



J. M. Buchanan's contractarian constitutionalism: political economy for democratic society

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Abstract

The purpose of this paper is to support three claims. Firstly, that it is Buchanan's uncompromising commitment to a methodological and a normative individualism to which his lifework owes its coherence and internal consistency. Secondly, that a principal motivating force behind his life-long research efforts has been the aim of inquiring into how the citizen-members of a democratic polity may govern themselves in mutually beneficial ways. And, thirdly, that his contractarian constitutionalism provides a paradigmatic alternative to received outlooks of liberalism, welfare economics, and democratic theory.

Keywords Constitutionalism · Contractarianism · Democracy · Individualism

JEL Classification D72 · D86 · E61 · H11 · 41

1 Origins and methodological clarifications

The individualist element in my vision of social reality ... has been an important component of my criticism of the work of others in political economy. (Buchanan 2001d [1992a], p. 23)

The coherence that the work does possess stems from the simple fact that I have worked from a single methodological perspective during four decades that span my career to date, along with the fact that I have accepted the normative implication of this perspective. (Buchanan 1999a [1986a], p. 27)

When a scholar's published lifework extends over more than half a century, one can scarcely expect it to be free of ambiguities, tensions (Boettke and Stein 2018), or even contradictory elements. James M. Buchanan's body of publications, extending from the late 1940s to the early 2010th is no exception to that rule, and critical reviewers engaging in exegetical exercises will be able to offer proof. My own interest in Buchanan's work never has been of such exegetical nature, nor is the purpose of the present paper of such kind.

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Over the many years I have been studying Buchanan's writings I have come increasingly to be impressed by the continuity, coherence, and consistency with which he elaborated and refined the research program that he embarked on at a very early stage of his academic career and that has become his trademark: *His contractarian constitutional political economy*. For quite some time my own research efforts have been concerned very much with expounding the theoretical core of that research program and presenting it in what I consider to be its most consistent and fruitful interpretation, deliberately leaving aside elements in Buchanan's work that may appear ill-suited to my interpretation. In other words, I have approached Buchanan's writings with a *constructive* rather than an *exegetical* attitude, seeking to extract from them a theoretical system on which those who seek to carry forward the contractarian-constitutionalist paradigm can build.

The present paper is written in that spirit. In it I shall seek to support three claims. Firstly, that it is Buchanan's uncompromising commitment to a methodological and a normative individualism to which his lifework owes its coherence and internal consistency. Secondly, that a principal motivating force behind his lifelong research efforts has been the purpose of applying his theoretical insights to the problem of how the citizens-members of a democratic polity can govern themselves in mutually beneficial ways. And, thirdly, that his contractarian constitutionalism provides a paradigmatic alternative to received outlooks at liberalism, welfare economics and democratic theory. The subsequent argument is organized into five parts. Part 1 deals with the origins of Buchanan's research program and discusses ambiguities concerning its methodological status. Part 2 reviews the core ingredients of the research program. Part 3 discusses the program's application to the problem of democratic self-government. Part 4 contrasts Buchanan's contractarian constitutionalism with alternative outlooks at political economy issues. Part 5 concludes.

1.1 The Virginia School of Political Economy: its two strands

Constitutional political economy is best interpreted as a re-emphasis, a revival, a re-discovery, of basic elements of earlier intellectual traditions that have been set aside, neglected, and sometimes forgotten in the social sciences and social philosophy....

These traditions are those of classical political economy and contractarian political philosophy. (Buchanan 1999a [1990], p. 387)

What has come to be known as the *Virginia School of Political Economy* owes its name to the fact that James M. Buchanan, its principal founder, spent the main part of his academic career at Virginia universities, the University of Virginia in Charlottesville (1956–1968), Virginia Polytechnic Institute and State University in Blacksburg (1969–1983), and George Mason University in Fairfax (1983–2007).¹ The research program that he helped to form and grow during those Virginia years was born, as he notes in retrospect, “in the foyer of the Social Sciences Building at the University of Chicago early in 1948” (Buchanan 2001d [1992b], p. 51), where, in a casual conversation, he and his fellow graduate student, G. Warren Nutter, noticed that they shared a dissatisfaction with an economics that, in their assessment, “had shifted, and was shifting, away from its classical foundations as

¹ Buchanan (2001d [1992b], p. 50) wrote “I have, of course been pleased by the emergence of the appellation ‘Virginia’ or ‘Virginian’ applied or assigned to the particular research program in political economy with which I have been associated at three separate universities in the commonwealth, and over a period of more than three decades.”

a component of a more comprehensive moral philosophy” and in which “technique was replacing substance” (ibid.). While, at the time, they could do no more than concur “in the view that some deliberately organized renewal of the classical emphasis was a project worthy of dreams” (ibid.), the opportunity to put that dream into practice arose when in 1957 both Nutter and Buchanan simultaneously joined the faculty at the University of Virginia and established the *Thomas Jefferson Center for Studies in Political Economy and Social Philosophy* (ibid.).²

The Virginia School, the foundation of which was laid in UVA’s Thomas Jefferson Center, came to revive political economy in the two ways in which it can be interpreted. On the one hand, it can be understood as an application of *economics to politics* in a purely positive sense as an enterprise concerned with studying and explaining the workings of politics with the tools of economic theory. On the other hand, it can be understood as an application of economics to matters of *political choice*, in the sense of providing policy advice and of passing judgment on the merits of alternative policy options.³ In its incarnation as *public choice theory*, Virginia political economy falls squarely into the first rubric. “Public Choice,” Buchanan (2001a [1987a], p. 8) notes, “concentrates attention on analyses of alternative political structures and on behavior within these structures. Its focus is on predictive models of political interactions”. Public choice theory was, in particular, meant as a corrective to the analytical asymmetry of a welfare economics that, from the diagnosis that real world markets often “fail” compared to the ideal workings of perfect markets, recommended government interventions to correct “market failures”.⁴ The public choice research program emerged naturally from the objection that, before any such conclusion can be drawn, “the two institutional structures must be evaluated on the basis of predictions as to how they will actually work” (Buchanan 2001d [1992b], p. 56), along with the assessment that economics offered no theory concerning how politics actually works. Developing such a theory in ever more detail became, and continues to be, the public choice project.

As important as Buchanan’s role in the theoretical and institutional promotion of the public choice project surely has been, his principal interest never has been confined to political economy as a positive, explanatory exercise. To him, political economy in the first of its two interpretations is instrumental in serving as the necessary foundation on which political economy in its second interpretation rests. As he puts it:

² Looking back at the Fulbright year 1955–1956 he spent in Italy, Buchanan (2001d [1992c], p. 37) mentions the “Italian perspective on politics” he had studied: “This perspective has much in common with eighteenth-century conceptions from which emerged both the ideas of the Scottish Enlightenment and those of the American Founding Fathers. After Italy, I was prepared, intellectually, psychologically, and emotionally, to join in an entrepreneurial venture with my Virginia colleague Warren Nutter, a venture aimed at bringing renewed emphasis to ‘political economy’ in its classical sense.”

³ Buchanan (1958, p. 5): “The Thomas Jefferson Center strives to carry on the honorable tradition of ‘political economy’—the study of what makes for a ‘good society.’ Political economists stress the technical economic principles that one must understand in order to assess alternative arrangements for promoting peaceful cooperation and productive specialization among free men. Yet political economists go further and frankly try to bring out into the open the philosophical issues that necessarily underlie all discussions of the appropriate functions of government and all proposed economic policy measures” (quoted from Boettke and Marciano 2015, p. 55).

⁴ Buchanan (2001d [1992b], p. 56): “(T)he predominant emphasis of the theoretical welfare economics of the 1950s and 1960s was placed on the identification of ‘market failure’, with the accompanying normative argument for politicized correction. In retrospect, it seems naïve in the extreme to advance institutional comparisons between the workings of an observed and an idealized alternative.”

The ‘positive science of political economy’ ... does not have as its ultimate normative purpose the accumulation of predictive knowledge about behavioral relationships in the observable world ... Political economy has, instead, the ultimate purpose of enabling persons to analyze their own behavior, along with that of others, in some imagined state and, from such analysis, to define the appropriate or desired set of constraints that will be then embodied in the law assigned to the sovereign for enforcement. (Buchanan 2001b [1982], p. 51)⁵

Constitutional political economy as an offspring of public choice theory⁶ is that branch of the Virginia School that explicitly embraces that view of the ultimate purpose of political economy and that Buchanan particularly identifies himself with. Speaking of “the two separate strands” he states:

I have come increasingly to think that the constitutionalist-contractarian methodological framework is, indeed, the central feature of Virginia Political Economy, a framework that, from the start I have found to be appropriate. ... Positive public choice theory suggests that the rent seekers are indeed to inherit our earth.... Constitutional reform offers the only escape from this gloomy projection.... I have often stated that I feel a moral obligation to hope that such reform can indeed take place. Underneath its abstract analysis, the Virginia research program has always embodied a moral passion that our adversaries have fully appreciated. The program has advanced our scientific understanding of social interaction, but the science has been consistently applied to the normatively chosen question. How can individuals live in social order while preserving their own liberties? (Buchanan 2001d [1992b], p. 62 f)

It is the constitutional economics strand of the Virginia School that Buchanan (2001a [1987a], p. 5) sees as most fully reviving “classical political economy, ... particularly as represented in the works of Adam Smith”:

Classical political economy was, from its eighteenth-century origins on, largely concerned with the comparison of alternative social or institutional orders. Its main purpose was not the predicting of economic behavior for its own sake; its purpose was, instead, that of developing appropriate models of the working of alternative institutions in order that the choice between those institutions might be better informed (Brennan and Buchanan 2000 [1983], p. 89).⁷

⁵ Buchanan (2001b [1982], pp. 41, 54): “‘Science’, in a narrowly defined sense that is descriptive of the ‘hard-science’ disciplines, is explicitly positive.... By more or less natural presumption, ‘science’ is valued because it is precursory to its usefulness in control. Physics, as a positive science is antecedent to the miracle of modern technology.... In the ultimate sense, this science [political economy], too finds its normative purpose in control, that which is exercised upon our behavior by the selection of the institutional–constitutional constraints within which we interact one with another.”

⁶ Buchanan (2001d [1992b], p. 59): “From the early 1970s, public choice, defined comprehensively, came to embody two separate and distinct research programs. The first, constitutional economics, finds its precursor in the work of Wicksell and its modern representatives in those of Vining, Buchanan, Wagner, Brennan and Vanberg. And ... my own emphasis has been almost exclusively limited to this program. The second research program within public choice falls more appropriately under the rubric “the economic theory of politics” and involves the extension of *Homo economicus* to behavior under observed institutional rules.”

