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Constitutional Reform: Promise and Reality

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In 1962, James M. Buchanan and Gordon Tullock published *The Calculus of Consent*. It contained numerous important analyses of and insights into the properties of voting rules and political institutions. Arguably its most long lasting contribution, however, was to introduce into the public choice literature and more broadly political science the view that politics is a two stage process in which the rules of the political game are first written at a constitutional stage, and the political game then played under these rules at a later stage, which we might call the parliamentary stage.

Throughout his long and productive subsequent career, James Buchanan laid great stress upon the important role constitutions can play in the political process, both facilitating collective action by citizens, and constraining the State. He clearly thought of constitutions as an essential part of the political process, and when discussing how this process might be improved, he often recommended changes in the

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R. E. Wagner (ed.), *James M. Buchanan*, Remaking Economics: Eminent Post-War Economists, https://doi.org/10.1007/978-3-030-03080-3_15

constitution. In this essay, I review some of his analyses and recommendations for constitutional reform. Buchanan's oeuvre is so vast that it would be impossible to review all of his suggestions for constitutional reform. I shall, therefore, limit my discussion to a handful of what I regard to be his most important and representative recommendations. Following this review, I shall examine the need for and possibility of major constitutional reforms in the United States and the European Union.

The structure of the essay is as follows. I begin appropriately enough with *The Calculus of Consent* (1962), Section "The Calculus of Consent". In Section "The Limits of Liberty", I discuss what I regard as Buchanan's most important analysis of constitutions following *The Calculus, The Limits of Liberty* (1975). Section "Further Recommendations for Constitutional Changes" looks briefly at several later works, which deal with constitutional issues. In Sections "Constitutional Change in the United States" and "Constitutional Change in the European Union", I turn to the questions of constitutional reform in the United States and the European Union, viewed from the perspective of Buchanan's work. Conclusions are drawn in the final section.

The Calculus of Consent

The Calculus of Consent was James Buchanan's first, extensive exercise in what would later be called "constitutional political economy." The stated objective of the book was to describe "what *we think* a State ought to be" (Buchanan and Tullock 1962, p. 3, italics in original). Thus, unlike most of public choice, the book can be regarded as a largely normative exercise to show both how the institutions of the State can be better understood using the methodology of the economist, and how they can be better designed for making collective decisions.

As noted above, *The Calculus* is built around a two-stage depiction of the political process in which the rules of the polity—voting rules, electoral rules, etc.—are chosen at the constitutional stage of the process. Early in the book they confront the infinite regress problem. What voting rule should be used at the constitutional stage to choose

voting rules for the subsequent stage? They circumvent this infinite regress by assuming that unanimity can be reached on the features of the original constitution, and any changes to it (Buchanan and Tullock 1962, p. 6). Although individuals are likely to have different views or preferences concerning the policies they would like to see the State implement, the long-run nature of the decisions to be made at the constitutional stage introduces considerable uncertainty about the consequences of different voting rules and institutions in the minds of those writing the constitution. Buchanan and Tullock (1962, pp. 78–79) claim that this uncertainty will suffice to produce unanimity at the constitutional stage thereby resolving the infinite regress problem.

The use of uncertainty by Buchanan and Tullock to achieve unanimous agreement on the constitution resembles John Rawls's introduction of a *veil of ignorance* to achieve unanimity on the content of a social contract (Rawls 1972, p. 136 ff.). Indeed, although the original addition of *The Calculus* contained no index, a reprint of the book by the Liberty Fund in 1999 added an index and refers to the discussion of uncertainty on pp. 78 and 79 as “the veil of uncertainty,” even though the word “veil” appears nowhere in the text. Rawls's treatise constituted a major revival of the contractarian approach in philosophy, and *The Calculus* is very much in the contractarian tradition. In later works Buchanan championed and defended Rawls' work (e.g., Buchanan 1976).

In an appendix to *The Calculus* Buchanan defends the contractarian nature of the analysis in the book against the oft made criticism that states do not in reality emerge from a state of anarchy through a social contract. “The relevance of the contract theory must lie, however, not in its explanation of the origin of government, but in its potential aid in perfecting existing institutions of government” (Buchanan and Tullock 1962, p. 319). And a bit later, “Discussion must be concentrated on the ‘margins’ of variation in political institutions, not on the ‘totality’ of such institutions, and the relevant question becomes one of the criteria through which the several possible marginal adjustments may be arrayed” (p. 320). Thus, circa 1962 James Buchanan clearly believed that constitutions were an important, indeed, fundamental component of the political process, and that they could be changed, at the margin at least, to improve the working of this process.

