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**A Constitutional Economics Perspective
on Soft Paternalism**

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A Constitutional Economics Perspective on Soft Paternalism*

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Abstract. Using a framework that distinguishes short-term consumer preferences, individual reflective preferences and political preferences, we discuss from a constitutional economics perspective whether individuals find it in their common constitutional interest to endow representatives and bureaucrats with the competence to impose soft paternalist policies. The focus is specifically on soft paternalist policies, because these often work with non-transparent “nudges” that are considered as manipulative in some contributions to the literature. We show that those soft paternalist policies that are manipulative indeed collide with three criteria of consumer sovereignty, reflective sovereignty and citizen sovereignty that can be argued to represent common constitutional interest of citizens. On the other hand, we argue that the set of paternalist policies that is deemed acceptable on the constitutional level is restricted to non-manipulative instruments, and their application as government policies is limited to cases with stable and very homogenous preferences. However, we also argue that competitive markets are capable of supplying many mechanisms that allow individuals to cope with problems in their decision-making processes on a private level.

JEL-Classification: D11, D18, D63, D83, H11, Z18.

Keywords: nudge; biases; autonomy; consumer sovereignty; reflective preferences; behavioural policies.

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1 Introduction

Starting with Sunstein and Thaler (2003), as well as Thaler and Sunstein (2003), the issue of ‘soft’ or ‘libertarian’ paternalism has become a concern to economists, legal scholars and psychologists. The idea to correct for individual choice defects through moderate paternalistic interventions has evoked both support and criticism, each covering a wide range of specific issues. One of the most important arguments made in the supporting contributions is the claim that the new forms of paternalism do not impose serious restrictions on the autonomy of individuals. Decision-makers are, it is claimed, always at liberty to deviate from the choices suggested by the paternalist planner. Not surprisingly, the contributions critical of soft paternalism put a lot of effort into refuting this claim (e.g. Rebonato 2012; Schnellenbach 2012; White 2013).

Although the issue of autonomy is important, and will also play a major role in the argument laid out in this paper, it is not decisive in a simple and straightforward way. Ever since Ulysses tied himself to the mast when approaching the Sirens, we know that individuals may be willing to surrender some of their short-term autonomy in favour of attaining a higher level of overall personal well-being, provided they believe that such a trade-off exists. But is this a political issue? Or is it a matter of finding individually suitable mechanisms of self-control? These are exactly the questions to be discussed in this paper. Looking at the issue on the constitutional level, we ask whether individuals will find it generally acceptable to endow political representatives and bureaucrats with a mandate to implement soft paternalist policies. And more specifically, are there certain soft paternalist instruments that are more likely to be agreeable for citizens than others, and what are the criteria to identify them?

A constitutional perspective on new paternalism has been discussed briefly by Schubert (2014), who argues that paternalism can be constitutionally constrained such that it becomes less problematic than the original concept by Sunstein and Thaler. However, he does not discuss in detail the core question of the extent of a possible citizens’ consent to soft paternalist interventions. This is a particularly important question because recent empirical evidence suggests that there may exist some skepti-

cism against having one's own choices steered by a paternalist authority. For example, Kragh Pedersen et al. (2014) report survey evidence from Danish students whose support for paternalism varies substantially between different instruments. Interestingly, individual-level capability of self-control has no effect on the demand for what the authors call weak paternalism. But strong paternalism is supported more ardently by individuals who have stronger self-control. This could be a first indicator that paternalist desires follow in part from the belief of one group of individuals that they should serve as a role model for the other group.

Lusk et al. (2014) report experimental evidence showing that a large majority of subjects are willing to pay non-trivial sums in order to make their own choices, which supports the claim that individuals value their decision-making autonomy. This claim relates to a research on the determinants of subjective well-being, which has shown empirically that not only outcomes of decisions matter, but also the decision-making procedures themselves. In particular, being in control of one's own matters is generally associated with a positive effect on subjective well-being (e.g. Frey et al. 2004). It will be argued in this paper that soft paternalism can easily have an adverse effect on individual autonomy that, maybe paradoxically, is even worse than it would be in the case of more traditional, hard paternalism. This is one of the reasons for our main result, which states that there is only a very narrow range of support for soft paternalist policies on the constitutional level. In particular, it is argued that manipulative nudges do not serve common constitutional interests of citizens, and that the approach of soft paternalism is to a large extent misdirected when it is addressed at benevolent and well-informed politicians and bureaucrats, instead of the citizens themselves.

In order to assess whether soft paternalism is in the common constitutional interest of citizens, three criteria are used. Two of them are already well established in the constitutional economics literature (e.g. Vanberg 2005): consumer sovereignty and citizen sovereignty, which – broadly speaking – depend on the market order and the political order being responsive to the preferences that individuals have in their roles as consumers and citizens. In this paper, and related to the hierarchical preference

approach of Brennan and Lomasky (1983), a third criterion is added, which is called reflective sovereignty. As will be discussed in detail below, this criterion requires that individuals are able to influence both their short-term consumption patterns according to their own higher-order, reflective preferences, and also the further development of their own reflective preferences.

This paper will proceed as follows: Section 2 gives a very brief, general outline of the constitutional perspective. In Section 3, it is argued that a contractarian, constitutional argument for paternalism could in general be made in some instances, but that a look at the details of the proposed measures is necessary. Section 4 discusses the relationship between soft paternalism and consumer sovereignty, Section 5 does the same for reflective sovereignty. In the light of the results from this discussion, Section 6 discusses soft paternalism from the contractarian perspective. Finally, Section 7 concludes.