⁷ Buchanan (2001a [1987a], p. 6): “Classical political economy emerged from moral philosophy, and its proponents considered their efforts to fall naturally within the limits of philosophical discourse. As a modern embodiment, Constitutional Economics is similarly located, regardless of disciplinary fragmentation. How can persons live together in liberty, peace, and prosperity? This central question of social philosophy

1.2 Applied versus normative political economy

[T]he Virginia research program... has advanced our scientific understanding of social interaction, but the science has been consistently applied to the normative chosen question. How can individuals live in social order while preserving their own liberties? (Buchanan 2001d [1992b], p. 63)

Unnecessary irritation about the methodological status of his contractarian-constitutionalist approach has been caused by Buchanan's (1989, p. 93) occasional references to constitutional political economy as involving "both positive and normative elements", or "variants" thereof (Buchanan 2001d [1992a], p. 24), provoking the question whether the "normative variant" is meant to be about *value judgments*, i.e., judgments about *what ought to be*, in contrast to the inter-subjectively testable conjectures of positive science. The irritation is needless because it easily can be avoided if one replaces the (misleading) contrast of positive and "normative political economy" (Buchanan 2001d [1988], p. 140) with the (more appropriate) distinction between *theoretical* and *applied* political economy.

To be sure, applied sciences have a *normative purpose*: they aim at using the insights of their theoretical counterpart to find solutions to practical problems. Yet, their normative purpose does not make them "normative" sciences. To be sure, the problem-solving recommendations they propose are *value judgments* in the sense that they say what one *should* do to solve a problem. Yet, the recommendations are *conditional* rather than *unconditional* should-be-statements—they are, in philosophical parlance, *hypothetical* rather than *categorical* imperatives. They say what one should do *if* one wants to solve the problem in question. And such *conditional* or *hypothetical* imperatives can be scrutinized by the same methods of inter-subjective testing that apply to the pronouncements of theoretical or positive science. They are falsified if the problem solution they recommend can be shown not to work. They are incomplete if other, and potentially superior, problem solutions exist. And they are irrelevant to those who have no interest in solving the problem in question.

For any careful reader it should be apparent that for Buchanan the task of the "normative variant" of constitutional economics, just as of any other *applied* science, is to state *conditional* rather than *unconditional* value judgments, even though he (misleadingly) refers to them as "normative propositions":

Indeed, the only purpose of science is its ultimate assistance in the development of normative propositions. We seek to learn how the social world works in order to make it work 'better', to 'improve' things; this is as true for physical science as it is for social science. (Buchanan 1999b [1962], p. 306)

Buchanan (1999a [1959], p. 196) expressly states that what he calls "normative propositions" are to be understood as problem-solving conjectures:

Propositions advanced by political economists must always be considered as tentative hypotheses offered as solutions to practical problems.

Footnote 7 (continued)

requires continuing contributions from many specialists in inquiry, surely including those of the constitutional economist."

Advancing propositions on what are recommendable means *if* one wants to solve a particular problem is, Buchanan (2001d [1986], p. 329) notes, quite different from pronouncing, in the name of science, categorical imperatives:

The economist who implies that his ‘science’ enables him to call for the repeal of minimum-wage legislation is on all fours with the nuclear physicist who implies that his ‘science’ enables him to call for nuclear disarmament.... My own effort in what we now call ‘constitutional economics’ has often been classified as ‘normative economics’. Does this suggest that I have been guilty of my own admonitions here? Careful reading of my positions would suggest otherwise.

2 The core ingredients of the contractarian-constitutionalist research program

2.1 Wicksell’s influence: efficiency and unanimity

[T]he constitutional approach ... has characterized my own work since the initial Wicksellian influence.... I have come increasingly to think that the constitutionalist-contractarian methodological framework is, indeed, the central feature of Virginia Political Economy. (Buchanan 2001d [1992b], p. 62)

On numerous occasions Buchanan has acknowledged the intellectual debt he owes the Swedish economist Knut Wicksell, whose (1896) dissertation “Finanztheoretische Untersuchungen”, only serendipitously discovered,⁸ electrified him. It was in particular the chapter titled “Ueber ein neues Prinzip der gerechten Besteuerung”⁹ that impressed Buchanan strongly. It made him look at fiscal phenomena “through a different window” than the outlook adopted by orthodox public finance theory,¹⁰ and set him on the path of developing his own constitutionalist-contractarian paradigm. As he has described his reading experience in retrospect:

Wicksell’s new principle of justice in taxation gave me a tremendous surge of self-confidence. Wicksell, who was an established figure in the history of economic ideas, challenged the orthodoxy of public finance theory along lines that were congenial with my own developing stream of critical consciousness. (Buchanan 1999a [1986b], p. 456)¹¹

⁸ Buchanan (1999a [1986b], p. 455 f.): “One of the most exciting intellectual moments of my career was my 1948 discovery of Knut Wicksell’s unknown and untranslated dissertation, *Finanztheoretische Untersuchungen*, buried in the dusty stacks of Chicago’s old Harper Library. Only the immediate post-dissertation leisure of an academic novice allowed for the browsing that produced my own dramatic example of learning by serendipity.”

⁹ A translation of this chapter, prepared by Buchanan, was published 10 years after the discovery (Wicksell 1958 [1896]).

¹⁰ In a review of Buchanan’s (1999d [1968]) *The Demand and Supply of Public Goods*, Head (1970, p. 121) notes that “More than any other fiscal theorist over the postwar period, Buchanan has helped us to view fiscal phenomena, as he himself puts it ‘through a different window’. This book represents in many respects the cumulation of these efforts”.

¹¹ Buchanan (1999a [1986a], p. 15): “The effect on me was dramatic. Wicksell laid out before me a set of ideas that seemed to correspond precisely with those that I had already in my head, ideas that I could not have expressed and would not have dared to express in the public-finance mindset of the time.”

Wicksell told us that if economists really want to apply the test of efficiency to the public sector, only the rule of unanimity for collective choice offers the procedural guarantee. If we seek reform in economic policy, we should change the rules under which political agents or representatives act. Economists should, once and for all, cease and desist proffering advice to non-existent benevolent despots. (Buchanan 1999a [1986a], p. 15 f)

The essential Wicksellian message that resonated with Buchanan's own analytical intuitions is that economists, when they address the theoretical and normative issues posed by politics in a democratic society, must start from methodological and normative premises that are adequate for such societies as associations of free and equal individuals in which governments are "ultimately responsible, electorally, to their constituencies."¹² The *methodological* premise is that explanations of political processes must be *individualistic*, i.e., they must show how policy choices result as the eventual outcomes of individual inputs into the processes. And the *normative* premise is that the merits of policy choices must be assessed individually, i.e., in terms of the subjective evaluations of the individuals on whose behalf they are made. In effect, Wicksell called on his fellow economists to apply to politics the same analytical standards they customarily apply in their study of market phenomena, or, in other words, to keep their outlooks on markets and on politics analytically symmetric. Just as they explain market outcomes as resulting from the actions and interactions of individual market participants they ought to explain political choices in a likewise manner, as resulting from the actions and interactions of individual participants in political processes.¹³ Correspondingly, just as they can infer the "efficiency" or welfare-enhancing property of market exchanges only from the presumption that the traders *voluntarily agreed* to the transactions, as economists explicitly assume, so does Wicksell insist that no criterion exists for judging the "efficiency" of political choices other than agreement among the individuals involved.¹⁴

To Wicksell (1958 [1896], p. 89), agreement meant specifically that in a democratic society of free and equal citizens, public expenditures can be considered legitimate only if they are "intended for an activity useful to the whole society and so recognized by all classes without exception", that is, only if the benefits of a "proposed activity to the individual citizens would be greater than its costs to them" (*ibid.*, p. 79). Wicksell insisted that "no-one can judge this better than the individuals themselves or those who represent their interests in the legislature" (*ibid.*). Accordingly, economists have no way of judging the

¹² Buchanan (2001d [1988], p. 140): "Wicksell suggested that if improvements in fiscal outcomes are desired the advising economist should concentrate attention on the structure of the political decision process, on the incentives that were faced by legislators who are ultimately responsible, electorally, to their constituencies."

¹³ Buchanan (2000d [1975], p. 6 f.): "Wicksell admonished economists for their failure to recognize the elementary fact that collective or public-sector decisions emerge from a political process rather than from the mind of some benevolent despot."

¹⁴ Buchanan (2001a [1987b], p. 71): "Wicksell sought to extend the range of economic analysis of resource use to the public or governmental sector. He sought a criterion for efficiency in the state or collective use of resources that was comparable to the criterion that had been formally specified for the use of resources in the market sector of the economy. In determining the value of the collective use of a resource, Wicksell adhered to the basic individualistic postulate of market exchange: individuals, who both enjoy the benefits of state financed services and pay the costs of sacrificed privately supplied goods, are the only legitimate judge of their own well-being. From this individualistic presupposition, there emerged the Wicksellian unanimity criterion."

efficiency—or usefulness to the whole society—of policy measures *as such*, independently of the *procedure* by which they have been decided upon—with voluntary agreement providing the only ultimately conclusive criterion of judgment.¹⁵ For the role that economists can play as advisers in political matters, the implication is that, rather than seeking to judge the merits of particular policy measures, their attention should be focused on how the procedures by which such measures are chosen might be reformed to make them more responsive to citizens’ preferences. In Buchanan’s words:

Wicksell... did seek to achieve more responsive government through changes in the procedures through which taxing-spending decisions were made (Brennan and Buchanan 2000 [1980], p. 182).