The Limits of Liberty

Following the rather calm “Eisenhower years” of the 1950s, the United States entered into a rather turbulent period in the 1960s. John F. Kennedy, Martin Luther King Jr., and Robert Kennedy were all assassinated. Civil rights demonstrations led to violent confrontations in the South, opposition to the expanding war in Vietnam brought protests across the country. By the late 1960s this unrest had spread to college campuses. Buchanan became personally caught up in the turbulence in 1968 when he left the University of Virginia and moved to UCLA. Shortly after his arrival, UCLA students demonstrated and occupied buildings on campus. Buchanan was not pleased by the university administration’s response, and quickly departed for what was then called the Virginia Polytechnic Institute (VPI) in Blacksburg, Virginia, where he and Gordon Tullock founded the Center for the Study of Public Choice.

Buchanan’s 1975 book, *The Limits of Liberty*, is a reflection upon and reaction to the events of the late 1960s and early 1970s. In the book he contrasts the “orderly anarchy” that existed on university campuses in the relatively tranquil 1950s with the atmosphere in the early ’70s.

Consider the situation in the orderly anarchy that was the university community in the late 1950s. Although there may have been a few notable exceptions, most university communities were then characterized by relatively pure standards of free expression. Almost any student or faculty group could invite almost any speaker on almost any subject in the assurance that the event would be allowed to take place without disruption. The intellectual environment of the university embodied free expression, and expectations were made on the basis of this fact. In the 1960s, much was changed...Can anyone seriously dispute the statement that the quality of the intellectual environment was lower in 1970 than it was in 1960? And, once commenced, how can erosion be stopped? How can behavioral standards, which allowed the university community to remain an ordered anarchy for so long, be recovered once they are lost? (Buchanan 1975, pp. 122–123)

Alas, free expression on American university campuses is, if anything, more restricted today than it 1970.

In the appendix to the *Calculus*, Buchanan sole authored, he cites Immanuel Kant's social contract theory as an influence on his thinking (p. 316). Later Buchanan would remark that he and Tullock more or less consciously had the U.S. Constitution in the back of their minds when they wrote the *Calculus*. Kant was one of the greatest, and most optimistic of the Enlightenment thinkers, and some of this optimism is visible in the *Calculus*. The events unfolding in the United States after its publication altered Buchanan's views about both the United States and the role a constitution must play in the political process. Immanuel Kant gives way to Thomas Hobbes.

I have come to be increasingly disturbed by this basic optimistic ontology [in *The Calculus*]...I have found myself describing what I observe as "constitutional anarchy" rather than any institutional translation of individual values into collective outcomes. In the 1970s much to be explained does not seem amendable to analysis that incorporates positive-sum institutional processes. Zero-sum and negative-sum analogues yield better explanatory results in many areas of modern politics... (Buchanan 1975, p. 7).

Thus, in contrast to *The Calculus*, *The Limits of Liberty* is much more concerned with understanding why states may *fail* to advance the interests of their citizens, why they may provide *bads*. Where the *Calculus* focused on the *productive* State providing public goods that benefitted all, *The Limits of Liberty* concentrated on the *protective* State, a state that shielded individuals from their fellow citizens and indeed the State itself (1975, pp. 68–70). Where *The Calculus* analyzed voting rules and other democratic procedures, *The Limits of Liberty* proposes specific constitutional constraints on what the State can do.

On page 47 of *The Calculus* a section appears entitled, Minimal Collectivization—The Definition of Human and Property Rights. The section consists of two paragraphs and in fact contains no definitions of rights. Instead, the authors explain why "it will be useful to 'jump over' the minimal collectivization of activity that is involved in the initial definition of human and property rights...". The contrast with *The Limits* could not be greater. While much of *The Calculus* is concerned with the choice and properties of various voting rules, the focus in *The Limits* is

on the selection of rights to be written into the constitution. Although Buchanan's concept of rights can be construed broadly, the analysis and examples provided seem most appropriate for property rights.