2 The constitutional perspective

The foundation of a constitutional perspective is normative individualism, i.e. the claim that legitimacy of social orders is to be found in the consent of individual citizens (Buchanan 1999). But why is it reasonable to start from such a premise in discussing the new paternalism? There can be no absolute justification for this choice, and of course, the choice of criteria to evaluate a class of policy instruments can and should itself be subjected to debate and critical scrutiny. However, there are at least two reasons that support taking the perspective of constitutional economics in this case. The first is the claim made by proponents of the new paternalism themselves that their policy approach respects individual autonomy. This makes the choice of individual consent as a benchmark somewhat natural. The second reason is the fact that the most obvious alternative framework, standard welfare economics, can not be applied if the empirical results of behavioural economics are taken seriously. In particular, with incoherent individual preferences, it becomes impossible to construct a

unique and unambiguous social welfare function to be maximised,¹ and the contractarian approach, that finds legitimacy of social orders in individual consent, becomes an appealing alternative.

The constitutional economics approach argues that “individuals are the ultimate sovereigns in matters of social organization, that individuals are beings who are entitled to choose the organizational structures under which they will live” (Buchanan 1999, p. 288). Buchanan emphatically points out that normative individualism does not depend on an epistemic privilege, i.e. it does not depend on the claim that the individuals themselves always know best what is good for them. Rather, his argument relies on individuals taking responsibility for their choices, both in the private sphere and in deciding on the rules of social organisation. The perspective of constitutional economics is then contractarian in the sense that it aims to demonstrate which kind of rules can be mutually beneficial for individuals, such that gains from trade on the political level can be realised between individual citizens (e.g. Buchanan 1991). It aims, therefore, at identifying common constitutional interests between citizens and at stating hypothetical imperatives (Vanberg 2005), addressed not at a fictitious welfare maximiser, but at the citizens themselves: *If you want to realise political gains from trade on a certain set of political issues, then there exists a set of rules that will be instrumental in achieving this.*

Vanberg (2005) argues rather convincingly that two twin criteria can be used to evaluate how far a given market order and a given political order serve common, general rather than special interests: consumer sovereignty and citizen sovereignty. For the former, he illustrates this by contrasting the interests of consumers with those of producers. All individuals play the role of consumers some of the time, and in this sense their interests as consumers in having a competitive market process that responds to their wants can be generalised. On the other hand, producer interests that

¹See e.g. Sugden (2008), Sugden (2010) and Bernheim (2009) for different takes on the problems that follow from this fact. We will have a closer look at some of the arguments that have surfaced in this debate later in this paper.

conflict with consumer sovereignty regularly demand special privileges, which can not be generalised and therefore are not common constitutional interests. In a similar way, all individuals play the role of citizens at least some of the time, and therefore have a common constitutional interest in a political process that is responsive to their political preferences, and that also preserves the possibility for individual rather than collective political choice through the exit option, e.g. in a federal order.

This line of thought is very straightforward with individuals who are rational in the traditional, narrower sense of having coherent and stable preferences, and being able to choose accordingly. But constitutional economists have long argued that their reasoning does not rely on microeconomic textbook concepts of full rationality. For example, Buchanan (1999) flat-out rejects the idea that the concept of a utility function or a stable preference order has any counterpart in reality. To him, the statement that an individual has made a choice that does not maximise her utility is simply meaningless: “All there is are individual choices, and it is about these choices, not about some alleged relationship to some utility function, that we develop theories.” (Buchanan 1999, p. 286). Again, the central idea is to rely on the individual ability to make choices that are mutually beneficial for those who agree on making that choices. And again, the important point is that hypothetical imperatives are addressed at these individuals themselves, not at a fictitious, benevolent and all-knowing welfare maximiser. Buchanan’s statement does not imply a claim that individuals do not make mistakes, i.e. choices that they later regret. What is refused is the idea that there is a stable utility function representing the individual and serving as a benchmark for their level of welfare – and that is of course a claim that is very much in line with the empirical results of behavioural economics. However, it is also a well-known fact, acknowledged by Buchanan, that sovereign individuals may find it reasonable to restrict their own choice set, because they believe that this is in their own best interest.

3 Is anti-paternalism implied by consumer and citizen sovereignty?

Brennan and Lomasky (1983) were among the first to introduce into economics the idea of distinguishing reflective and short-term preferences, which they call market preferences. Tracing a philosophical line of thought back to Aristotelian philosophy, they argue that it is more or less a necessary part of the human condition to have reflective preferences in which we judge what types of short-term, market preferences we wish to develop. Interestingly, however, Brennan and Lomasky emphasised that this is not a hierarchical model in a normative sense. It does not imply that reflective preferences need to be in any sense superior to market preferences. On the contrary, reflective preferences may be problematic because they, as they are not associated with immediate choice and costs, are not necessarily the result of thorough deliberation and weighing of actual consequences (ibid., p. 202). However, they also argue that consumer sovereignty does not entail only the ability to pursue the satisfaction of market preferences, but also “reflective sovereignty” (ibid., p. 197), a term which is used by Brennan and Lomasky to denote the ability to pursue the satisfaction of reflective preferences.²

Today, hierarchical models of human decision-making are generally accepted in economic theory, but these models come in different guises. What the more recent approaches have in common, however, is that they do assume a superiority of long-term over short-term preferences. Examples are the distinction between well-reflected ‘System 2’ decision-making, which involves high cognitive investments, and quick, instinctive ‘System 1’ decision-making that relies on gut feelings and affect (Kahneman 2011), or time inconsistency in decision-making modelled with quasi-hyperbolic preferences (Laibson 1997). Within such a framework, it cannot be denied that an individual

²We will argue below that the meaning of reflective sovereignty should be extended to also imply the ability to steer one’s own path of changing and adapting reflective preferences.

demand for means of self-control is in line with normative individualism³. On the contrary, it can be argued that giving the individual tools which help her to enforce her reflective preferences – if she indeed wants to privilege her reflective over her short-term preferences – even increases her ability to make sovereign decisions. And if there is widespread consent that a certain set of paternalistic policies can serve as a tool to improve consumer and reflective sovereignty, then paternalism can also be compatible with citizen sovereignty (Kirchgässner 2014).