As Buchanan suggests, Wicksell’s view of procedural reform in politics can be compared to the concept of *consumer’s sovereignty* as a criterion for reforms in the institutional framework of markets. While the latter aim at improving producers’ responsiveness to consumers’ wants, Wicksell’s focus is on procedural reforms of politics that promote responsiveness to citizens’ wants or, in other words, “citizens’ sovereignty”.¹⁶

His “chance-reading” of Wicksell inspired and encouraged Buchanan to embark on the research program that was to remain the central focus of his academic life, a research program that, as he phrased it, “insured personal differentiation of ‘my product’ from that of most of my American peers” (Buchanan 2001d [1992c], p. 36). And it is the uncompromising commitment to methodological and normative individualism, a commitment that he shared with Wicksell, to which Buchanan’s research output over more than a half century owes its remarkable continuity and coherence.¹⁷ By committing to a methodological and normative individualism he in effect chose a *constitution* for the theoretical-explanatory and the “normative”-applied branches of constitutional economics: the rules or “the constraints (the constitution) within which the scientific discourse is conducted” (Buchanan 1999a [1990], p. 390).¹⁸ Methodological individualism as a “framework for conducting

¹⁵ Wicksell (1958 [1896], p. 90): “In the final analysis, unanimity and fully voluntary consent in the making of decisions provide the only certain and palpable guarantee against injustice in tax distribution.” Brennan and Buchanan (2000 [1980], p. 9 f.): “Knut Wicksell was the first to recognize the importance of the unanimity rule as an idealized benchmark—since it would be necessary to ensure that all governmental actions represented genuine improvements (or at least no damage) for all persons, measured by the preferences of the individuals themselves. Only through general agreement could the preferences of citizens be revealed; there is no other way of ‘adding up’ the individual evaluations....”

¹⁶ Buchanan (2001d [1988], p. 141): “Wicksell’s objective was to construct a criterion for efficiency in fiscal decisions, by which he meant the satisfaction of the demands of individuals, as consumers of collectively financed goods and services, analogous to the satisfaction of consumer demands in the competitive market for private goods and services. In Hutt’s later terminology, Wicksell was seeking to establish institutional requirements that would ensure that the principle of consumers’ sovereignty is met through governmental provision of goods and services, alongside the operation of the market or private sector.”

¹⁷ Buchanan (1991 [1989a], p. 29): “I am a methodological and normative individualist”; Buchanan (2001a [1987a], p. 9): “Methodological individualism... is almost universally accepted by economists who work within mainstream... traditions. A philosophical complement of this position that assumes a central role in Constitutional Economics is much less widely accepted and is often explicitly rejected. A distinction must be drawn between the methodological individualism that builds on individual choice as the basic unit of analysis and a second presupposition that locates the ultimate sources of value exclusively in individuals. The single most important precursor to Constitutional Economics in its modern variant is Knut Wicksell, who was an individualist in both of the senses discussed above.”

¹⁸ Buchanan (2001d [1992a], p. 23): “I shall acknowledge that I work always within a self-imposed constraint that some may choose to call a normative one. I have no interest in structures of social interaction that are non-individualist... The individualist element in my vision of social reality, actual or potential, has been an important element of my substantive criticism of the work of others in political economy.”

social science” (Buchanan 2001b [1989], p. 56) implies the requirement that an “understanding of any social interaction process must be based on an analysis of the choice behavior of persons who participate in that process. Results that are predicted or that may be observed in social interaction must be factored down into the separate choices made by individuals.” And that requirement applies to the realm of politics no less so than to the market arena.

In my vision of social order, individual persons are the basic component units, and ‘government’ is simply that complex of institutions through which individuals make collective decisions, and through which they carry out collective as opposed to private activities. ‘Politics’ is the activity of persons in the context of such institutions.... In my vision, or my model, individual persons are the ultimate decision-makers, and if we want to discuss governmental decision-processes we must analyze the behavior of individuals as they participate in these processes. (Buchanan 2000c [1968], p. 4)

While methodological individualism posits that individuals are to be viewed as the only “ultimate decision-makers” (ibid.),¹⁹ normative individualism posits that individuals are to be viewed as the only “source of value.”²⁰ Accordingly, it requires that normative judgments on social matters—in markets as well as in politics—must be derived from assumptions about how the individuals involved themselves evaluate them.²¹ For the applied branch of political economy, the implication is that policy recommendations must be based on conjectures about the preferences of the individuals involved, conjectures that ultimately are to be tested against the expressed judgments of the individuals themselves.²²

2.2 Politics as exchange: the constitutionalist-contractarian paradigm

By the very nature of the problem that he confronted... Wicksell was compelled to adopt the criterion of *agreement*, interpreted as that which emerges as the end state of any voluntary exchange process. As this criterion was extended to the fiscal choice process, the ‘voluntary exchange theory’ of modern public finance was born (Buchanan 2001d [1988], p. 141).

¹⁹ Buchanan (2001a [1987]a, p. 8f.): “Only individuals choose and act. Collectivities, as such, neither choose nor act, and analysis that proceeds as if they do is not within the accepted scientific canon. Social aggregates are considered only as the results of choices made and actions taken by individuals.... An aggregative result that is observed but which cannot, somehow, be factored down and explained by the choices of individuals stands as a challenge to the scholar rather than as some demonstration of non-individualistic organic unity.”

²⁰ Brennan and Buchanan (2000 [1985], p. 25f.): “The critical normative presupposition on which the whole contractarian construction stands or falls is the location of value exclusively in the individual human being. The individual is the unique unit of consciousness from which all evaluation begins....There is no external source of evaluation.”

²¹ Buchanan (2000b [1987], p. 125): “‘Social value’, as such carries no ethical weight. A system must be ethically judged... exclusively in terms of its ability to allow individuals to further their own values, whatever they may be.”

²² Buchanan (1999a [1959], p. 208): “Since ‘social’ values do not exist apart from individual values in a free society, consensus or unanimity (mutuality of gain) is the only test which can ensure that a change is beneficial.”

As to the theoretical perspective on public finance that Wicksell (1958 [1896], p. 87) sketched under the heading “The Principle of (Approximate) Unanimity and Voluntary Consent in Taxation”), Musgrave (1939) coined the label “Voluntary Exchange Theory of Public Finance”. Musgrave (1939, p. 219) rendered his verdict on that theory quite plainly. “Considering the predominantly compulsory nature of the actual revenue-expenditure process”, he argued, the assumption of voluntary exchange “must be rejected as highly unrealistic.”²³ The theory, he concluded, “appears to be of little practical significance” (ibid.). It not only “fails to supply a realistic explanation of the revenue-expenditure process as conducted in the actual world,... it similarly fails to supply an acceptable standard of reference” (ibid.).

At the level of particular public projects or fiscal decisions at which Wicksell thought to apply it, his voluntary exchange model must indeed be acknowledged to be highly unrealistic. At the same time, if one shares his individualistic presuppositions, one also must acknowledge the conclusiveness of his general theoretical argument. If in a polity of free and equal citizens fiscal projects qualify as legitimate only if they promise mutual benefits to all parties, it should, as Wicksell (1958 [1896], p. 89f.) insists, “always be theoretically possible, and approximately so in practice, to find a distribution of costs such that all parties regard the expenditure as beneficial and may therefore approve it unanimously.”²⁴

Sharing Wicksell’s individualism and general outlook while recognizing the practical difficulties of its implementation,²⁵ owing to decision-making costs and participants’ incentives for strategic behavior,²⁶ Buchanan faced the challenge of finding an answer to the apparent conflict. Unanimity as the ultimate test of mutuality of gains, he suggested as solution, can be maintained and the obstacles that Wicksell’s scheme faces can be avoided if one shifts the analytical focus from the level of ordinary, day-to-day politics to the *constitutional* level, the level at which the *rules of politics* are chosen.²⁷

²³ Musgrave (1939, p. 220): “The contention that fiscal policy in the modern community—democratic or authoritarian—is determined as a direct resultant of the mutual agreement of a multitude of contributors, acceptable to each and all of them, at best constitutes an unacceptable simplification of the highly intricate political process through which collective decisions are arrived at.”

²⁴ Buchanan (2001a [1987a], p. 10): “If only individual evaluations are to count, and if the only source of information about such evaluations is the revealed choice behavior of individuals themselves, then no change could be assessed to be ‘efficient’ until and unless some means could be worked out as to bring all persons (and groups) into agreement. If no such scheme can be arranged, the observing political economist remains silent.”

²⁵ Buchanan (1999c [1967], p. 116): “Wicksell recognized that unanimity would be difficult, if not impossible, to achieve, and he did modify this requirement to one of ‘relative unanimity’ when he came to discuss implementation of this schemes. He did not, however, abandon his basic notion, which is surely correct, that unanimity provides the only criterion to ensure that expenditure proposals are really worth making, ‘worth’ being measured in terms of individual evaluations.”

²⁶ Buchanan and Congleton (2003 [1998], p. 22): “And, of course, for any collective action project that promises to yield a net surplus, there may exist many possible cost-sharing schemes. Recognition of the differential distributional gains from implementation of the action provides the motivation for separate bargaining strategies that may make ultimate agreement difficult to secure. Participants may find it privately rational to invest in strategy aimed at decreasing cost shares while they may acknowledge the mutuality of gain that agreement might make possible.”

²⁷ Buchanan (1999c [1967], p. 116f.): “The ultimate validity of the unanimity criterion can be accepted without the implication that either full or relative unanimity should be the rule for the making of day-to-day fiscal choices. At the level of ‘constitutional’ decision, where the alternatives are the various possible rules for making ordinary decisions for the group, it may be recognized and predicted that the costs of reaching each separate decision through a unanimity rule may be intolerably high and that some acceptance of ‘inefficient’ results in particular instances seems warranted.”

That the Wicksellian practicability problem can be solved and the voluntary exchange theory can be saved by such a shift of focus, is hinted at implicitly when Musgrave (1939, p. 220) argues that the necessity of *compulsory* taxation “indicates the absence of a general willingness to comply with the obligation to contribute.” The standard practice of coercive tax collection surely reflects the absence of a general willingness to pay one’s taxes voluntarily. Unwillingness to pay does not mean, however, that the citizen-members of a polity would not voluntarily agree to a tax regime that obliges them to pay their shares and, moreover, recognizing the need to enforce such a regime, have rational reasons to agree on a system of compulsory tax collection.²⁸

As a necessary implication of his commitment to a normative individualism, Buchanan (2001b [1985a], p. 250) insists that “Legitimacy can be derived only, at one level or another, from the voluntary consent of individuals.” If, for whatever reason, reaching agreement appears to be impossible at the level of particular policy choices, possibilities for reaching agreement must be sought at “higher” levels of decision-making, levels on which the rules for choosing particular policies and the rules for choosing rules are decided upon. Shifting Wicksellian unanimity “upward” to the *constitutional* level at which the rules of the game of politics are chosen, as Buchanan and Congleton (Buchanan and Congleton (2003 [1998], p. 23) note, serves two analytical purposes:

First, it eliminates the unanimity requirement for agreement on particularized within-period political choices, thereby substantially reducing the personal motivation for bargaining over differential shares in distributional gains.... Second, and related, application of the unanimity norm at the constitutional level of choices among rules acts to reduce the potential for distributional conflict by the necessary introduction of uncertainty concerning the impact of alternative rules on identified interests of persons and groups. By necessity, a choice among rules that are to remain in place over a series of periods, during which many within-rule choices are to be made, creates a veil of uncertainty that makes explicit distributional motivation less likely to emerge.