Buchanan envisaged individuals negotiating a constitutional contract from a state of anarchy in which some well-defined, primitive property rights already existed. Each individual has an endowment of goods to consume or to trade with others, or more broadly, each individual possesses a set of preferences and capacities he or she can use to acquire goods. Each individual is unique and "owns" herself. Over the course of several chapters, Buchanan describes how and why rational individuals would agree to establish contractual rights that would lift them out of anarchy.

In the appendix to *The Calculus* cited above, Buchanan defended the contractarian approach from the criticism that its adherents actually believed that states came into existence through some unanimous agreement on a social contract. Much of the discussion in *The Limits* of the move from anarchy to a constitutional democracy, however, seems to suggest that such moves would not only be desirable, but feasible. For example, Buchanan cites with favor Harold Demsetz's (1967) account of how Canadian Indians moved from an anarchy in which beaver-skins were regarded as common property to a state in which private property rights over beavers were established (pp. 22–23). Thus, Buchanan seems to want to legitimize the protective state by a prior unanimous agreement that created it.

Here it is perhaps useful to highlight another important difference between *The Calculus* and *The Limits*. In the former, uncertainty at the constitutional stage was crucial for getting unanimity on, say, the optimal voting rule. No uncertainty need be assumed in the state of anarchy described in *The Limits* to get people to agree to a set of rights that will make everyone better off in the future. This point was first formally pointed out by Christian Müller (1998). Buchanan, however, seems to have been aware of it.

I have tried to examine the prospects for genuine contractual renegotiation among persons who are not equals at the stage of deliberation and who are not artificially made to behave as if they are, either through

general adherence to internal ethical norms or through the introduction of uncertainty about post-contract positions. It is for this reason that a return to the conceptual emergence of contract from Hobbesian anarchy has been necessary to develop my argument. (Buchanan 1975, pp. 175–176)

The protective State consists of a set of rights and rules that protect individual citizens from one another, and all citizens from the State. The existence of rights and rules is a form of social or legal capital. With time individuals learn to abide by the rules, respect others' rights, and exercise their own rights. It is the existence of these legal institutions and the behavior they foster that distinguishes life in civil society from life in Hobbsian anarchy, and explains why life in a civil society is superior to life in anarchy. Abiding by the rules and respecting others' rights constitutes a form of n-person prisoners' dilemma, however. If all individuals believe they are better off in the long run by abiding by the rules, the cooperative solution to the dilemma will be sustained. Economic developments, technological change, and changes in underlying preferences may, however, distance the prevailing rights and rules from the set which would emerge from a new constitutional bargain. Individuals, who feel disadvantaged by the current rules, will be tempted to break them. As more and more people break the rules, a community's legal capital erodes and it slides back toward a state of anarchy. This is what Buchanan thought he saw happening in the United States in the 1970s.

How can a community respond to such a loss of social and legal capital?

There are two ways a community can respond to an increasing "distance" between the status quo and the set of renegotiation expectations for a large number of its members. It may, first of all, increase resource commitments to enforcement...Second the community may attempt to renegotiate the basic agreement, the constitutional contract itself, so as to bring this distance back to acceptable limits...In practice, the only alternative may be that of attempting to renegotiate the basic constitutional contract, at least along some of the margins of possible adjustment. (Buchanan 1975, p. 77).

In Chapter 10 Buchanan elaborates upon what is needed to rectify the sorry situation in the United States in the early 1970s. Here the focus is not so much on rowdy college students and Vietnam protesters, but on “the threat of Leviathan,” discussed at greater length in Chapter 9. Buchanan attributes many of the problems he has identified in the United States of the 1970s to the great expansion of the size of the state that began under Roosevelt in the 1930s, and the overreach by the Supreme Court. What was needed was a “constitutional revolution.” By this Buchanan meant

...basic non-incremental changes in the structural order of the community, changes in the complex set of rules that enable men to live with one another, changes that are sufficiently dramatic to warrant the label “revolutionary”...

A central hypothesis of this book is that basic constitutional reform, even revolution, may be needed. The existing legal order may have lost its claim to efficiency, or, in a somewhat different sense, to legitimacy. At the very least, it seems time that genuine constitutional change be considered seriously. (Buchanan 1975, pp. 168–169)

Thus, I think it can be safely said that in the book, *The Limits of Liberty*, James Buchanan both thought that significant reforms were desperately needed in the United States, and that they were also feasible.