This reasoning contrasts with Sugden (2010), who proposes to use the opportunity criterion as a benchmark for evaluating social orders. For him, the opportunity of an individual to satisfy her preferences as far as possible at any given point in time is important, while coherence of preferences through time simply does not matter. He then argues that in a contractarian framework, individuals can pursue their common interest by agreeing on an institutional framework that maximises opportunity. Sugden arrives at his proposition from the premise that individuals are responsible in the sense that, even if their preferences change over time, they identify with whom they have been in the past and whom they will be in the future. This inter-temporal identification with oneself, rather than coherence of preferences, constitutes personhood in Sugden’s analytical framework. It is noteworthy that this does not necessarily exclude the existence of a hierarchy of preferences. Also in Sugden’s framework, an individual may find it worthwhile to attempt to cultivate her own preferences according to some overarching meta-preference (Sugden 2015). But she will not use mechanisms that limit her opportunities in the future to do so, and if she (partially) fails in directing the change of her preferences, she still takes responsibility for and identifies with the kind of preferences that she has actually adopted.⁴

An individual interested in having a maximum of opportunities at any given point in time will not value positively the imposition of self-control by reducing her own

³This is also pointed out by Buchanan (1999).

⁴Under standard neoclassical assumptions, on the other hand, a preference for resisting temptation through a limitation of the choice set can exist, see Gul and Pesendorfer (2001).

opportunity set. Being confronted with two different sets of premises concerning the core characteristics of human personhood thus leads to very different interpretations of what individual autonomy actually is – the maximisation of consumption opportunities at any given point in time, or the ability to consciously shape current and future consumption patterns, even by limiting the future set of opportunities in line with reflective meta-preferences.⁵

It is a matter of empirical robustness and also intuitive plausibility which of the approaches sketched here is generally preferable over the other. The opportunity criterion has been criticised mostly on empirical grounds (Schubert 2015), and the reliability of reflective preferences in the real world has also been questioned, in particular with regard to the level of information and effort that go into the individual reflection about long-term reflective preferences (Schnellenbach 2012, 2014). At this point, we can restrict ourselves to a pragmatic choice between approaches. If we follow Sugden, the debate is over at this point. Individuals who do not want to restrict their own choice sets will certainly not find it worthwhile to have their choice sets manipulated through paternalist interventions. But with the hierarchical preference approach, it is at least generally conceivable that individuals seek paternalist help in order to impose effective control over their future choice behaviour, and the interesting question is to which extent this is indeed the case. The subsequent argument in this paper will therefore rest on the assumption of hierarchical preferences, i.e. on the premise that is more favourable to paternalism. But this should be read as a thought experiment, not as a general and unqualified endorsement of models with hierarchical preferences.⁶

⁵One may even find some middle ground and argue that maintaining an opportunity to learn new preferences, rather than opportunity on the level of immediate choice, is a criterion that individuals could agree on in a contractarian setting, see Schubert (2015).

⁶It is also noteworthy that there are other models of preferences that also principally allow for individual consent to paternalist interventions, such as the “web of preferences” concept used by Grüne-Yanoff (2009). In such a web of preferences, some preferences are more central than others, in the sense of being connected to a greater number of other preferences. If individuals strive for coherence, these central preferences are more important and should be privileged over less central

4 Soft paternalism and consumer sovereignty

4.1 An example

Using consumer sovereignty as a criterion, some instruments out of the toolbox of soft paternalism can be relatively straightforwardly evaluated as harmless or even useful. An example is the “Save More Tomorrow” (henceforth SMT) mechanism proposed by Thaler and Benartzi (2004), which is designed as a voluntary, fully transparent and revocable contract that individuals can enter in order to commit themselves to automatically designate a fraction of their future salary increases to be saved for retirement.⁷ A decision to use the mechanism needs to be made consciously, and is likely to be made after some individual deliberation. This may concern questions like the current status of individual retirement savings, but also the individually felt tendency to procrastinate and to be in need of a new incentive scheme that is specifically designed to overcome the procrastination problem.

It can be argued that the SMT even increases the degree of consumer sovereignty exerted by the individual. She is supplied an additional tool that she may or may not use in order to influence her choices regarding her own level of savings. At any given period, she has full control and is able to terminate the contract, which means that here is not even a conflict between consumer sovereignty (the ability to spend of her budget now on a market that is responsive to her immediate wants) and reflective sovereignty (the ability to use the SMT mechanism to increase saving over her life-cycle, if that is what her reflective preferences tell her). The consumer retains the ability to reassign the relative weights between short-term and reflective goals. But most importantly,

preferences. It is then possible to base an argument for some paternalist measures on the individual wish to increase coherence of her preferences.

⁷To avoid misunderstandings, it is important to note that all three implementations of SMT reported in Thaler and Benartzi (2004) required individual sign-ups to the program. Other programs, where the collective default is to have automatic saving increases and individuals unhappy with the program would need to opt out, are conceptually different.

the contract is offered to her just as other goods on markets are offered to her, and the decision to take up the offer or not is entirely taking place on the individual level in a fully transparent setting.

Regarding the example of SMT, one can legitimately debate whether the mechanism is paternalistic at all, since it has all the characteristics of a private contract. The remaining element of paternalism proper in the implementations reported in Thaler and Benartzi (2004) is a nudge to start thinking about the problem at all. The attention of individuals is drawn towards the problem of life-cycle savings, for instance by a consultant appearing at their workplace or through letters sent to them. But as long as the information given to individuals in this process of nudged decision-making is neutral, appeals to their capacity for rational deliberation, and could also be simply ignored, there is no negative effect on consumer sovereignty.