Buchanan explicitly recognizes the challenge that Musgrave posed to Wicksell’s voluntary exchange theory and that likewise has been posed to his own approach,²⁹ namely how to account for the universally observed fact of government coercion. Yet, he insists that the answer to that challenge cannot be to abandon the criterion of legitimacy implied in the individualistic presupposition.³⁰

The observed presence of coercive elements in the activity of the state seems difficult to reconcile with the model of voluntary exchange among individuals. We may, however, ask: Coercion to what purpose? Why must individuals subject themselves to the coercion inherent in collective action? The answer is evident. Individuals acquiesce

²⁸ In his review essay on Buchanan’s (1999d [1968]) *The Demand and Supply of Public Goods*, J.G. Head (1970, p. 117), after calling it “impossible to accept Buchanan’s contention... that Wicksellian consensus can usefully be regarded a political ‘ideal’”, notes in reference to the constitutionalist argument in *The Calculus of Consent* (Buchanan and Tullock 1999 [1962]) that, “With this argument, perhaps the major traditional objection to voluntary exchange theory is effectively undermined.”

²⁹ Holcombe (2018, p. 582): “One challenge facing Buchanan’s constitutional project is reconciling the coercive nature of government with his politics as agreement framework.”

³⁰ Buchanan (1999a [1986b], p. 463): “Politics as observed remains, of course, far from the idealized collective-cooperative exchange that the unanimity rule would implement.... But barriers to realization of the ideal do not imply rejection of the benchmark definition of the ideal.”

in the coercion of the state, of politics, only if the ultimate constitutional ‘exchange’ furthers their interests. Without some models of exchange, no coercion of the individual by the state is consistent with the individualistic value norm upon which a liberal social order is grounded. (Buchanan 1999a [1986b], p. 461)³¹

The “voluntary exchange” individuals engage in at the constitutional level of choice is an exchange of commitments to rules that impose constraints on their in-period behavior. They have rational, self-interested reasons for engaging in such exchange of commitments if the simultaneous application of those constraints to all participants promises to result in more desirable patterns of outcomes than would have to be expected in their absence.³² That such voluntary exchange of commitments to a *constitution* is the source from which the coercive powers of governments must derive their legitimacy has been the central claim of the advocates of social contract theories of the state, a fact that, as Buchanan notes, establishes a natural affinity between his constitutional economics and contractarian political philosophy.³³

Like the latter, by adopting his politics-as-exchange framework Buchanan does not mean to say anything descriptive about how present or past governments originated. The sole purpose of the contractarian framework or the exchange framework is to explicate the normative standard against which political matters must be judged if one adopts a normative individualism, i.e., if one presupposes that normative judgements on these matters must be derived “from individual choices independently from externally-imposed ethical criteria” (Buchanan 1999a [1976], p. 147).³⁴

The contractarian unanimity criterion for legitimacy in collective-political action and the constitutionalist focus on the choice of rules are the two principal ingredients of the *applied* branch of Buchanan’s constitutional political economy, the branch that enquires into the *practical* problem of how the “game of politics” might be organized so as to

³¹ Buchanan (1991 [1989b], p. 39): “How can we even begin to explain political reality by an exchange model?... Conflict, coercion... do indeed characterize political institutions, as they may be observed to operate within a *set of constitutional rules*.... But if analysis and attention is shifted to the level of rules, among which choices are possible, we can use potential and actual agreement among persons on these rules as the criterion of normative legitimacy.”

³² Buchanan (1999a [1990], p. 381): “(T)he choice of reciprocally binding constraints by individuals who are related one to another in an anticipated interaction becomes fully analogous to trade in ordinary goods and services”.

³³ Buchanan (1999b [1962], p. 319): “The contract theory of the State can be interpreted as... an attempt to derive a logic of collective action from an analysis of individual choice. Since our own efforts embody both of these elements, it follows that our work falls within the broadly defined limits of the contractarian tradition.” Buchanan (1999a [1986b], p. 24): “The Wicksellian extension of the exchange paradigm to the many-person collective... when applied to the choices among political rules... merges into political philosophy, and the exchange paradigm becomes a natural component of a general contractarian theory of political interaction. Almost by definition, the economist who shifts his attention to political process while retaining his methodological individualism must be contractarian.”

³⁴ Buchanan (1999a [1990], p. 388f.): “[W]ithin the tradition of contractarian political philosophy... attempts were made to ground justificatory argument for state coercion on agreement by those individuals who are subject to coercion.... The assignment to the individual of a capacity for rational independent choice, as such, allowed... a science that embodied a legitimatizing explanation for the emergence of and existence of the state. In agreeing to be governed, explicitly or implicitly, the individual exchanges his own liberty with others who similarly give up liberties in exchange for the benefits offered by a regime characterized by behavioral limits.”

promote the prospects of it to work to the mutual benefit of all participants.³⁵ The general thrust of this approach Buchanan and Congleton (2003 [1998], p. 23) summarized in these terms:

The shift of the Wicksellian benchmark norm to the level of constitutional politics allows the contractarian perspective of politics as exchange to be retained while ... ordinary political actions may take place in the clear absence of consensus. The inclusive ‘game of politics’ considered as a continuing interaction over many periods, in each of which many separate political actions may be carried out, may remain potentially positive sum for all participants. That is to say, persons may be considered to have agreed (or might have agreed) upon the basic rules, even in the anticipation that on particular occasions their own interests would be damaged by political action. This stance would depend critically on the prediction that over the whole set of political actions that might be taken under the operation of chosen rules benefits would exceed costs.

3 Applied constitutional political economy: policy advice in democratic society

Normatively, the task for the political economist is to assist individuals, as citizens who ultimately control their own social order, in their continuing search for those rules of the political game that will best serve their purposes, whatever these might be. (Buchanan 1999a [1986b], p. 467)

Buchanan always has stated quite explicitly that his interest is focused on exploring the working properties of democratic politics and on assisting the citizens of *democratic* polities to deal with the problems they face in governing themselves.³⁶ As he emphasizes, “the whole of the constitutional economics research program rests squarely on a democratic foundation” (Buchanan 1999a [1990], p. 392).³⁷ As he argues, an inherent connection exists between normative individualism and the ideal of democratic government: The presupposition that individuals are “the ultimate sources of value... implies democracy in governance” (Buchanan 2001a [1987a], p. 9) and, reversely, “the ‘individualistic’ assumptions... [are] the only appropriate ones for democratically organized societies” (Buchanan 1960, p. 4).³⁸

³⁵ Buchanan (2001a [1977], p. 15): “I am a constitutionalist and a contractarian: Constitutionalist in the sense that the rules of order are, and must be, selected at a different level and via a different process than the decisions made within those rules, a contractarian in the sense that I believe that conceptual agreement among individuals provides the only benchmark against which to evaluate observed rules and actions within those rules.”

³⁶ In one of his very first publications, Buchanan (2001c [1950], p. 8) advocates a principle of fiscal equity of which he says: “it is essential as a guide to the operation of a liberal democratic society, stemming from the same base as the principle of equality of individuals before the law.”

³⁷ Buchanan and Tullock (1999 [1962], p. 11): “[W]e propose to construct a theory of collective choice that has relevance to modern Western democracy.” Brennan and Buchanan (2000 [1983], p. 150): “[O]ur attention is limited to democratic polities”. Buchanan and Congleton (2003 [1998], p. 3): “Our concern in this book is exclusively with those structures of social order that qualify as ‘democratic’”.

³⁸ Buchanan (1999a [1976], p. 147): “In my view, and it is one that I think was shared by Wicksell, the exchange-contractarian paradigm is the only one that is wholly consistent with what we may legitimately call ‘democracy’ or with a social order that embodies ‘democratic values.’” Buchanan (2001b [1985b], p.

As discussed above, when Buchanan employs the attribute “normative” in characterizing the applied branch of his research program, the term is meant to describe the nature of the *problems* with which it is concerned, not the nature of the *conjectures* it pronounces. As in applied sciences in general, Buchanan’s applied constitutional economics is about what one *should* do, if one wants to solve certain kinds of problems. If its recommendations are to be of any relevance, they must address someone who is supposed to be interested in solving the problem in question. In a democratic polity, the citizens are the ultimate decision-makers and, accordingly, the ultimate addressees of policy advice,³⁹ even if, in practice, their elected representatives may be the proximate addressees.⁴⁰ The policy recommendations constitutional economists advance are, as noted, “hypothetical imperatives” subject to citizens’ judgment or, as Buchanan (1999c [1967], pp. 203, 269) puts it, they are to be

subjected to testing in the collective choice processes. Actual values are revealed only through the political action of individuals, and consensus among individual members of the choosing group becomes the only possible affirmation of a ‘social’ value....

If, when presented a suggested change in rules, agreement among all potentially interacting parties is forthcoming, the hypothesis is corroborated. The previous existing rule is proven inefficient. If disagreement emerges on the proposed rules change, the hypothesis is falsified.

To be sure, on exegetical examination one may, indeed, discover many instances in Buchanan’s writings when he speaks of “conceptual agreement” or “hypothetical consensus”. Yet, when Holcombe (2018, p. 585), in his “Public Choice Analysis of Buchanan’s Constitutional Project”, portrays those phrases as implying that Buchanan “leaves agreement within a hypothetical framework” instead of “framing his analysis within real-world political institutions” (ibid., p. 579)⁴¹ and, moreover, when he insists that Buchanan’s project is “subject to the same criticism as... neoclassical welfare economics” (ibid., p. 599),⁴²

Footnote 38 (continued)

267): “The first and most critical presupposition that provides a foundation for any genuine democratic theory is that which locates sources of value exclusively in individuals.”

³⁹ Brennan and Buchanan (2000 [1988], p. 87): “The public choice theorist does not envisage his ‘science’ as offering a base for ‘preaching to the players’ on how to maximize welfare functions. His task is not the Machiavellian one of advising governors, directly or indirectly, on how they ought to behave. His task is that of advising all citizens on the working of alternative constitutional rules.”

⁴⁰ As Buchanan (1999a [1991], p. 288f.) put it in concluding his Nobel Prize Lecture, “If individuals are considered the ultimate sovereigns, it follows directly that they are the *addressees* of all proposals and arguments concerning constitutional-institutional issues. Arguments that involve reliance on experts in certain areas of choice must be addressed to individuals, as sovereigns, and it is individuals’ choice in deferring to expert-agents that legitimize the potential role of the latter, not some external assessment of epistemic competence as such.”