Further Recommendations for Constitutional Changes

In this section I briefly discuss a few later contributions by Buchanan that offered suggestions for constitutional reforms.

The Power to Tax

In *The Power to Tax* the State (Leviathan) is modeled as a monopolist (Brennan and Buchanan 1980). This Leviathan seeks to maximize

its revenues from taxation. They admit that this assumption is somewhat unrealistic, but defend it on the basis of the analytic insights it produces. Because of the distortions and disincentive effects of taxation, tax revenue can be assumed to be a concave function of the tax rate, $R(t)$, a function made famous by Arthur Laffer. A revenue-maximizing Leviathan chooses the tax rate corresponding to the peak of the Laffer curve.

Substituting the assumption of a revenue-maximizing dictator for a benevolent dictator leads to many striking differences with conventional models of taxation and the State. A typical exercise in optimal taxation usually would, for example, begin with the assumption that an exogenously given fixed amount of revenue must be raised. It then proceeds to analyze how this revenue can be raised with the least amount of dead weight loss. Lump sum taxes are ideal, since they produce no distortions in behavior, but are rather rare. Broad-base taxes are better than narrow-base ones, because a given amount of revenue can be raised with a lower tax rate through a broad-base tax causing fewer distortions. This conclusion gets “stood on its head” once the State is viewed as a revenue maximizer. Narrow-base taxes are now superior, because they limit the amount of revenue the State can extract from the citizens. Definitions of income, which exclude some potential components like the implicit rents earned by homeowners, are superior to broad definitions (Chap. 3). Taxes on individual commodities are superior to general sales or value-added taxes (Chap. 4). One explanation for the relatively small size of the federal government over the nineteenth century might simply be that it was constrained to a fairly small set of revenue sources.

Where the last chapter of *The Limits of Liberty* was fairly short on specific proposals for a new constitution, *The Power to Tax* is replete with them. Constitutional rules regarding money expansion or inflation targets appear, as do limitations on public deficits (Chap. 6). Earmarked taxes are better than general taxes, because they force the state to provide a public good in exchange for more tax revenue. More generally, Knut Wicksell's (1896) proposal that each expenditure item in the state's budget be tied to a specific tax to finance it, combined

with a requirement of a super majority (5/6ths) to authorize any expenditure would be desirable (Chap. 7).

In Chapter 9, Brennan and Buchanan extol the advantages of federalist states over unitary states, because with federalism the threat of citizen exits at lower levels of government constrains regional and local Leviathans' abilities to tax without providing corresponding public goods. The importance of federalist institutions in constraining Leviathan and, more generally, in promoting individual liberty was stressed by Buchanan many times. "I suggest that a coherent classical liberal must be generally supportive of federal political structures, because any division of authority must, necessarily, tend to limit the potential range of political coercion" (Buchanan 1995 [1996], p. 259). Upon the collapse of communism in East Europe, Buchanan also expressed hope that Europe would develop a set of federalist structures that would protect individual liberties (Buchanan 1990).

The Power to Tax constitutes Buchanan's fullest statement of how Leviathan might be constrained. All of the work in forging these constraints must be done at the constitutional stage. As with Hobbes's monarch, in the model of Brennan and Buchanan once the social contract cum constitution is signed, Leviathan is essentially unfettered except for the constraints written into the constitution.

The Reason of Rules

The Reason of Rules (Brennan and Buchanan 1985), is to a large extent a methodological treatise. The authors wish to demonstrate the superiority of a constitutionalist/contractarian approach to the study of politics over a non-contractarian approach. Thus, the book takes up and extends the arguments Buchanan put forward in the appendix to the *Calculus of Consent* and in *The Limits of Liberty*.

A noncontractarian is portrayed as believing that some ideal set of outcomes from the political process, a definition of the "public good," is "out there" and the task of the social scientist or social engineer is to discover what this "public good" is, and then bring it about. In contrast, the contractarian starts with the individual and his/her preferences and desires. Political outcomes emerge from the interactions of individuals

in the political process, just as allocations of private goods emerge from the interactions of individuals in markets. If all citizens have agreed on what the rules of the political game are, then the outcomes of the political process might be judged as good, because they emerged from a mutually agreed upon set of rules. It is the *means* by which the political outcomes are obtained that gives them normative value, not some externally imposed definition of the public good.