4.2 The inherent danger of manipulation

On a more general level, the scheme followed by soft paternalism is the purposeful application of choice architecture, using the insights of empirical behavioural economics and psychology (Thaler and Sunstein 2008). In designing choice situations, the paternalist planner is advised to use the systematic deviations of the decision-making process of real humans from that of *homo economicus* in a way that improves their individual welfare. Soft paternalist policy advice therefore rests on two claims: The first one is that the way real humans make decisions – using heuristics, following rules of thumb, being vulnerable to psychological biases and so on – offers some leverage to influence their choice behaviour. The second one is that this can systematically be done in a way that is in the true self-interest of the individuals concerned.

There is little doubt that the first claim is generally true, as long as an influence on, but not a complete control of individual choice behaviour is claimed. The empirical evidence, for example, on the existence of framing effects and psychological biases is overwhelming (e.g. Camerer and Loewenstein 2003), as is the evidence on the widespread use of heuristics (e.g. Gigerenzer 2008). Regarding the second claim,

there is some doubt. Even a bureaucrat or a politician who is perfectly informed about what is in the best interest of individuals may, given the incentives of actual political processes, be unwilling or unable to actually implement the most efficient choice architecture (Glaeser 2006). This problem, however, is generally not accounted for by the vast majority of papers looking at behavioural market failures (Berggren 2012). And similarly worrisome is the fact that it is very difficult for policy-makers to gauge the true self-interest of the individuals concerned (Rebonato 2012).⁸

Consider, for example, a consumer who announces after a period of reflection that she intends to save more for retirement. We can assume that these are her reflective, long-term preferences. In the following months, her actual choices contradict these reflective preferences – she spends a lot of money on current consumption and even goes into short-term debt. The standard interpretation would be that she suffers from self-control issues, as they are modelled with the assumption of quasi-hyperbolic discounting. But there are other possibilities. Maybe the announcement to save more has been made after a period of extensive media reporting on the risks of falling into old-age poverty. After she had realised that her new reflective preferences resulted from an irrational exaggeration of risk due to a faulty use of the availability heuristic (Kuran and Sunstein 1999), she rationally revises her reflective preferences and returns to her formerly planned consumption pattern again.

The individual observed here could also, after having made her resolution, have discovered a subjectively new consumption pattern, say a risky sport or extensive travel, that she has to pursue while being relatively young, leading her to rationally revise her reflective preferences in light of a changed subjective choice set. The reflective preference may also have been the result of the specific incentives associated with inconsequential thinking on the reflective level (Brennan and Lomasky 1983). It is easy to say on an abstract level that one should be saving more, but when the true opportunity costs of doing so become evident in the short-run, it may be perfectly

⁸Interestingly, representatives appear to even have some problems to infer the true state of public opinion in large electorates on relatively general items, see Jottier et al. (2012).

rational to act against reflective preferences that have been resolved upon based on imperfect or biased information.

There are many more possible interpretations of this situation. To a paternalist planner, whose information consists primarily of observed behaviour, the situation resembles a jigsaw puzzle that can be put together to many different complete pictures, and the planner is unable to identify which of them is actually the correct representation of the individual's true self-interest.⁹ It is then inescapable that even a perfectly benevolent choice architect must start from a subjective reconstruction of the hierarchical preferences of the nudged individual. In the best case, choice architectures are designed starting from an honest, but imperfect attempt to identify and empathise with the individuals concerned. In the worst case, choice architectures solely reflect the value judgments of a paternalist planners with regard to the choices that he believes should be made by others – the evidence reported by Kragh Pedersen et al. (2014) for a preference of individuals with high self-control to impose their own choice patterns on others is an indicator for the presence of such a motive.

4.3 Transparency, manipulation and consumer sovereignty

All of this is not a problem at all if the soft paternalist intervention has the characteristics of the SMT mechanism, because our consumer can use it or leave it at will. Clearly, that is not the case for all proposed mechanisms that run under the rubric of soft paternalism, or even for most of them. It is widely agreed that SMT is an exception, rather than the rule, insofar as most nudges use manipulative techniques in order to change individual choices.¹⁰ The types of manipulation differ over a wide range. For example, a choice architecture that aims at changing the subjectively perceived choice set involves a certain degree of intransparency – the famous cafeteria nudge, where un-

⁹This is a necessary consequence of living in a world where the weak axioms of revealed preference do not hold, which they probably do not, as behavioural economics has taught us.

¹⁰See e.g. Bovens (2008), Schnellenbach (2012), Guldborg Hansen and Maaløe Jespersen (2013), Wilkinson (2013) and White (2013).

healthy food is principally accessible, but hidden away somewhere illustrates this. But if the subjectively perceived choice set differs from the actual choice set, without the individual knowing that this is the case, then choosing as the paternalist desires is no indication of consent with being nudged. It is merely a sign of successful manipulation, and if the consumer cannot consciously choose between entering a manipulative and a non-manipulative choice architecture, there is also a loss of consumer sovereignty.

Even fully transparent nudges can be manipulative. Shock photographs of cancerous lung tissue on cigarette packs are clearly transparent. They even meet the more demanding transparency criterion of Guldborg Hansen and Maaløe Jespersen (2013), because it is easily and unambiguously discernible for the consumer what the paternalist wants to achieve with this nudge. But instead of supplying neutral information on the risks of smoking, and thereby appealing to reflective thinking, they make use of the availability heuristic. The nudge aims at exploiting a psychological weakness in order to make the consumer hold a far exaggerated risk perception, and it does so by appealing to emotions such as fear and disgust, rather than rational deliberation (Grüne-Yanoff 2012). However, Sunstein (2015b) argues that such a manipulative nudge may be warranted if it counters an earlier manipulation of individual behaviour, which in this case could have come in the form of advertising by tobacco companies.