⁴¹ Holcombe (2018, p. 597) repeats in various iterations the claim that Buchanan’s project is “focused heavily on identifying... rules which citizens would, under hypothetical conditions, agree with.”

⁴² Holcombe (2018, pp. 591, 599): “Buchanan objects to the neoclassical welfare economics approach that (often implicitly) assumes that policy decisions will be made by an omniscient benevolent despot, but the same objection could be raised toward constitutional rules that might be approved in a hypothetical unanimous agreement.... Just as there is no omniscient benevolent despot who is able to implement Pareto-optimal policies there also is no omniscient benevolent despot who is able to identify and implement policies to which everyone would agree under hypothetical circumstances.”

he misrepresents the essential thrust of Buchanan's argument. As if to guard against such misreading, the latter (Buchanan 2001c [1977], pp. 180f, 103) expressly states:

There has been some tendency to interpret the contractarian position as implying that conceptual consent or agreement offers a criterion for imposing constitutional change.... This argument represents, however, a gross perversion of the contractarian position.... Change in an existing rule, or changes in a set of rules, finds a contractarian justification only in agreement among all participants.

We may evaluate any element of the existing legal structure in terms of its possible consistency with 'that which might emerge' from a genuine 'social contract' among all persons who are involved in the interaction.... The evaluative analyst must test all 'law' on such 'as if' contractarian criteria. But from such tests he can do nothing other than advance hypotheses of possible 'failure'.... The ultimate test of his hypothesis is observed agreement on the change suggested.

Likewise, with his charge that "Buchanan's framework stops short of applying the tools of public choice fully to the selection of constitutional rules, because he relies on a hypothetical model of agreement", Holcombe (2018, p. 590)⁴³ fails to appreciate the distinction between the two branches of Buchanan's political economy, the theoretical-explanatory and the "normative"-applied. When Buchanan took on his constitutional project, he, a cofounder of public choice theory, surely was aware of the insights into the factual workings of democratic politics that public choice research has generated.⁴⁴ That project was not meant to ignore the sobering outlook that public choice theory takes with its focus on governmental failure.⁴⁵ It was, instead, motivated by the conviction that the political economist should not consider his task completed with such sobering analysis, but should, building on his insights into the shortcomings of factual democratic politics, explore potential remedies for those shortcomings. In Brennan and Buchanan's (2000 [1988], p. 87) words:

Public choice – the hardheaded, realistic, indeed cynical model of political behavior – can be properly defended on moral grounds if we adopt a 'constitutional perspective' – that is, if the purpose of the exercise is conceived to be institutional reform, improvements in the rules under which political processes operate.... Improvement, or hope for improvement, emerges not from any expectation that observed agents will behave differently from the way the existing set of incentives leads them to behave, but from a shift in the rules that define these incentives.

As an exercise in applied political economy, Buchanan's constitutional project aims at advising citizen-members of democratic polities on the possibilities for institutional reforms that may help to improve the prospects of actual politics to work to their common

⁴³ Holcombe (2018, p. 591): "Buchanan's benchmark of hypothetical agreement is at odds with the public choice methodology. Public choice analyzes actual collective decision-making processes rather than hypothetical ideal processes that have no real-world parallel."

⁴⁴ In that "public choice spirit", Holcombe (2018, p. 594) emphasizes that "A public choice approach to constitutional decision-making recognizes that actual constitutional rules are not unanimously approved; they are designed by an elite few who bargain with each other to design the rules for their benefit.... Public choice clearly recognizes that public policy often benefits some at the expense of others."

⁴⁵ Buchanan and Tullock (1999 [1962], p. 13): "Were it not for the properly grounded fear that political processes may be used for exploitative purposes, there would be little meaning and less purpose to constitutional restrictions."

benefit.⁴⁶ As noted above, the reform proposals the constitutional economist advances are *conditional* conjectures about what would be of citizens' mutual advantage *if* the economists' estimate of their interests are correct. Those conjectures must, as Buchanan (1999a [1959], p. 196) notes, “find empirical support or refutation in the observable behavior of individuals *in their capacity as collective decision-makers*—in other words, in politics”. Considering the factual workings of real-world democratic politics, the charge that Buchanan's consensus-test rarely if ever is applicable seems to suggest itself.⁴⁷ The answer to that charge lies in distinguishing between the significance of unanimity as *legitimizing principle* and its role as *decision-making rule*.

An applied political economy that is committed to a normative individualism, i.e., that requires respect for individuals as the “ultimate *sovereigns* in matters of social organization” (Buchanan 1999a [1991], p. 288) and “locates the ultimate source of value exclusively in individuals” (Buchanan 2001a [1987a], p. 9), *must* insist that it is *only* from voluntary agreement among the individual members of the choosing group that collective-political choices ultimately can derive their legitimacy. At the same time, it must recognize the obvious impracticability of unanimity as a decision-making rule, at least in groups beyond minimal size. The challenge is to reconcile the indispensability of unanimity as the ultimate legitimizing principle with its limited applicability as a rule for decision-making.

Acknowledging that “absolute unanimity may have to be ruled out for practical reasons”, Wicksell (1958 [1896], p. 92) rose to the challenge by softening the criterion to a “requirement of approximate unanimity of decisions.” In contrast to Wicksell's ad hoc compromise, Buchanan has proposed a systematic-theoretical answer, building on the fact that the prospects for reaching agreement in collective decisions improve as one moves from the level of choice among particular policies to the level of choice among rules. While for specific policies individuals can more easily anticipate how they will work out for them personally, in the case of rule choices individuals will be “behind a veil of uncertainty” and will, therefore, be required to judge rules from an *impartial* perspective, the more so the more *general* the nature of the rules under consideration. Faced with the practicability problems of unanimous consent, a group of individuals seeking to enter into a cooperative arrangement must choose between two options: either to give up on their joint project or to seek to find agreement on more practicable decision rules—potentially requiring them to move several levels of generality upwards in the hierarchy of rules. In complex societies the level at which genuine agreement is achievable will, in fact, be several levels removed from the level of day-to-day politics. As Buchanan (1999a [1986b], p. 461) notes about “the ultimate constitutional ‘exchange’”:

An implication of this interpretation is that the effective constitution of any polity is that subset of political institutions upon which there exists generalized consensus or agreement among widely inclusive elements of the citizenry.... [T]here are surely

⁴⁶ Buchanan (2003, p. 153): “The constitutional way of thinking must emerge from a faith, of sorts, that political order can be so constructed as to yield mutual benefits to all participants, in other words, that the political game is positive rather than zero or negative-sum.”

⁴⁷ Holcombe (2018, p. 594): “The first step in a public choice analysis of constitutional decision-making is to recognize that constitutional rules can never be agreed to by everyone who is subject to them except when the size of the group is very small.”

elements of a political order that command almost universal agreement (Buchanan 2003, p. 148).⁴⁸

The implication is that the constitutional economist's reform proposals typically will be "tested" at levels of political decision-making that operate under less-than-unanimity rules, rules that can grant legitimacy to the choices made through them because they themselves are legitimized by an agreement reached at a higher constitutional level. Accordingly, the "acceptance-test" to which such proposals are subject in real-world politics always can be only of a provisional nature. Acceptance of proposed legislation by the required majority neither is definite proof of its efficiency (common benefit), nor is its rejection definite proof of its inefficiency. But that "modest" role is the only one that political economists, if they are committed to normative individualism, can play in a democratic society. As Buchanan (2000c [1968], p. 4). notes:

The role of the social scientist who adopts broadly democratic models of the governmental process, who tries to explain and understand how people do, in fact, govern themselves, is a less attractive one than the role that is assumed by the implicit paternalist.

4 The constitutionalist-contractarian paradigm in contrast

4.1 Constitutional liberalism: individual sovereignty and individual liberty

The justificatory foundation for a liberal social order lies, in my understanding, in the normative premise that individuals are the ultimate *sovereigns* in matters of social organization, that individuals are the beings who are entitled to choose the organizational-institutional structures under which they will live. In accordance with this premise, the legitimacy of social organizational structures is to be judged against the voluntary agreement of those who are to live or are living under the arrangements that are judged. (Buchanan 1999a [1991], p. 288)

As Holcombe (2018, p. 582) charges, Buchanan faces not only the challenge discussed previously of "reconciling the coercive nature of government with his politics as agreement framework", but also the challenge of "reconciling his norm of agreement with his classical liberal political views" (ibid., p. 583). The challenge of "reconciling Buchanan's two norms of liberty and agreement" (ibid.) being, so Holcombe argues, "that people might agree to illiberal rules" (ibid.).⁴⁹

A straightforward answer to that challenge is available: Buchanan's classical liberalism and his contractarian constitutionalism are concerned with *different issues* and, therefore, do not need to be reconciled. On the one hand, as an advocate of classical liberalism,

⁴⁸ In private voluntary associations, agreement to the constitution can be inferred from members' voluntary decisions to join and to remain in the organization. In the case of polities, as inter-generational organizations, that is true only for those who voluntarily adopt citizenship and thereby explicitly express their consent to the constitution. For the vast majority who typically are born into citizenship, no equivalent indicator for voluntary consent can be found. See on this issue Vanberg (2007, p. 111).

⁴⁹ Holcombe (2018, p. 583): Buchanan's "constitutional project, which rests on the norm of agreement, could conflict with his classical liberal views that rest on the norm of freeing individuals from the coercive power of others."

Buchanan shares with like-minded liberals certain convictions about what constitutes a desirable social-institutional order, an order that promises to better serve the interests and desires of the individuals concerned than alternative social-institutional regimes. Those convictions will, to a greater or lesser extent, be in conflict with socialist, communitarian or other concepts of “the good society”. On the other hand, as a contractarian constitutionalist Buchanan shares with other contractarians certain convictions about the sources from which social-institutional orders derive their legitimacy, and those convictions will, to a greater or lesser extent, be in conflict with concepts that derive legitimacy from sources other than agreement among the individuals concerned, such as, e.g., god’s will, history, or natural rights.

To be sure, as a contractarian-constitutionalist, Buchanan must recognize as legitimate social-institutional regimes that conflict with classical liberal convictions, as long as those regimes meet the contractarian criterion. One may call this a tension between “Buchanan’s two norms of liberty and agreement”, but it is not a conflict requiring reconciliation. Instead, it shows that the classical liberal cause needs further justification for those who express preferences for non-liberal regimes. Incidentally, such advocates of liberalism as Ludwig von Mises and F. A. Hayek comment in a similar spirit on the relation between liberalism and democracy.