As its title suggests, the book is much concerned with the existence of rules and their effects on social outcomes. Rules can improve social outcomes by eliminating uncertainty about the actions of others. In much of *The Reason of Rules* the authors appear to be referring to rules imbedded in a constitution. Their notion of rules is much broader than this, however, and includes things like rules of the road (1985, pp. 7–12).

The authors discuss how and why an individual's decision in a private market differs from the same individual's decision when voting (1985, Chap. 5). Both authors have written on this topic several times elsewhere. Here the emphasis is on inter-temporal problems. An individual who takes out a loan to start a business faces uncertainty about future demand, costs and so forth. She knows, however, that she will be in charge of the business, and thus can react to developments in an optimal way. A voter contemplating whether the government should issue debt to finance a given project has much less, indeed, essentially no control over what the government will do in the future. In particular, he cannot assume that the government will make optimal choices in the future. This introduces a kind of myopia in individuals as voters.

This myopia produces several undesirable outcomes from democratic processes—a high-tax trap, an inflation trap, a public-debt trap, and still others (1985, Chap. 6). The high-tax trap takes the form of governments adopting policies, which lead them past the peak of the Laffer curve. Today's government increases expenditures and taxes to win votes. Over time citizens adjust to the higher taxes with behavior that reduces their tax obligations. If the tax increase is on income, they may take longer vacations, or early retirement. The self-employed may work fewer hours. Thus, in the long run the tax increase produces less revenue than it did in the short run. A cut in the tax rate might even lead to an *increase* in revenue—in *the long run*. Because this increase would not immediately

occur, in the short run the government is trapped with its high tax rates. Voter myopia also leads in fairly predictable ways to the government printing too much money (inflation), and running too big of deficits.

As in *The Limits of Liberty* and *The Power to Tax*, the proposed solutions to these problems take the form of constitutional provisions dealing with tax rates, increases in the money supply, and a balanced budget constraint. The authors also propose that redistribution to the poor be dealt with in the constitution (1985, pp. 127–131).

In the closing chapter, Brennan and Buchanan pose the same question that Buchanan answered positively in the closing chapter of *The Limits of Liberty*. “Is constitutional revolution possible in a democracy?” They answer yes, but recognize the obstacles to achieving such a revolution. Three things work in favor of such a revolution taking place—the undesirability of the status quo, the uncertainty surrounding the effects of constitutional choices on particular individuals’ welfare, and the possibility with a complete constitutional overhaul of making side payments to compensate those who think they will lose as a result of some changes. More than two decades after the publication of *The Calculus* Buchanan still believed constitutions could be changed to improve individual welfare.

Politics by Principle, Not Reason

The Calculus contains an extended discussion of the simple majority rule. Some of it is positive, as the analysis of logrolling (Chaps. 10 and 11), but most of it is critical, and Buchanan criticized this rule on many other occasions. By the end of the twentieth century, however, he seems to have decided to accept the fact that the simple majority rule will continue to be the universal choice of legislative bodies. *Politics by Principle, Not Reason* (Buchanan and Congleton 1998), discusses how majoritarian democracy might be constrained so as to produce better outcomes. While much of the public choice literature criticizing the majority rule focuses on the problem of cycling, Buchanan and Congleton are more concerned about the tendency for the majority rule to induce redistribution.

To see the problem, consider a simple prisoners' dilemma situation involving, say, the provision of a public good with all row players having identical payoffs, and all column players having identical payoffs. The bottom right-hand box contains the Pareto-inferior Nash equilibrium with the two groups free riding and receiving payoffs of, say, 5 and 4 per person. The cooperative solution appears in the upper left-hand box with payoffs of, say, 12 and 10. As Buchanan often stressed neither the initial positions of the players nor the gains from cooperation need be ones of equality. If the community uses the simple majority rule, and the column group is larger, the column players will gain even more, if they vote to provide the public good *and* combine its provision with a tax that redistributes income from the row group resulting in an outcome in the upper right-hand box and payoffs, say of 2 and 13. The community's use of the simple majority rule gives majority coalitions the legal right to steal (redistribute) from the minority. Buchanan and Congleton (1998, pp. 23–24) point out an important difference between the provision of a public good using the simple majority rule and classical prisoners' dilemma situations. In the latter, each player *independently* chooses a strategy and the outcome emerges from their separate choices. With majoritarian democracy, a majority coalition can choose any of the four boxes in the matrix. It could choose to tax its own members the same as members of the minority, or even choose the opposite off-diagonal box and tax its own members more than the minority. Self-interest, of course, leads a majority coalition to choose the off-diagonal box that is most advantageous to it.

