morality and major philosophical concepts of morality, as far as they are concerned with the issue of desirable rules for human coexistence and cooperation, can essentially be interpreted in terms of this concept or are at least compatible with it.

I suppose that many of the major ethical doctrines do in fact, with their respective definitions of the attributes of moral rules, refer to criteria which are identical or very

⁴ On this issue see pp. 11ff. below.

similar to what has been defined here in terms of consensual constitutional interests. This evidently applies to concepts which see the essential criterion of moral rules in their impartiality and universal applicability or, as the discourse ethics of H.O. Apel and J. Habermas, in the “Konsensfähigkeit für alle Betroffenen” (acceptability to all parties) (Apel 1997: 191).⁵ This is also true for all concepts which - like the moral philosophy of David Gauthier (1986)⁶ - in one form or another, view moral rules as behavioral constraints, which enable people to realize mutual gains from cooperation in cases where an unconstrained pursuit of self-interest would exclude such gains, or would even result in direct mutual damage. Donald Campbell (1986: 171) similarly focuses on the issue of constitutional interests when he states that the rules of morality reflect our preferences with respect to the behavior of *others*, i.e. our interests in how they should behave. Obviously, the direct implication of this interest is only that we wish *others* to be bound by such rules. Yet, where rules cannot be unilaterally imposed but have to find agreement among equally rational agents, these interests in how others should behave can be implemented only as mutual or reciprocal commitments (Baurmann 1996: 139ff.; Buchanan 1962: 312; Homann and Blome-Drees 1992: 44).

4. Constitutional interests and “Ordnungspolitik” (constitutional politics)

The constitutional economics concept of consensual constitutional interests is based on the idea that people can reap mutual benefits by jointly committing to suitable rules of the game. The key idea of this approach is that the notion of “gains from trade,” familiar from the economic concept of voluntary market exchange, is generalized to agreements on rules, interpreted as voluntary “exchanges” of self-binding commitments (Buchanan 1991: 81ff.; Vanberg 1999). To be sure, the constitutional interests referred to here merely entail the desire to live in a community in which the rules in question are enforced. This desire alone does not per se generate an interest in personally conforming

⁵ Habermas (1991: 32): „Jede gültige Norm muß der Bedingung genügen, daß die Folgen und Nebenwirkungen, die sich aus ihrer *allgemeinen* Befolgung für die Befriedigung der Interessen *jedes* Einzelnen voraussichtlich ergeben, von *allen* Betroffenen zwanglos akzeptiert werden können.“

⁶ See Vanberg (1994: 54ff.).

to these rules. In other words, the *constitutional* interest in seeing rules *enforced* in one's community does not automatically generate an *action*-interest in *conforming to* them. Rational agents will recognize, however, that their constitutional interest in living in a community where certain rules are enforced can become effective only if conditions are in place that ensure a sufficient direct interest in rule-compliance among the parties involved. Therefore, they should have a common interest in creating such conditions where necessary.

It is the task of *Ordnungspolitik* (constitutional politics), on the one hand, to identify and implement rules which serve the consensual constitutional interests of the members of a community and, on the other hand, to create conditions which generate sufficient interest in complying with these rules. This is what Walter Eucken (1990: 366) had in mind when he argued that the "coordination of individual and collective interests is the task of *Ordnungspolitik*." As noted before, to ensure sufficient interest in adhering to moral rules does not require that the utility-maximizing and the moral course of action coincide for all agents in every single choice situation. This would in fact be an unsolvable task. What is required is that conditions are created which allow people to be "rationally" moral in the sense that they can trust that by respecting moral rules they serve their own overall interests and do not systematically and permanently put themselves at a disadvantage.

Eucken (2990: 368) refers to this issue when he notes that "it is unfair to require people to do what can only be accomplished by the economic constitution: to create a harmonious relationship between individual and collective interests." If people are systematically and constantly penalized for behaving "morally," i.e. in a socially desirable manner, it means that the general system contains flaws that cannot be offset by appealing to people's willingness to make personal sacrifices. In fact, people who are particularly open to such appeals would only expose themselves to exploitation by more cynical agents (Vanberg 1987). And even if everyone could be motivated to make moral sacrifices, a moral system based on this type of willingness would always be vulnerable, since it would not have any defense against "immoral invaders," to whose exploitative tendencies it would only provide a particularly profitable niche.