This is, in a way, good economic thinking along the lines of second-best welfare economics: If there is a distortion that cannot be removed, it may be efficient to use a counter-distortion in order to reduce the overall negative effects on welfare. But why should it not be possible to alleviate the original manipulation? In our example, it clearly is. Tobacco advertising is heavily regulated in most countries (World Health Organization 2013). While the efficacy and proportionality of some of the measures can be critically debated, it appears to be the case that all manipulative advertising techniques are being regulated.¹¹ But if this is feasible, the argument in favour of increasing consumer welfare through increasing, rather than reducing manipulation is not

¹¹Similar developments are ongoing for other consumer goods. For example, since 2012, EU legislation requires that all health claims in food advertising need to be based on reliable scientific evidence.

convincing: Reducing undue manipulation takes the consumer and her decision-making capacities seriously, using counter-manipulation does not. Why are manipulative techniques still used in practice? One reason may be that the political goal is not to help consumers make their own choices undistorted of manipulative influences, but to reach a situation with as close to zero consumption of tobacco as possible (ibid.). Both goals are not identical, and the second one is not compatible with consumer sovereignty.

5 Soft paternalism and reflective sovereignty

5.1 Heterogeneity of reflective preferences

Models of hierarchical preferences often propose that reflective, long-term preferences should be privileged over short-term preferences. However, it is not always clear whether this view is rooted in a positive analysis of the actual way reflective preferences are formed, or in a normative claim that these reflective preferences should be formed in a certain way. For example, Kirchgässner (2014, p. 7) refers to a tradition in philosophical thought which argues that human beings have moral obligations not only towards others, but also towards themselves (e.g. de Marneffe 2006). Among such moral obligations, which could in principle serve as justifications for paternalist policies, are, for example, the demand to avoid doing harm to others, and to oneself, as well as the demand to refrain from actions that are associated with a high probability of permanently deteriorating our own capacity for autonomous decision-making.

This line of reasoning provides a general justification for paternalist policies, but it does not provide concrete content for higher-order preferences. To some individuals, the obligation to avoid harm to themselves may be met by abstention from hard drugs, while others, for the same reason, may find it justified to impose a healthy organic diet on themselves and others. Then there are two possible approaches: Either every individual herself attempts to let her own higher-order *reflective* preferences influence her own choices, or democratic deliberation leads to some higher-order *political* preferences that serve as a foundation of paternalist policy-making. In a discussion of the latter

possibility, it would however be false to simply assume that actual political preferences on paternalist policies conform to the normative ideal of thoroughly deliberated, well-informed higher-order preferences. Short-term market preferences, reflective and political preferences need to be clearly distinguished, and the specific problems of each need to be taken into account (see already Brennan and Lomasky 1983).

Heterogeneity of preferences, also on the reflective level, can be taken as a given and is also acknowledged by supporters of soft paternalism (Sunstein 2013, p. 1826). Even very fundamental wants are subjected to trade-offs, as becomes evident when some people are more and others less willing to risk health defects for the fun of a risky sport or an unhealthy diet, or to give up personal liberties in favour of security. Different reasonable compromises on such trade-offs, even between competing absolute values, are possible and should be taken seriously by any approach that subscribes to normative individualism (Schnellenbach 2015). But if that is the case, then reflective sovereignty does not only imply that an individual should be able to let her reflective preferences influence her choices, but also that she can steer the process of changing her reflective preferences.¹² Again, to avoid misunderstandings, it should be noted that reflective preferences as understood here do not only contain fundamental moral commitments to oneself and others, which can most likely be generalised over populations, but also individual conceptions of who one wants to be and which kind of life one wants to live, which most likely can not be generalised over populations.¹³

¹²This should not be understood such that there are “meta-meta-preferences” which then steer the development of reflective preferences. But it is crucial that individuals are the authors of their own lives (see White 2013, p. 133), and it has been argued that being a good author of one’s own life implies to seek a constitution for oneself and to strive for internal consistency (or integrity) under this individual self-constitution (Korsgaard 2009). But such a self-constitution is not simply there, and individual needs to find and refine it in the course of her life. However, as White points out, if a paternalist intervenes by manipulating an individual, then that individual does not act upon her own reasons – and a loss of integrity may follow.

¹³This broad view is compatible with established notions of hierarchical preferences, as proposed in Brennan and Lomasky (1983), as well as Thaler and Shefrin (1981), while a focus solely on moral

5.2 Reflective preferences are tentative and temporary

It is also noteworthy, as already briefly indicated in Section 3, that the widespread belief that higher-order preferences are the generally superior elements of an individual's system of preferences may not be warranted by reality. Kahneman (2011) describes reflective thinking as involving serious cognitive effort, but since reasoning on individual long-term goals and purposes often has no immediate costs and benefits, this is not necessarily true in everyday practice. There are at least two different plausible outcomes in a situation where no immediate consequences follow from one's reasoning: One very plausible outcome in such low-cost situations is that individuals are inclined to act morally (Kirchgässner 1992, 2010), which in our context would imply a serious and sincere reflection about the goals and purposes of one's own life.

Another, similarly plausible outcome, is expressive behaviour. In this case, individuals gain utility from conforming with a self-chosen identity (Hillman 2010), and they try to make choices in order to gain expressive utility from confirming their self-chosen identity, vis-à-vis themselves or others. However, an expressively chosen identity (a decision regarding the adoption of a set of higher-order preferences in our context) need not be the result of serious reflection. For example, one may announce to be changing towards a healthy lifestyle in order to gain expressive utility from conforming to one's vegan friends, and make conforming choices in their presence, while a true identity as an indulger of burgers and fries, while one is not in the presence of vegan friends, never goes away. Hillman calls such choices *deceptive-expressive* if they only occur when the expressive decision is by and large inconsequential with regard to the individual's non-expressive utility. In our example, this might be the case if the individual meets her vegan friends only once a week, and can safely indulge in burgers and fries for the rest of the time. What to an outsider would look like a preference inconsistency and an inability to stick to a healthy lifestyle, is for the individual herself simply a rational scheme to realise a net gain of expressive utility. And remembering that many

deliberations leaves out many complications that need to be considered in any positive theory of hierarchical preferences.

nudges aim at conflicts between long-term preferences and short-term behaviour, it is relevant to account for the fact that expressive reasoning is more inconsequential, the further distant the future it concerns.