The solution to this problem is to remove the off-diagonal options from the domain of choice. Buchanan and Congleton (1998) propose to do this by enshrining a *generality principle* in the constitution. Application of the principle to taxation might take the form of a comprehensive, common tax base for all citizens, and a proportional tax to pay for a public good that all consume.

As in his earlier works, in this book Buchanan seeks to correct a perceived failure in the functioning of democracy with a constitutional change, a constitutional constraint on the democratic process. Presumably, he would not have written the book, if he did not think

that such a change in the constitution was feasible. Unlike in some of his earlier works, however, the final chapter of *Politics by Principle, Not Reason* is not so much a call for a constitutional revolution, but an expression of hope that such a change might come into being.

Competitive Federalism by Default

In 1990, almost immediately after Communism had collapsed across much of Europe, Buchanan gave a lecture in Paris addressing the dramatic events taking place in Europe at that time (Buchanan 1990). In it he “suggested that the time was ripe for the Europeanization that was already in progress to be directed toward the organization of a genuine competitive federalism, with a strong, but quite limited, central authority, and with the competing nation-state regulatory regimes all operating within an enforced open and integrated economy” (Buchanan 2003, p. 25). He soon, however, realized that his “argument was quite naive” *ibid.* He also claimed to be surprised by the vehement criticisms the suggestion elicited. Some years later, I published an article in which I tried to sketch how a European federalism might look (Mueller 1997). It, too, elicited serious criticism (Aroney 2000).

The suggestion put forward in 1990 seemed to be calling for a constitutional moment in Europe, a conscious and presumably explicit creation of institutions that would constitute a competitive federalism of nation states. Thus, circa 1990, Buchanan’s faith in the possibility of meaningful and substantive constitutional change seemed to still burn bright. Thirteen years later, the glow had substantially dimmed. Now constitutional change was seen as *emerging* through an evolutionary process much in the spirit of Frederick Hayek (Buchanan, 2003, pp. 26–27).

Toward the end of this essay, Buchanan asserted that the “effective constitution for the Europe of this century will not be ‘laid on’... by some explicitly constructed special assembly operating under well-defined rules” (Buchanan 2003, p. 34). In fact, such an assembly had already been constituted, and charged with the task of writing a constitution for the European Union. This effort is discussed below.

Constitutional Change in the United States

If there was a need for a constitutional revolution in the United States in 1975, 1985, and still in 1998 as Buchanan seemed to suggest, then in the year 2017 there is a *desperate* need. The federal budget deficit has grown to an unsustainable level, fiscal crises loom in the state provision of health care and pensions, Congress is incapable of passing legislation to provide basic public goods like highway and bridge maintenance. The word “dysfunctional” often appears in discussions of the efficacy of the federal and several state governments.

The poor performance of Congress in recent years has not gone unnoticed by Americans. A Gallup poll in 2017 found 47% of those polled had little or no trust in Congress. Only 12% had a great deal or quite a lot of trust, a rather low figure but higher than the 7% recorded in a 2014 poll.¹

James Buchanan often remarked that the ideal form of government took a federalist form. The United States has one of the strongest set of federalist institutions in the world. Elected representatives at the federal, state and local levels of government have the authority to both determine spending at their respective levels, and to levy the taxes needed to cover these expenses. In many so-called federalist states like Austria and Germany, the latter authority is largely lacking. In an ideal federalist system, legislative bodies at each level of government would largely confine their attention to providing public goods and services that benefitted all citizens within this governmental unit. At the national level, parties would compete for votes by offering platforms containing the bundles of public goods and services they thought should be provided at the national level, similar competitions would take place at state and local levels, with the choices in local elections often being among *persons* instead of parties. This is not how politics works in the United States, however. All of the Republican candidates for seats in the House of representatives do not promise their constituents the identical set of national policies. The same is true for the Democratic candidates.

¹See, <http://www.gallup.com/poll/1597/confidence-institutions.aspx>, accessed 28 August 2017.