According to what has been argued above, the ethical question concerning the rules of a moral order is essentially the same as the constitutional economics question concerning rules that reflect the consensual constitutional interests of the parties concerned. If one accepts this argument, one must regard behavior as moral as long as it is in accordance with rules of the game that are desirable for, i.e. in the consensual constitutional interest of, all persons involved. This fact is of special significance since the moral intuitions of people may not always correspond with their consensual constitutional interests.

Constitutional, that is rule-related interests are *derived* interests, in the sense that it is not the rules per se that interest us, but their working properties or their effects, i.e. the pattern of outcomes that result from alternative rule systems. The connection between the “order of rules” and the resulting “order of actions” (Hayek 1969) is often complex and not at all obvious. Which rules people believe to serve their interests depends on their explicit and tacit, more or less adequate theories about what outcomes will result from potential alternative rules, and how they will be personally affected. Accordingly, people’s understanding of what is in their consensual constitutional interest depends on their explicit or implicit expectations concerning the working properties of alternative rule regimes. This means that there is no guarantee for their moral intuitions always to coincide with their “informed” constitutional interests, i.e. the interests that they would hold if aware of the actual functional characteristics of the rules in question. It seems that discrepancies between spontaneous moral intuitions and informed constitutional interests are one of the main causes of the widespread moral distrust by which the competitive order of the market is often met.

5. The market and morality

The rules of the market system are rules for the interaction of an - in principle, unlimited - number of people, who are not related by personal ties or mutual attachment, but nevertheless wish to enjoy the mutual benefits that can be reaped from voluntary exchange and cooperation. By contrast, people’s moral intuitions must be expected to be primarily shaped by the experience of living together in small groups, where “experience” is to be interpreted in a double sense, as the “experience” that, in a metaphorical sense,

the species “homo sapiens” has undergone over its evolutionary history, and the experience that, in the ordinary sense, an individual person undergoes through his life time. The evolutionary history of the species was, up to roughly ten thousand years ago, marked for countless generations by the conditions of life in small hunter/gatherer groups. Ten thousand years are too short a time span for significant changes to occur in biological evolution. We may conclude, therefore, that our *genetic* makeup - including our “moral instincts” - is adapted to these primordial conditions, and not to the conditions of life in modern extended societies.⁷ As regards the socialization history of individual persons, that too is predominantly shaped by the conditions of life in small groups - the family, school, the workplace, so that we must assume that the acquired behavioral dispositions of human beings - including their learned moral intuitions – are primarily adapted to the conditions of life in such intimate groups. Yet, the “moral instincts” and “moral intuitions” that are essential for cooperation in such groups are by no means necessarily adapted to the problems that have to be solved in order to sustain a mutually advantageous system of cooperation among a large number of virtual strangers. The creation of such a system is, however, precisely the function of the rules of the market. Needless to say, some of the behavioral rules governing cooperation in small groups will also be essential for market cooperation as well. Yet, some of the moral principles (Hayek refers specifically to notions of “distributive justice”) that may be functional in the context of small groups may well prove totally dysfunctional when transferred to a market context.

The moral qualities of a market order – as of any other constitutional order - cannot be judged appropriately just by applying the moral instincts or intuitions referred to above. They should be judged according to whether their defining rules correspond to the (informed) consensual constitutional interests of the persons concerned. In other words, responsible moral criticism of the market system should prove its case by explicitly stating which of the rules of a market order are supposedly in conflict with the consensual, constitutional interests of the people concerned, and by specifying which

⁷ This fact about our “moral instincts” has been stressed by F.A. Hayek (e.g. 1979: 160, 164). Hayek’s argument finds support in more recent contributions from “evolutionary psychology,” such as J. Tooby and L. Cosmides (1992).

alternative rules of the game are supposed to serve these interests better than the rules that are considered deficient.

Since Adam Smith's days, advocates of the competitive market order have, explicitly or implicitly, argued their case from the conviction that the order they favor serves the common interests of all, that it corresponds - in the terminology used here - to people's consensual constitutional interests. In his critique of the mercantilist system of privileges and in his appeal for what he termed the "simple system of natural liberty" Adam Smith was clearly concerned with the ethical nature of the competitive market order as a privilege-free system, a concern which has been restated most emphatically by Franz Böhm, co-founder of the Freiburg School, in an article on "Private law society and the market economy" (1966). Yet, the message of the ethical value of the competitive market order as a privilege-free system has almost been drowned out by the choir of voices of those who, even if they are prepared to concede the "economic efficiency" of the market economy, nevertheless suggest that it is somehow a morally deficient system. In reference to such "resentment against economic liberty," as it emerged in the final decades of the 19th century, Franz Böhm (1980: 260) noted: "It was less the socialist critique than various diverse intellectual trends which have rapidly gained ground within the sciences - including economics - since the turn of the century that reinforced this prejudice: the conviction that the free market was an ethically reprehensible and socially amoral system gradually became an almost universally shared view among all intellectuals."