Always and everywhere Liberalism demands democracy.... The demand for democracy is not the result of a policy of compromise or a pandering to relativism in questions of world-philosophy, for Liberalism asserts the absolute validity of its doctrine. Rather, it is the consequence of the Liberal belief that power depends upon a mastery over mind alone and that to gain such a mastery only spiritual weapons are effective. Even where for an indefinite time to come it may expect to reap only disadvantages from democracy, Liberalism still advocates democracy. Liberalism believes that it cannot maintain itself against the will of the majority (von Mises 1981 [1932], p. 71).⁵⁰

Liberalism is a doctrine about what the law ought to be, democracy is a doctrine about the manner of determining what will be the law.... [Liberalism’s] aim, indeed, is to persuade the majority to observe certain principles. It accepts majority rule as a method of deciding, but not as an authority for what the decision ought to be (Hayek 1960, p. 103f.).⁵¹

For the simultaneous acceptance of liberalism and democracy of which Mises and Hayek speak, Buchanan’s contractarian constitutionalism provides a systematic theoretical foundation. A liberalism, so Buchanan (1999a [1986b], p. 461) insists, that consistently adheres

⁵⁰ von Mises (1949, p. 193): “*Democracy* guarantees a system of government in accordance with the wishes and plans of the majority. But it cannot prevent majorities from falling victim to erroneous ideas and from adopting inappropriate policies which not only fail to realize the ends aimed at but result in disaster. Majorities too may err and destroy our civilization. The good cause will not triumph merely on account of its reasonableness and expediency.” von Mises (1985, p. 68): “Governments must be forced into adopting liberalism by the power of the unanimous opinion of the people.”

⁵¹ Hayek (1960, p. 115): “The principles that plead for the limitation of the power of the majority are not proved wrong if democracy disregards them, nor is democracy proved undesirable if it makes what the liberal must regard as the wrong decision. He simply believes that he has an argument which, when properly understood, will induce the majority to limit the exercise of its own powers and which he hopes it can be persuaded to accept as a guide when deciding on particular issues.”

to the “individualistic value norm upon which a liberal order is grounded” must take a contractarian-democratic view of politics.

The “great scientific discovery” of the 18th century classical liberals, Buchanan (2001d [1990], p. 310) emphasizes, was the “recognition that the complementary values of liberty, prosperity, and peace can be attained”. It was the “discovery of the spontaneous coordination properties of the market economy” (Buchanan 2001d [1993], p. 274) that provided the intellectual foundation for a social order that limits the range of politics and “offers maximal scope... for individual freedom in its most elementary meaning” (Buchanan 2000a [1975], p. 24).⁵² The focus of classical liberalism is on the ideal of individual liberty as private autonomy, the ideal of “freedom under the law” (Hayek 1960, p. 153). Recognizing that individuals’ freedom to act must be limited by “abstract rules that apply equally to all” (ibid., p. 155), classical liberalism also recognizes a necessary role for politics in maintaining and enforcing the legal framework delimiting and protecting individuals’ rights.⁵³ But, the founders of classical liberalism and their intellectual heirs have not paid much attention to the issue of where a liberal order’s legal framework is to derive its legitimacy or its “ultimate justification” from (Buchanan 1999a [1991], p. 281). As Buchanan posits on the same page:

Social philosophers who are, at the same time, advocates of a liberal or free society embodying the maximal exercise of individual liberties have often neglected these basic questions, perhaps in some misguided presumption that answers are as unnecessary as they are obvious.

Social transactions and arrangements concluded *within* the liberal order are, to be sure, legitimized by the voluntary consent of the participants exercising their freedom to choose. Consent expressed within the legal framework that defines those rights can, however, not confer legitimacy on the framework itself.⁵⁴ In contrast to the separate contractual arrangements concluded *within* that framework, the framework itself necessarily applies *to all* members of the respective group and to the extent that it is chosen it must be chosen *for all*. A liberalism that, being based on a normative individualism, considers voluntary agreement among the contracting parties to be the source from which the contractual arrangements concluded within the legal framework derive their legitimacy, must, as a matter of consistency, also consider voluntary consent among all group members as the source from which rule-choices as well as other political decisions that are made in the name of all ultimately derive their legitimacy.⁵⁵ As Buchanan (1995, pp. 293–294) puts it,

⁵² Buchanan (2001d [1993], p. 274): “The range of necessary political decisions on economic matters is dramatically reduced in a polity that gives a predominant place to a market or enterprise economy.”

⁵³ Buchanan (2001c [1995], p. 69): “The potential for the exercise of individual liberty is directly related to the relative size of the market sector in an economy. A market organization does not, however, emerge spontaneously from some imagined state of nature. A market economy must, in one sense, be ‘laid on’ through the design, construction, and implementation of a political-legal framework (i.e., an inclusive constitution) that protects property and enforces voluntary contracts.” That classical liberal consensus is not shared by advocates of what Buchanan (2001a [1989], p. 244) calls the “romantic ideal of laissez-faire, the fictional image of the anarcho-capitalists.”

⁵⁴ Rothbard (1956, p. 250; emphasis in original?) implies the opposite claim when he argues that “The free market is the name for the array of all voluntary exchanges that take place in the world. Since every exchange demonstrates a unanimity of benefit for both parties concerned, we must conclude that *the free market benefits all its participants*.”

⁵⁵ Buchanan and Congleton (2003 [1998], p. 20f.): “What should an idealized politics do in a community described by adherence to traditional liberal values, including the exclusive location of evaluation in the consciousness of those who are participants.... If the sources of evaluation are located only in the

It is useful to distinguish two, quite different, foundational elements that might be adduced to describe a liberal order. Both emerge from a grounding in normative individualism, but one version directs attention too narrowly on the range of individual liberty, independently of possible restrictions. The alternative version places emphasis on individual sovereignty, rather than directly on liberty.... This more inclusive conception of liberalism or the liberal enterprise clearly allows for wide variations in the precise range for personal liberty exhibited in different cultures.

A consistent individualistic liberalism, so Buchanan insists, must respect individuals as the ultimate decision-makers not only in their capacity as private law subjects who engage in social transactions and cooperative ventures among one another, but also in their capacity as citizens who, jointly with their fellow citizens, choose the rules according to which their polity operates.⁵⁶ It must respect *individuals' liberty*, their freedom to choose in their private capacities, as well as *individuals' sovereignty*, their freedom to choose collectively the socio-political regime within which they wish to live. The categorical difference between the domain of individual liberty and the domain of individual sovereignty is, of course, that choices in the latter inevitably are *collective choices*, choices that involve the above-discussed necessity of translating the *legitimizing principle of unanimity* into *workable decision-making rules*.⁵⁷

The central premise of *individuals as sovereigns* does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as principals. The normative premise of individuals as sovereigns does not provide exclusive legitimacy to organizational structures that—as, in particular, market institutions—allow internally for the most extensive range of separate individual choice. Legitimacy must also be extended to ‘choice-restricting’ institutions so long as the participating individuals voluntarily choose to live under such regimes. (Buchanan 1999a [1991], p. 288)⁵⁸

Footnote 55 (continued)

consciousness of persons, and are known only by persons themselves, any legitimacy of coercion must be derived ultimately from voluntary consent, whether actually or tacitly given. The direct implication of normative individualism... is that the idealized politics must reflect contractarian foundations.”

⁵⁶ Buchanan (2003, p. 154) speaks of “the implied presumption that the basic rules must embody a generalized public consensus, without which a liberal social order cannot long survive.”

⁵⁷ Buchanan (2001b [1985b], p. 271): “Politics, inclusively defined, involves the whole set of activities in which separate persons participate as a collective body or organization. That is to say, politics and governance involve the determination of rules, institutional structure, and particular outcomes that are to be applied to all persons in the collective. There is, by definition, a single political choice among relevant alternatives that are confronted. In the terminology of modern economics, politics, by definition, involves ‘publicness’, whether ‘public good’ or ‘public bad’.... Because of the possible conflict among separate individual interests and values, any political decision must override at least some of those who participate in the process. Nominal political equality insures only that all persons may participate equally in the ultimate choices to be made.”

⁵⁸ Buchanan (1995/96, p. 267f.): “What is the ultimate maximand when the individual considers the organization of the political structure?... [T]his maximand cannot be summarized as the maximization of (equal) individual liberty from political-collective action.... A more meaningful maximand is summarized as the maximization of (equal) individual sovereignty.”

4.2 Constitutional economics versus welfare economics: choice-individualism versus utility individualism

The social welfare function of the utilitarians was based... on components imputable to individuals. But the welfare edifice so constructed was not necessarily coincident with that resulting from the ordinary choice-making process. It was made to appear so because the utilitarians were also individualists and, in one sense, philosophically inconsistent. (Buchanan 1999a [1954], p. 94)

As far as mainstream economics is concerned, welfare economics and its close relative, social choice theory, are the dominant versions of applied political economy. From the early beginning of his academic career onward, Buchanan has advanced his own research program as a paradigmatic alternative to the welfarist-social choice approach.⁵⁹ Comparing the latter with his own approach, he notes that

Both ... aim at establishing a role for the economist qua scientist beyond positive economics narrowly defined. The differences between the two approaches lie in the treatment of individual values (Buchanan 1999a [1959], p. 202).

When Arrow (1987, p. 124) posits that economists generally have taken for granted “that alternative policies should be judged on the basis of consequences for individuals”, he certainly means to include welfare economics and social choice theory as approaches that are, in that sense, based on a *normative individualism*. They may appear, therefore, to start from the same normative presuppositions as Buchanan’s contractarian constitutionalism. However, a critical difference exists between them in terms of their respective interpretations of their normative premises. And that difference results in categorically different theoretical accounts of how to cross the “bridge between individual decisions and collective decisions” (Buchanan 1960, p. 5). On earlier occasions, I have contrasted the two interpretations as utility- or preference-individualism on the one side and choice-individualism on the other.⁶⁰

As heirs of utilitarian political economy, welfare economics and social choice theory seek to cross the “bridge between personal or individual units of decision and ‘social’ aggregates” (Buchanan 1999a [1964], p. 30) by compiling measures of *individual utilities* or *individual preferences* into a *social welfare function* or a *social preference ordering* that are supposed to guide policy choices.⁶¹ A necessary condition for deriving such a social welfare function or social preference ordering is, so Buchanan (1999a [1954], p. 100) argues,

that all possible social states be ordered *outside* or *external* to the decision-making process itself. What is necessary, in effect, is that the one erecting such a function be

⁵⁹ Buchanan has characterized his critique of the welfarist-social choice approach as involving “an extension of some of Wicksell’s ideas on fiscal theory to modern welfare economics” (1999a [1959], p. 192).—For a detailed comparison and contrast between, on the one side, welfare economics and social choice theory and, on the other side, Buchanan’s contractarian constitutionalism, see Vanberg (2019).