It is as unlikely that actual reflective preferences are comprehensively the result of serious moral reflection, as it is unlikely that they are completely the result of deceptive expressive reasoning. They do most probably cover some middle ground between these extremes, but this insight suffices to state that reflective preferences also usually are provisional, tentative and temporary; they are no stable benchmarks that can be reliably used to judge actual choices, but they are themselves open to critical reflection and revision in light of experience.¹⁴ Reflective sovereignty entails that individuals have a high level of control over the path along which they want to develop their own reflective preferences. In this way, it is closely knit with consumer sovereignty. Preferences are, at least in part, adapted according to experience. The individual-level development of reflective preferences is a path-dependent process, and a loss of control over one's choice history carries over to a partial loss of control over the change of reflective preferences.

It is important to see that this goes beyond a mere information problem, where the only issue is the transfer of information regarding the true self-interest of an individual to the paternalist planner. The problem is that a stable true self-interest may not even exist in the form of a set of outcomes that appears as arguments in a utility function. Rather, the true self-interest may be of a procedural kind, i.e. individuals may have an interest to be able to preside over an ongoing intra-individual deliberation on their reflective preferences, taking place in the light of experiences made and new information gathered. The analogy used by Sunstein (2015a), comparing nudges to a GPS system, seems therefore somewhat off target – if I find out where I wish to drive

¹⁴On a general debate concerning the instability of preferences in the context of paternalist policies, see also Whitman and Rizzo (2015). A thorough discussion of preference learning is beyond the scope of this paper, but see e.g. Schubert (2012, 2015) for a discussion of some important topics related to preference change and learning.

by observing the scenery while driving, a GPS is of little help. Suppose now that a consumer is nudged in a certain direction, into making certain choices. The issue at hand is then not simply about immediate outcomes of choices,¹⁵ but about interference in a process that reaches deeper, into the individual’s reflective preferences.

Interestingly, self-determination theory in psychology posits that individual autonomy is among the innate psychological needs whose satisfaction helps individuals function well and increase their well-being (Deci and Ryan 2000, 2012). Curbing reflective sovereignty by shifting the locus of control of learning processes away from the individual and towards a paternalist planner would, however, be the exact opposite of satisfying a need for autonomy.

5.3 Preserving reflective sovereignty: private nudges

But is soft paternalism indeed a danger to reflective sovereignty? Again, this is certainly not the case for mechanisms such as SMT, or moderate, mandatory cooling off periods, which may even increase reflective sovereignty because they give the individual an additional opportunity to think about her gut feelings and impulses. But it should be noted that even a very mild nudge like a cooling-off period increases reflective sovereignty at the expense of consumer sovereignty – one cannot get immediately what one wants and can afford.¹⁶ The problem is more severe for soft paternalist mechanisms that are not transparent, or that work towards steering individuals through affective or emotional manipulation. Consider again, for example, the cafeteria choice architecture which intransparently manipulates the individually perceived choice set. While the cafeteria example is still somewhat innocent, the general idea to steer individuals towards certain choices by making them believe that alternatives do not exist is trou-

¹⁵Such a more standard, welfare-oriented argument about individuals getting, or not getting, what they want is discussed in Sunstein (2015b).

¹⁶In this sense, it is false to state that nudges that are privileging “System 2” preferences increase autonomy (Binder and Lades 2015). It increases a specific element of autonomy – reflective sovereignty – at the expense of a different element of autonomy.

bling, simply because it systematically limits the scope of learning new tastes, but also of learning how to cope consciously with tempting choices that one rather wants to avoid some (but not all) of the time.

Reducing the opportunity for autonomous learning by doing is particularly problematic if we take behavioural economics seriously and assume that humans are not perpetual, conscious maximisers of subjective utility functions. If, for example, individuals are to a large extent guided by internal rules and habits (e.g. Vanberg 1994, 2002) that they gradually learn and improve by adapting them to their environment according to their individual experiences, then it is not unlikely also from an economic perspective that soft paternalism can reduce the problem-solving capacities of individuals in the long run.¹⁷

Against such objections, Thaler and Sunstein (2008) argue that nudging is inevitable, since choice architectures are inevitable – every choice to be made comes with some kind of frame, thus it can just as well be designed purposefully by a well-meaning paternalist planner. However, accidental influences and intentional choice architectures are very different animals (Guldborg Hansen and Maaløe Jespersen 2013), and so are intentional choice architectures on markets and those devised by a government planner. Purposeful choice architecture by profit-seeking businesses can even have positive effects on reflective sovereignty. Thaler and Benartzi have registered their SMT mechanism as a trademark and used it for commercial purposes. Ian Ayres and Dean Karlan, economists at Yale, have founded a commercial website that allows individuals to enter self-binding contracts with themselves to overcome self-control issues. If purposeful choice architecture in supermarkets, leading to bickering children at the counter, was really as annoying to parents as popular myth has it, opening a shop advertising a

¹⁷See also Bovens (2009), who warns of a risk of infantilisation being associated with paternalist planners designing choice architectures such that the opportunities for individual learning processes are reduced. This is compatible with a criticism by Cornell (2015), who argues that paternalism is objectionable because it conveys towards the paternalised individual the degrading message that she is unable to settle her own matters. The psychological implications of receiving such a message may be similar to what Bovens suspects.

non-bickering choice architecture and making a profit would not be a problem at all. Similarly, it is unclear why “optimal sin nudges” (Binder and Lades 2015), intended to keep consumers from eating too much, should be adopted as a policy, when the market itself provides restaurants with predominantly healthy food on the menu – the choice architecture for autonomous individuals is already there, and the self-binding mechanism for a reflectively sovereign consumer consists in going to the restaurant with a menu that fits his long-term purpose.