A preferred target of moral criticism is the link between market competition and profit-seeking, or, more precisely, the fact that the sanctioning mechanism of competition forces market participants to be guided in their economic decisions by anticipated profits. There can, of course, be no doubt about the fact that economic profit is the principal indicator of success in the "game of catallaxy," as Hayek has called the market exchange game. The "market game" works to reward those who succeed in producing goods or services for which others are willing to pay a price that exceeds the costs of providing them, i.e. the opportunity costs of the resources used. Profits simply constitute the difference between revenue and (opportunity-) costs. Profit-seeking thus means nothing other than striving for success in the "market game." If this is the case, what sense does

it make to view striving for profit as immoral? What sense is there in reproaching the participants in a competitive game for simply attempting to play the game well? To be sure, one may well ask whether the game itself is desirable, i.e. whether it is at all in the common interest of all participants to play the game in its current form, i.e. as defined by the set rules, or whether they might not be better off playing a different game, one defined by better rules? Yet, if there is no reason to doubt that the game itself is a desirable game, then it is absurd to morally criticize people for seeking to play the game successfully, as long as they do so within the rules. And, if there are reasons to believe that a better game could be played, then the appropriate response is to seek a change in the rules of the game, not to require the players to disregard their own interests.

What is true for other games applies, of course, no less to the “market game,” namely that players, or market participants, are morally obliged to comply with the rules that are binding for all. Market competition does not take place in an anarchic vacuum; it operates within specific rules of the game, within the constitutional framework of a competitive order, a *Wettbewerbsordnung*. The participants are not at liberty to strive for success using any means available. They are expected to seek success only by employing means and strategies that comply with the rules of the game, rules which may include, in addition to what is explicitly codified and formally sanctioned, certain generally accepted standards of fair and honorable behavior, which, even if they are not sanctioned formally, one cannot violate without damaging one’s reputation. However, it does not make sense to regard not only unfair striving for success, but the striving for success per se as morally suspect. Nor does it make sense to require market participants to compensate for deficiencies in the rules of the game by sacrificing their ambition to play the “market game” successfully. Ensuring that the competitive market process is a worthwhile and desirable game for all, as long as it is actually played according to the rules, is a matter of appropriate constitutional framing, the task of *Ordnungspolitik* or constitutional politics. To play the game within the rules is the obligation of the players. But it cannot be their role, to compensate, by their way of playing the game, for what *Ordnungspolitik* fails to do. Nor could they ever succeed in doing so.

6. Consensus and the choice of rules

If we assume that the attribute “moral” applies to rules which are in the *consensual* constitutional interests of the parties concerned, and if, on the other hand, we take into account that people generally have incentives to pursue their respective interests in *privileges*, a critical question arises with regard to the processes by which rules are selected. The question is whether conditions exist, or whether one can create or promote such conditions, in which people’s consensual constitutional interests are likely to prevail (line 3, column 3 of the table). The remainder of this paper is about this issue.

Where people are in a position to affect the choice of rules in a community without regard for the interests of other parties, they will be tempted to opt for rules that put them in a privileged position, i.e. for rules that work to their differential advantage. Similar to what Eucken and Böhm had to say in their critique of what they described as “refeudalisation,”⁸ the economic theory of rent-seeking (Buchanan et al. 1980) has pointed to the problem that, by their simultaneous efforts to secure privileges for themselves, people tend to bring about, as an unintended but inevitable aggregate outcome, an overall constitutional regime that is less desirable for all parties - including the “beneficiaries” of privileges - than a privilege-free rule system would be that reflects the consensual constitutional interests of all. Therefore, the vital issue is how a constitutional order that serves the consensual interests of all can be established, and how it can be protected from being eroded by privilege-seeking or rent-seeking activities that induce a progressive decline towards a system which, in the end, serves nobody's interests.