Incumbents running for the House emphasize all of the benefits (pork) that he or she was able to obtain for the district. The challengers make promises of what they will do for their constituents if elected. In office, representatives often provide ombudsman services for their districts, e.g., help getting a son or daughter of a major campaign contributor into West Point (Fiorina 1977, p. 41). Geographic representation in the United States often results in local concerns taking precedence over the national interest. Since state legislatures are structured in much the same way as Congress is, similar problems arise at this level.

A fundamental principle underlying a fair set of democratic institutions is one man one vote. Each citizen's vote should carry the same weight in determining the outcomes of elections and ultimately of the policies the state adopts. This principle is grievously violated in the United States. In 2016, the population of California was 39.25 million. North Dakota's was 757,952. Thus, the vote of a citizen of North Dakota has roughly *50 times* the weight in the Senate as a vote of a Californian has. I can think of no country in the European Union where the one man one vote principle is violated as dramatically as in the U.S. Senate. Gerrymandering has existed in the United States throughout its history. Since state legislatures draw the lines for their Congressional districts, each party has an incentive to draw the lines in such a way as to maximize the number of representatives who will be elected from their party. In recent years, the Republicans have controlled a large fraction of state legislatures, and it is they who have benefitted the most from gerrymandering. In 2016, Republican candidates for the House got 50.4% of the votes cast for either a Republican or a Democrat, which gave them 55.4% of the seats at the beginning of the 115th Congress in 2017.² Similar disproportionate outcomes occurred in the 2010, 2012, and 2014 elections (Reynolds 2016). Then there is the anachronistic institution, the College of Electors, which allows the person who comes in second in the voting across the entire country to

²See, <http://history.house.gov/Institution/Election-Statistics/Election-Statistics/>, accessed 28 August 2017.

win the office of president, an event which has occurred twice in the last five presidential elections.

American politicians often refer to the United States as the “greatest democracy in the world.” The above discussion suggests that this statement is a gross exaggeration. This judgment is supported by the data gathered by institutions that rank countries by the quality of their democratic institutions. The United States has *never* been at the top of the list in recent years, nor even in the top ten. One recent ranking placed it 16th.³ Clearly, there is much room for improvement in the quality of the democratic institutions in the United States.

What to do? I shall offer a couple of answers to this question by taking up the constitutional reform gauntlet that Buchanan often threw down.

Two reforms are simple—abolish the Electoral College and the Senate, and declare the candidate with the most votes in a presidential election the winner. One could consider adding seats to the Senate and basing the number of senators per state on population, but this would only make the Senate look like the House and be more or less redundant.⁴

The best way to get parties in the legislature to focus on national issues is to have each party compete for votes across the entire nation. There are essentially two variants of such a system—multiparty and two-party systems.⁵ Given the past dominance of two parties in the United States, if it were to adopt one of these systems, I am sure it would opt for the two-party variant. Briefly it would work as follows. Each party draws up a list of candidates it proposes for the legislature. The parties compete across the nation for votes. An initial allocation of seats is determined by the number of votes each party gets in the election. If one party receives a majority of the votes, it is allocated a majority of the seats in the legislature and can implement its proposed

³See, <http://democracyranking.org/wordpress/>, accessed 29 August 2017.

⁴For further criticism of bicameralism see Mueller (1996, Chap. 13).

⁵I discuss ideal variants of these systems in Mueller (1996, Chaps. 8–10).

program. If no party receives a majority of the votes, a second, run-off election is held with only the two largest parties from the first election taking part, as in French presidential elections. Unlike the so-called two-party systems in Britain and Canada, where parties can win a majority of the seats in parliament with less than 50% of the votes, this system would ensure that the party with a majority of seats had won a majority of the votes in at least one election. Under certain assumptions, the competition for votes in such a two-party system would maximize a social welfare function (Mueller 2003, Chap. 12). Given this property, such a two-party system should not be coupled with an executive branch in which a president can wield a veto. Either no president should exist or a very weak one as in Germany and Austria.

Constitutional amendments in the United States have come about through the first route defined in Article 5 of the Constitution. The proposed Amendment is first approved by at least two thirds of both the House and the Senate. It is then handed over to the states and becomes part of the constitution, once three fourths of the state legislatures have approved it. There is no chance of a system such as sketched above being adopted using this procedure. The Senate would never vote to abolish itself, and the 400+ members of the House with relatively safe seats would not vote to put their safety at risk.