In many environments, the market is able to provide tools, and to transparently advertise specific choice architectures, which help individuals to consciously enforce their reflective preferences, if they feel that they should do so. This, however, requires a diversity of choice architectures and the entrepreneurial liberty to provide new, innovative choice architectures. In many cases, it is therefore unclear why soft paternalism is addressed as policy advice to politicians, when it could also be framed as advice to sovereign consumers and citizens.¹⁸ Soft paternalism in the hands of government is indeed quite different from this, as will be argued in the following Section.

6 Soft paternalism, citizen sovereignty and the contractarian perspective

6.1 Are we nudging ourselves?

The discussion so far has shown that there are tools inspired by behavioural economic research, which aim at improving individual decision-making and are at the same time quite unproblematic with regard to consumer sovereignty and reflective sovereignty. The SMT mechanism has been an example, and in general, the conditions for a mechanism being unproblematic are full transparency, a lack of emotional and affective

¹⁸See, however, also Sunstein (2013, p. 1827) arguing in favour of personalised nudges, should they become technologically feasible. However, he does not clarify whether these private nudges should only be supplied upon individual demand, or imposed as instruments of government policy-making.

manipulation, and the full autonomy of the individual to participate or opt out at any time. Obviously, not many nudges will meet these conditions. We have also seen that other nudges have a negative effect either on consumer sovereignty, or on reflective sovereignty, or on both, at least if the individual does not impose these nudges voluntarily upon herself. But that is precisely the argument made for example by Kirchgässner (2014): If democratic polities choose to elect governments that introduce (soft as well as hard) paternalist policies, then we impose them on ourselves. Paternalism is, according to this argument, compatible with normative individualism, because through the democratic process, individual preferences for self-binding mechanisms are aggregated to corresponding collective preferences.

This line of argument has two major problems. One of them is that it implicitly assumes a very well-functioning political process that is highly responsive towards the political preferences of citizens. We know that this is not reliably the case, and much less in purely representative than in direct-democratic systems. The other problem is that it also implicitly assumes perfect knowledge of citizens – they know that paternalism is good for them, therefore they want it implemented. But this is also not necessarily true because political discourses are often as much conflicts of theories as they are conflicts of interests (Vanberg and Buchanan 1989). A rational critique of soft paternalism is therefore still warranted, as it is of all other policies, whatever their democratic origin (Albert 1985, Section 28). In particular, the constitutional economist can work with hypothetical imperatives (Vanberg 2007), and critically discuss whether an actually used institutional framework or political instrument does actually serve the purpose well that citizens have implemented it for.

A parallel debate is ongoing in the economics of subjective well-being for some time. There is ample evidence showing that individuals frequently err in estimating *ex ante* the actual subjective welfare that is associated with certain choices (e.g. Frey and Stutzer 2007). Nevertheless, there is a lot of caution about using these empirical results to justify policy instruments that aim at a political micro-management of individual preferences and choices in order to increase subjective well-being (Frey and Stutzer

2010, 2012; Schubert 2012). The reasons are manifold, but they include the domination of outcome utility by procedural utility which results from individual autonomy and active participation in decision-making processes. Interestingly, Frey (2008) also shows that often, real-world policies actually exactly counteract what would be rational from the perspective of happiness research. For example, the latter robustly shows that commuting significantly reduces individual welfare, but nevertheless commuting is heavily subsidised in many democratic countries.

It is not a surprise that policy failures exist in the realm of behaviourally inspired policies, as they do exist in traditional fields of public policy. However, as will be argued in the remainder of this paper, a negative association between soft paternalist policies and citizen sovereignty makes these policy instruments particularly suspicious.

6.2 How soft paternalism erodes citizen sovereignty

From the perspective of citizen sovereignty, once again those nudges that are not transparent are particularly problematic. Suppose that a representative government has sufficient leeway between elections to impose soft paternalist policies that are not a response to a widespread demand for such policies from the electorate, but self-induced, e.g. because they serve influential special interests or are in accordance with personal preferences of some members of the executive. Clearly, this can happen with any kind of policy – but the crucial difference is again the problem that the soft paternalist approach is likely to be framed such that it is not detected as an intrusive, manipulative act by the citizens (Bovens 2009). A more traditional political intervention would be associated with a higher probability of initiating a political debate than the soft paternalist intervention.

Once a new tool with this characteristic is out of the box, it is unclear how it could be limited to applications that actually do find widespread consent among citizens. Thaler and Sunstein (2008) propose the Rawlsian (and originally Kantian) publicity criterion: Soft paternalism should be only applied insofar as the government can come up with plausible arguments for justification if the general public discovers that a

nudge is being given. But this is a relatively weak criterion, since plausible reasons to motivate one's actions *ex post* may be found more easily than explicit support *ex ante*. For example, the British government explored how to increase the numbers of organ donors by appealing to emotion and affect in advertising campaigns (Behavioural Insights Team 2013). While a good, contractarian argument can be made for trying to increase the number of organ donors, the question of becoming an organ donor on the individual level should most likely be the subject of thorough reflection, taking into account a moral obligation to save anonymous lives as well as, for instance, possible psychological costs to surviving family members.