⁶⁰ See, e.g., Vanberg (2005, p. 10ff.; 2019, p. xixff.).

⁶¹ Buchanan (1999a [1954], p. 90): Arrow “defines the social welfare function as a process or rule which, for each set of individual orderings... states a corresponding social ordering”.

able to translate the individual values (which are presumably revealed to him) into social building blocks.⁶²

Two principal ingredients characterize the welfarist-social choice approach. First, it is “individualistic” in the sense that it takes account of individuals in the form of their preferences or utility functions.⁶³ It is “primarily interested in individual values as units of account to be used in deriving social welfare functions” (Buchanan 1999a [1954], p. 97).⁶⁴ Second, its principal evaluative attention focuses on the “social states” or outcomes that alternative policies are predicted to produce, rather than on the procedures by which those policy measures are chosen. By whom and how policies are implemented is, in the logic of the welfarist approach of secondary importance.⁶⁵ The evaluation of outcomes logically is independent of the ways in which they are brought about. Crucially, the welfarist framework proposes that outcome-generating procedures be studied in terms of their suitability for producing the pre-evaluated outcome.

The principal ingredients of Buchanan’s contractarian-constitutionalist paradigm are the exact opposites to the two above-noted features. First, it insists that a consistent normative individualism requires respecting individuals as the “ultimate decision-making authority” (Buchanan and Tullock 1999 [1962], p. 6) instead of viewing them as “units of account” in calculating a measure of social welfare. Second, and as a corollary of the first, the principal focus of evaluative attention is on the *procedures* through which outcomes or end-states are brought about rather than on these *outcomes* or *end-states* per se.⁶⁶

If one acknowledges, as Buchanan (1999a [1959], p. 194) insists, that utility “is measurable, ordinally or cardinally, only to the individual decision-maker”, that “it is a subjectively quantifiable magnitude”, one must conclude that “individual preference patterns... are revealed only through behavior”. Once acknowledged, the applied political economist can no longer claim authority to recommend policies on account of the “efficiency” of the outcomes they are predicted to produce. Instead, he must confine himself to recommendations for procedural-institutional reforms, the “efficiency” of which is indicated by voluntary agreement among the individual members of the group in question.⁶⁷

⁶² Buchanan (1999a [1959], p. 193f.): “Welfare economists, new and old, have generally assumed omniscience in the observer.... The observing economist is considered to be able to ‘read’ individual preference functions. Thus, even though an ‘increase in welfare’ for an individual is defined as ‘that which he chooses’, the economist can unambiguously distinguish an increase in welfare independent of individual behavior because he can accurately predict what the individual would, in fact, ‘choose’ if confronted with the alternatives under consideration.”

⁶³ Buchanan (2001d [1988], p. 138): “The allocationist economist defines an individual strictly in terms of a preference or utility function.... In this analytical construction, efficiency or optimality in resource use is defined in terms of individual values, but these values are ‘disembodied’.”

⁶⁴ Buchanan (2003, p. 150f.): “Economists have tried... to remain methodological individualists while straining to extend their maximizing calculus to non-individualistic entities.... Because of the individualized building blocks, the economists have been forced into the sometimes tortuous searches for nonexistent social welfare functions.”

⁶⁵ Buchanan (1999a [1959], p. 203): “This central feature of the approach seems... to be contrary to the presuppositions of a free society. The function may be useful as a device in assisting the decision-making of a despot, benevolent or otherwise, an organic state, or a single-minded ruling group.”

⁶⁶ Buchanan (1999a [1959], p. 204): “Whereas the ‘social welfare function’ approach searches for a criterion independent of the choice process itself..., the alternative approach evaluates results only in terms of the choice process itself.”

⁶⁷ Buchanan (2001c [1986], p. 322): “Instead, ‘efficiency’ is defined as ‘that which tends to emerge from voluntary agreement among persons in the relevant group’. This definition becomes the only possible unless it is presumed that the subjective evaluation of individuals is objectively known to external observers or that the evaluations relevant to efficiency are to be divorced from individual evaluations altogether.”

The individual preferences which he incorporates into his models must be conceived as presumed or predicted, and the changes which are based on these must always be considered tentative hypotheses to be subjected to testing in the polling places. (Buchanan 1999a [1959], p. 208)

In contrast to the two principal ingredients of the welfarist-social choice approach, Buchanan considers the two principal ingredients of his own approach to be the only ones that are in line with the normative presuppositions of a liberal-democratic society. Being based on the premise that its citizen-members are the ultimate decision-makers, in such a society the political economist's proper role is to provide advice on potential, mutually beneficial reforms of the procedures by which policies are chosen, rather than telling the citizenry what policies should be chosen. If individuals' own choices are the only evidence from which one can infer their preferences, and if agreement is the only conclusive indicator of what a group of individuals judges mutually beneficial, there is no basis for an observer to judge the merits of particular policies other than the actual choices made by the individuals concerned.⁶⁸ As Buchanan (1999a [1986b], p. 462) words it:

There is no criterion through which policy may be directly evaluated. An indirect evaluation may be based on some measure of the degree to which the political process facilitates the translation of expressed individual preferences into observed political outcomes. The focus of evaluative attention becomes the process itself, as contrasted with end-state or outcome patterns. 'Improvement' must, therefore, be sought in reforms in process, in institutional change that will allow the operation of politics to mirror more accurately that set of results that are preferred by those who participate.

The role of the social scientist who adopts broadly democratic models ... is not that of improving anything directly; instead, it is that of explaining behavior of a certain sort which, only remotely and indirectly, can lead to improvements in the political process itself. (Buchanan 2000c [1968], p. 4f.)

4.3 Constitutional democracy versus majoritarian democracy

One apparent source of an anti-constitutionalist mind set arises from a naive commitment to democracy, without any underlying examination of what this term means. Implicitly, democracy as a political, governmental form of decision making is equated with majoritarianism. (Buchanan 2001a [1984], p. 361)

In her best-selling book *Democracy in Chains*, Duke University history professor Nancy MacLean (2017, p. 169) has painted James M. Buchanan as the mastermind behind "a rightwing political movement determined to undo the modern democratic state", as "the deeply political foot soldier of the right" (*ibid.*, p. xviii) who provided the guiding ideas (*ibid.*, p. xviii) for "a fifth column movement" (*ibid.*, p. 127) that, pushed "by relatively small numbers of radical-right billionaires and millionaires... has been working to undermine the normal governance of our democracy" (*ibid.*, p. xxxi). This is not the place to discuss the biases, misrepresentations, and malicious insinuations in MacLean's account

⁶⁸ Buchanan (1999a [1959], p. 195). "The political economist is often conceived as being able to *recommend* policy A over policy B. If... no objective social criterion exists, the economist *qua* scientist is unable to recommend."

of Buchanan's work that have been exposed by various reviewers.⁶⁹ Of particular interest in the present context is, though, the apparent fact that MacLean (*ibid.*, p. 211) identifies democracy with majority rule and that in her account calls for limiting the scope of majority rule are equivalent to an "attack on the foundational notion of government being of, by, and for the people".⁷⁰ Buchanan's attempts at a "practical removal of the sacrosanct status assigned to majority rule" (MacLean 2017, p. 184) and at separating democracy "from the commitment to majority rule" (*ibid.*, p. 148) reflect in MacLean's assessment "the wicked genius of Buchanan's approach to binding popular self-government" (*ibid.*, p. 159).⁷¹

Buchanan (2000c [1995], p. 110) indeed has expressly and persistently criticized a "tradition in modern democracy [that] elevates majority voting to center stage",⁷² a conception according to which "the will of the majority to do as it pleases becomes the essence of democracy" (Buchanan 2001a [1984], p. 361).⁷³ Yet, his critique of unconstrained majority rule is not directed against the principle of self-government. It is directed against a practice that simply equates democracy with majority rule⁷⁴—in MacLean's (1989, p. 32) terms, "Democracy is about majority rule"—a practice that gives the principle of self-government a misleadingly narrow interpretation. As exemplified by MacLean's reasoning, such a narrow interpretation discredits demands for constitutional limits on the scope of majority rule as attacks on democracy itself. Against such a narrow concept of self-government, Buchanan (2001b [1985b], p. 267) insists that

The first and most critical presupposition that provides a foundation for any genuine democratic theory is that which locates sources of value exclusively in individuals.

If that presupposition is accepted, democratic politics must be viewed as a cooperative enterprise "through which separate persons, as members of an organized political community, may jointly achieve their individually desired purposes." (*ibid.*, p. 269f.).⁷⁵ And that means, as Buchanan concludes, that an "individualistic-contractarian model of politics" (*ibid.*, p. 270) provides the appropriate analytical outlook at democracy.⁷⁶

⁶⁹ See, e.g., G. Vanberg (2017), Munger (2018), Fleury and Marciano (2018) and Magness et al. (2018).

⁷⁰ MacLean (2017, p. 226) deplors "inbuilt 'majority constraining' obstacles" in the US Constitution and "features of the U.S. system [that] further obstruct majority rule."

⁷¹ MacLean (2017, p. xxiii): "Buchanan's analysis of how the rules of government might be altered so officials could not act on the will of the majority became 'constitutional economics'". On "Buchanan's call for constitutional revolution" MacLean (*ibid.*, p. 227) comments that "it would be all but impossible for government to respond to the will of the majority."

⁷² In a letter to Buchanan in which he refers to the critique of unconstrained majority rule in *The Calculus of Consent*, John Rawls notes: "I agree that majority rule is just a *rule* to be adopted on rational grounds like any other, given experience with it. Majority rule as a principle of justice I agree is absent. On my view the principles of justice put constraints in the constitution, & on all political majorities; and majority rule is rational only where it can be supposed that majorities will limit themselves by the principles of justice" (quoted in Levy and Peart 2018, p. 180).

⁷³ In reference to *The Calculus of Consent*, Buchanan (1999a [1997], p. 421) notes that "In a sense, our book might have been interpreted as a criticism of majority rule or majoritarianism".