The second route to a constitutional amendment contained in Article 5 is through a national convention, which can be convened if two thirds of the state legislatures petition Congress to do so. Proposals to hold another constitutional convention have passed in numerous state legislatures down through the years, but the two thirds requirement has never been reached. At the time of this writing (October, 2017), a lobbying effort by the Balanced Budget Amendment Task Force has induced 27 state legislatures to pass resolutions calling for a convention. Other efforts are also afoot. Like the movement for a balanced budget amendment, these other efforts also have rather narrow and conservative objectives (*Economist* 2017). Nevertheless, the possibility that another constitutional assembly will meet in the United States cannot be ruled out. Once convened, the assembly might confine itself to the narrow objectives of the groups lobbying for the convention, but it might alternatively choose to expand its options and morph into a

“runaway” convention. It seems unlikely even in this event, that the convention would be able to agree to the kinds of structural changes needed to make the United States a truly great and responsive democracy. If the composition of the convention reflected the range of views that exists in the country, the polarization eating away at American society would simply be carried over into the convention and no consensus could be reached. If the composition of the convention was heavily weighted towards those of a particular ideological persuasion, the result might even further polarize the country. In *The Calculus* and other writings, Buchanan relied heavily in claiming a normative underpinning for the constitution on it being written behind a veil of ignorance or uncertainty. If a constitutional assembly were convened in the United States today, it is difficult to believe that its participants would step behind any such veil.

Constitutional Change in the European Union

The European Union had constituted a constitutional convention before James Buchanan predicted in 2003 that it would never do so. This was a great opportunity to close the much lamented “democratic deficit” in the European Union, and to decide whether the EU was to be structured as a confederation of nation states or a federation as Buchanan had recommended, and to eliminate the hodgepodge between the two that existed at that time. One possibility for choosing delegates to the convention that would have involved EU citizens from the start would have been for the citizens of each country to *elect* the delegates based on the views of the candidates about what the scope and structure of the European Union should be. This was not the way the convention was formed, however. As with all of the treaties that underscore the EU, the political elite in the EU decided who the delegates should be. The European Commission, the European Parliament, and each of the member states governments were all represented. The composition of the convention ensured that the question of whether the EU should be a confederation, thereby abolishing the EU parliament, or a federation, thereby abolishing the European Council in which

the national governments are represented, would not be resolved. The unwieldy 350 page document that the convention produced read more like a procedural manual for the bureaucrats in Brussels than a social contract joining the citizens of the European Union.

Having left the citizens out of the process of writing the EU constitution, the political elite of the EU still had the opportunity to involve the citizenry in the ratification process. When the citizens of France and Holland voted to reject the draft constitution, this option was closed. The constitution's rejection by the citizens of two of the founding countries of the EU might have caused its leadership to conclude that the constitution needed to be rethought. This was not the reaction, however. Instead, modest changes were made, the constitution was renamed a treaty and adopted without the consent of the citizenry of the European Union. Instead of closing the democratic deficit in the European Union, the process of writing and adopting the constitution/treaty only widened it.

Conclusions

Although James Buchanan placed heavy weight on the importance of constitutions in the democratic process, he *never* discussed how the constitutional reforms he advocated would come into being. Should one of the movements for a new constitutional convention succeed, a host of questions need to be addressed, for which Article V provides no guidance. How would delegates be chosen? Would the voting rule used at the convention be a 2/3rds majority, as stipulated in the Constitution, or should the convention strive for unanimity, as Buchanan clearly preferred? By not addressing questions such as these, Buchanan might be accused of wishful thinking.⁶

When discussing the constitutional stage of the democratic process, as say in *The Calculus*, Buchanan often seemed to assume that the

⁶I took some of these questions up in the final chapter of *Constitutional Democracy* (Mueller 1996).

citizens of the polity would themselves meet to decide on what voting rule to use in the future, whether to have a bicameral or unicameral legislature, and so on. In any community larger than a small town, such a procedure would be clearly infeasible. On the other hand, the experience in the European Union illustrates the costs of drafting a new Constitution *without* heavy citizen involvement. It also reveals just how difficult meaningful constitutional revolutions are. Thus, in closing, I conclude that Buchanan's many contributions to the broad area of constitutional political economy inform us about what constitution can and ought to accomplish, but, alas, give us little guidance about how those wished for constitutional changes can be made to come about.

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