By deciding to appeal to emotions and affect, or to use manipulative techniques, instead of using rational arguments, a government undermines citizen sovereignty. It ceases to act as an agent of its principals, the citizens, when it sees them not as responsible persons who can be engaged in a discussion about means and purposes, but indeed more as infants in need of subtle steering. In this respect, a novel slippery slope prediction with regard to soft paternalism can be made,¹⁹ i.e., not a slippery slope towards hard paternalism and regulation, but a slippery slope towards a changed political culture that relies less on rational argument, and therefore relies less on the necessity to find good reasons for convincing sovereign citizens of certain regulations and interventions.²⁰

Similar mechanisms are used in other contexts. An example are paternalist policies that attempt to promote more or less fashionable lifestyle choices by working with psychological benefits and costs, such as esteem and disesteem, rather than traditional policy instruments (Glaeser 2006).²¹ Or consider Sunstein and Reisch (2013, pp. 398-399) writing about the use of default rules to nudge individuals into the consumption

¹⁹See Rizzo and Whitman (2009) for other relevant slippery slopes in this context.

²⁰See also Hausman and Welch (2010) for an argument regarding the preferability of rational debate over subtle manipulation in policy-making.

²¹See however also Brennan and Brooks (2011) for a somewhat more positive take on esteem-based policies.

of renewable energies: “Especially in a period in which the standard tools – mandates, bans, and economic incentives – sometimes face both economic and political obstacles, default rules deserve careful attention.” Clearly, soft paternalism is quite openly advertised here as a mechanism to circumvent political opposition in order to reach a goal that is externally imposed, rather than deduced from individual political preferences.

6.3 Common constitutional interests, political preferences, and the principle of subsidiarity

Suppose now the political process is entirely responsive to the political preferences of a majority of citizens. Even in this case, it would be very doubtful that a consent to the use of manipulative soft paternalist policies is in the common constitutional interest of citizens. As we have seen above, citizens do know that their own reflective preferences are provisional and that they can benefit from revising them according to experiences made, and from adapting them to changing circumstances. These adaptations can be made relatively easily on the individual level. But as Brennan and Lomasky (1983) point out, reflective and political preferences need to be distinguished, even though they are formed under very similar conditions of lacking immediate consequences for individual choices and well-being. Since the veil of insignificance is much thicker on the political level, it is plausible that expressive motives can play a larger role with regard to political preferences, implying the possibility of a relatively weak link between an individual’s private, non-expressive concerns and her voting behaviour (Hillman 2010).

In such a constellation, the individual expects that, whether she is in the majority or not, her reflective preferences regarding her private consumption patterns and the decisive political preferences will differ. While expressive behaviour can turn into a problem in any field of policy-making,²² the important difference here is that a playing-field for it does not necessarily need to be opened. While decisions on public goods or

²²Over the long run, these problems may in some instances be mitigated by political learning (see e.g. Thomas et al. 2013), but this is probably not a mechanism that can be generally relied on.

externalities *nolens volens* need to be made in the political sphere, decisions on private consumption patterns can just as well remain private. The individual also knows that, if she does encounter the need to control her choice behaviour through self-commitment devices, a wide range of private mechanisms is available to her.

If all this is the case, it is difficult to see why a citizen should, in an area that is characterised by heterogeneous and evolving individual preferences, rationally forfeit some of her autonomy to a manipulative paternalist mechanism that does neither account for heterogeneity, nor respect her consumer sovereignty and reflective sovereignty, nor can be safely restricted to be applied only in limited policy areas. Where behaviourally inspired mechanisms to improve choice are transparent and non-manipulative, they can, as we have seen, most of the time also be supplied as private solutions. Applying the principle of subsidiarity, there seem to be no convincing arguments to delegate their implementation to the political level, when individuals can just as well find tailor-made solutions for themselves. Where those mechanisms are non-transparent and manipulative, they have on the other hand adverse effects on consumer sovereignty, reflective sovereignty, and citizen sovereignty.

Again, it should be pointed out that this does not imply that (hard or soft) paternalism has no legitimate place in policy-making at all. When it comes to buckling up when driving a car, painting “Look Right” onto the pavement as a nudge to pedestrians, or regulating the access to prescription drugs, individual preferences can be sufficiently aligned and stable to presume a common interest – after all, few people have a preference for being injured in traffic or becoming seriously ill after taking the wrong dose of medicine. But soft paternalist policies are, to a great extent, different. They intrude into the sphere of normal, everyday consumption choices, and they make normative claims, which are not at all rooted in stable and homogeneous individual preferences, about the supposed preferability of certain consumption patterns and lifestyles (Amir and Lobel 2008). As we have seen, a common constitutional interest among sovereign citizens to shift autonomy to a paternalist planner is difficult to identify in this area.

7 Conclusions

We have argued that, seen from a constitutional economics perspective, soft paternalist policies are often unlikely to be firmly rooted in common constitutional interests of the citizens concerned. This is, first of all, due to the characteristics of paternalist policies that are either not transparent, or work with appeals to emotions and affects rather than serious reflection, and therefore work in a manipulative way. It is, however, also due to heterogeneous and changing individual preferences, both of the level of everyday choices, as on the level of reflective preferences.

Three criteria that have been argued to represent the common constitutional interests of citizens – consumer sovereignty, reflective sovereignty and citizen sovereignty – have been shown to be negatively associated with soft paternalist policy-making. Under these conditions, it is unlikely that individuals find a common constitutional interest in surrendering some of their autonomy in decision-making over their normal, everyday consumption choices to a paternalist planner. This conclusion is reinforced when, as will often be the case, private mechanisms to deal with self-commitment problems exist.

It can be argued that much of the literature that supports soft paternalism is very valuable, because it points out problems of individual decision-making, that have to a great extent been identified in earlier empirical studies. However, the suggestions for improving the quality of decision-making should be addressed primarily at the individuals themselves. When the fictional character of a benevolent and well-informed policy-maker is revived, and this time acts on the level of behavioural policies, one gets the impression that many already decided intellectual battles between public choice and welfare economics are bound to be fought again, this time on the field of behavioural economic policy-making.

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