If the aim is to structure or frame the process of constitutional choice in ways that allow the consensual constitutional interests of the members of a community to prevail, and to “filter out” interests in privileges as far as possible, two basic approaches can be adopted. On the one hand, we can attempt to create conditions that *motivate* individuals to demand “fair” or consensual rules. On the other hand, we can attempt to create conditions which leave people with *no other choice* than to opt for consensual rule

⁸ See Vanberg (1997a: 716f.; 1998a: 177f.).

systems, i.e. conditions which exclude or at least effectively curb opportunities for successful privilege-seeking.

The first alternative is the theme of approaches that model the agreement on rules as a choice behind a veil of uncertainty (Buchanan and Tullock 1962) or ignorance (Rawls 1971). The essence of this concept is that people will be led, from their own self-interest, to choose fair or consensual rules, if they are ignorant or sufficiently uncertain about how alternative rules will affect them personally. Under such conditions, they need to consider the various possible ways in which they might be affected by the rules in question. Since they cannot know what their own position will be, they will have to assess the merits of alternative rules in terms of their predictable *general* working properties, i.e. in terms of how desirable they are irrespective of what one's particular position is. Stated differently, the effect of the veil of uncertainty or ignorance is to transform potential *inter*-personal conflicts of interest into *intra*-personal conflicts, causing individuals to opt for "unbiased" or fair rules out of self-interest. For the framing or structuring of constitutional choice processes this implies: To the extent that these processes can be organized in ways that increase uncertainty about how one will be personally affected by the rules under consideration, the incentives for privilege-seeking will be lessened, and the prospects will be enhanced for consensual constitutional interests to prevail.

As regards the second alternative, two basic methods can in turn be distinguished by which opportunities for successful privilege-seeking may be reduced. The first method is to explicitly constrain legislative processes by a non-discrimination or equal-treatment requirement, i.e. to exclude discriminatory and privilege-granting rules as inadmissible. This has been the purpose of the classical principle of the rule of law, or the generality principle, as the constitutional ideal of what Franz Böhm (1980) has called the "private or civil law society."⁹ Yet, efforts to implement this ideal by explicit constitutional constraints on governments and legislative powers have only had limited success. Especially in the area of economic legislation, all kinds of privileges have been, and are, commonly granted by governments and legislators of all modern democracies, be it in the form of subsidies, protectionist regulations, tax exemptions or other special treatments.

The second strategy for restricting privilege-seeking and improving the prospects for consensual constitutional orders consists of promoting competition between political communities or “jurisdictions.” What constitutes a privilege for one party (e.g. the recipient of subsidies) has as its mirror-image a discriminating, differential burden imposed on other parties (e.g. as taxpayers or consumers). The easier it is for members of a jurisdiction to evade discriminating treatment by moving mobile resources or by migrating in person to an alternative jurisdiction, the narrower the scope for successful privilege-seeking and for sustaining existing privileges becomes. In the limiting case of cost-free mobility between jurisdictions, the only constitutional regimes that can be sustained will be those that command the voluntary cooperation of all parties involved.¹⁰ Under such conditions, attempts at privilege-seeking cannot be assured long-term success. Whatever their respective potential interests in privileges might be, in the absence of willing counterparts who would have to carry the burden of their privileges, individuals will have no other option than to choose among consensual constitutional regimes. Real-life conditions are, of course, far removed from this theoretical borderline case, but every change in technology, institutional structure or other relevant factors that facilitates mobility between jurisdictions makes it more difficult to gain and to sustain privileges, and it improves the prospects for consensual constitutional interests to prevail. The developments currently being discussed widely under such headings as globalization and jurisdictional competition may turn out to be more effective in implementing the classical liberal ideal of a privilege-free constitutional order than the traditional efforts at implementing the generality principle have been.

Of course, what applies to competition in general, is no less true at the level of competition between jurisdictions, namely, that in order for competition to work beneficially it has to be governed by appropriate rules. To address this issue is a challenge for the theory and politics of constitutional order.

⁹ J.M. Buchanan and R.D. Congleton (1998) provide a detailed discussion of the generality principle from a constitutional economics perspective.

¹⁰ This purely theoretical limiting case corresponds to what R. Nozick (1974: 297ff.) describes as a “framework for utopia,” a meta-constitution which is to ensure that “each community must win and hold the voluntary adherence of its members” (ibid.: 316).

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