⁷⁴ Buchanan (1999a [1997], p. 421): "(M)ajority rule is equated in public attitudes with democracy." Buchanan and Congleton (2003 [1998], p. 23f.): "In popular as well as in professional discourse, democratic politics is associated directly with majority rule."

⁷⁵ In a similar spirit, John Rawls (1971, p. 84) speaks of democratic politics as "a cooperative venture for mutual advantage" and describes democratic citizenship as "a relation of free and equal citizens who exercise ultimate political power as a collective body" (Rawls 1999 [1997], p. 577).

⁷⁶ Buchanan (2001a [1986], p. 215): "If politics is to be interpreted in any justificatory or legitimizing sense without the introduction of supra-individual value norms, it must be modelled as a process within which individuals, with separate and potentially differing interests and values, interact for the purpose of

In individualistic-contractarian perspective, democracy cannot be defined *ex ante* in terms of preordained institutions, such as simple majority rule. Its defining characteristic is that citizen-members of a polity are the ultimate decision-making authority in institutional matters and that it is from their consent, not from some externally defined criteria, that the institutions of democracy must derive their legitimacy.⁷⁷ Accordingly, as a conjectural exercise the individualistic-contractarian model looks at the institutions of democracy as the object of constitutional choice, a choice that citizens who need to agree on some “ultimate contract” (Buchanan 2001a [1986], p. 220) must make in light of the predicted working properties of potential alternative rules and procedures. The prudential reasons that will guide this choice are likely to limit the range of institutional variety, but they cannot predetermine a fixed set of “democratic” institutions. As Buchanan (*ibid.*, p. 215) puts it,

the individualistic-contractarian presupposition does not, however, directly yield implications about the structure of political arrangements and hence about ‘democracy’ in the everyday usage of this term. We must acknowledge that in terms of ordinary language usage, ‘non-democratic’ political institutions may be analytically derived from fully consistent contractarian premises.

In particular, as Buchanan and Tullock (1999 [1962]) have shown, the constitutional *calculus of consent* is unlikely to result in the choice of unrestricted or “unchained” majority rule. In Buchanan’s (2001a [1986], p. 218) words:

Majority rule may well emerge from contractual agreement entered into by all citizens. But it does so only as one among a set of plausibly acceptable decision rules, any one or all of which might be chosen with equal validity.... [T]he rule that emerges from contractual agreement reflects the results of cost–benefit calculations on the part of the contractors. Because differing sorts of potential collective actions embody differing predicted cost and benefit patterns, there may be scope for the co-existence of several collective decision rules.... Majority rule, as a uniquely legitimate principle for the making of political decisions, cannot be derived from the contractarian perspective as such.

It is a complete misrepresentation of Buchanan’s contractarian-constitutionalist perspective on democracy to portray it as an attempt at “mass disfranchisement of voters” (MacLean 2017, p. xxxii).⁷⁸ Buchanan has made it unambiguously clear that his

Footnote 76 (continued)

securing individually valued benefits of cooperative effort. If this presupposition about the nature of politics is accepted, the ultimate model of politics is *contractarian*. There is simply no feasible alternative.” MacLean (2017, p. 97) characterizes Buchanan’s contractarianism as “hyper-individualistic”.

⁷⁷ Buchanan (2001a [1986], p. 220f.): “As we move to the constitutional stage,... there is *no* place for majority rule or, indeed, for any rule short of unanimity.... If politics... is modelled as the cooperative effort of *individuals* to further or advance *their own* interests and values, which only they, as individuals, know, it is evident that *all* persons must be brought into agreement.”

⁷⁸ MacLean (2017, p. 152) cites Samuels (1976) in support of her verdict on Buchanan’s work. One must, though, ascribe to Samuels (1976, p. 937) the same misreading of Buchanan’s argument when he posits: “Buchanan does not merely indicate problems with democracy and majoritarian decision; rather, his analysis strikes at the heart of self-government. In order ostensibly to limit government... Buchanan denigrates self-government (democracy)... [H]is analysis is dangerous: Its logical conclusion is the destruction of self-government.” Given Buchanan’s central premise that only the subjective evaluations of the individual citizens, and not any *external* criteria, provide the normative standard of judging policy issues, it strikes one as strange to read in Samuels’s (*ibid.*) review: “Buchanan fails to accept the predicament of self-govern-

individualistic-contractarian approach necessarily leads to the ideal of popular self-government and to the requirement of an inclusive franchise, as the following quotations illustrate:

If... individuals are presumed to be the only ultimate source of evaluation, the argument for electoral processes as means through which values (preferences, interests) may be expressed becomes straightforward. (Buchanan 2001b [1985b], p. 269)

The normative argument for democratic electoral processes, as a means of allowing individuals to express their own values, the only values that exist, becomes, at the same time, an argument for an inclusive franchise, or more generally, for individual political equality. (ibid., p. 270)

[T]he ethics of democracy suggests that restrictions on franchise are not to be tolerated. (Buchanan 2000c [1975], p. 151)⁷⁹

Buchanan's arguments for a democratic government within constitutional limits are quite obviously not meant to put the principle of self-government into doubt. To the contrary, they are meant to enhance the capacity of self-government to achieve its principal purpose, to work as a "cooperative venture for mutual advantage" (1971: 84) and to limit the risk of its misuse as an instrument for particularistic enrichment at others' expense. The need for constitutional limits or constraints on the permissible operation of democratic politics results, in Buchanan's account, from the facts that

- political-collective choices apply to all members of the polity;
- below the ultimate constitutional level those choices are made by less than unanimity;
- majority decisions, whether simple or qualified, produce minorities whose interests or values are overruled;
- the risk of decisions being made contrary to the interests of smaller or larger segments of the constituency is reinforced by the delegation of decision-making authority to representatives.

Constitutional limits on majority rule, or on politics more generally, serve as precautionary devices that the parties to the social contract on which a democratic polity is based may want to adopt to guard against systematic violations of their interests and values, an aim that they must balance against their simultaneous interest in enabling the political unit to carry out the activities that are the reason for its creation in the first place. Buchanan (2001a [1997], p. 229) addresses the issues involved in striking that balance when he states:

Constitutional politics involves setting the rules, selecting the parametric framework within which ordinary political decisions are to be made and carried out. Such politics defines the manner of selecting those who seek to govern others, the extent of

Footnote 78 (continued)

ment, that government *is* internal and not external.... Does not the very notion of self-government require the dismissal of all pretense of such absolutes and externals?"

⁷⁹ Brennan and Buchanan (2000 [1985], p. 26): "If the individual is presupposed to be the only source of value, a question arises concerning identification. Which individuals are to be considered sources of value? There is no apparent means of discriminating among persons in the relevant community, and there would seem to be no logical reason to seek to establish such discrimination if it were possible. Consistency requires that all persons be treated as moral equivalents, as individuals equally capable of expressing evaluations among relevant options." Also see Buchanan (1999c [1967], pp. 4, 174; 2001a [1986], p. 221; 2001b [1985b], p. 271) and Buchanan and Congleton (2003 [1998], p. 4).

the voting franchise, the timing and procedures for elections, the voting rules, the terms for eligibility for office, methods of representation and many other procedural details that are necessary for democratic processes to operate at all. These constitutional parameters for democracy will be almost universally acknowledged.... But the extension of constitutional parameters to include more than these formal procedures for governance must also be recognized to be important for ensuring stability of expectations. The range over which governments are allowed to act, even governments that are procedurally legitimate in the democratic features listed above, must be known, at least in terms of well-defined boundaries beyond which political intrusion shall not extend. Such constitutional limits may lay out protected spheres for personal liberties, as in bills of rights, and also for economic liberties, without which any market order remains highly vulnerable to piecemeal interferences generated by interest-motivated coalitions.⁸⁰

5 Conclusion: the ethics of democratic citizenship

Ultimately, our interest lies with the participation of individuals in contractual agreement on changes in the most fundamental rules of the socioeconomic game in which they live. (Brennan and Buchanan 2000 [1985], p. 27)

In a democratic polity that is to operate as “a cooperative venture for mutual advantage” (Rawls 1971, p. 84) the citizen-members share a common interest in adopting and maintaining a constitution that serves that purpose. The task to be accomplished is, as Buchanan (2001a [1993]) has stated in the title he chose for a short paper, “How can constitutions be designed so that politicians who seek to serve ‘public interest’ can survive and prosper?” In reference to Adam Smith’s insights into how, within the constraints of appropriate rules, self-interests and the common interest of market participants can be reconciled, *The Calculus of Consent* puts it in these terms:

An acceptable theory of collective choice can perhaps do something similar in pointing the way toward those rules for collective choice-making, the constitution, under which the activities of political tradesmen can be similarly reconciled with the interests of all members of the social group (Buchanan and Tullock 1999 [1962], p. 22).

The contractarian-constitutionalist paradigm starts from the presumption that individuals’ self-interests and their common interest as members of “cooperative ventures” are not aligned *naturally*, but may need to be reconciled by effectively enforced rules of the game. That very presupposition, however, poses an obvious challenge to the contractarian-constitutionalist project. What is to motivate self-interested citizen-members of a democratic

⁸⁰ Buchanan (2001b [1985b], p. 273): “Democracy, defined as a process that allows equal expression of separate individual values in choices that are *necessarily* mutually exclusive and that necessarily generate results applicable to all members of the polity, may be severely limited in scope and range. Such limitation is a mark of the political ‘success’ of the social interaction process, inclusively considered, rather than the opposite.” Furthermore, “the term ‘constitutional’ *must* be prefixed to the term ‘democracy’ if the latter is to be sustainable in an internally consistent normative argument.... ‘(D)emocracy’ assumes evaluative significance only under the presupposition... that effective political equality, which is the operative principle of democracy, can be meaningfully secured only if the range and scope of collective political action are constrained or limited by constitutional boundaries.” (ibid., p. 266f.)

polity to invest effort in achieving and maintaining the very constitution that is to reconcile their self-interest and common interest. As Brennan and Buchanan (2000 [1985], p. 160) ask,

Who are to take upon themselves the personal burden of designing provisional proposals for basic changes in the rules when the promised benefits accrue *publicly*, that is, to all members of the political community, and with no differentially identifiable residual claims to the promised ‘social’ profits?

It is a common theme in the public choice literature that democratic politics is vulnerable to the rent-seeking of special interest groups that use their political influence in the ongoing process of constitution-making to get privileged treatment for themselves enshrined in the rules of the game. Constitutional economists may of course inquire into and develop proposals for how the rules of politics might be designed so as to minimize the scope for successful rent seeking. Yet, that argument leads one back again to the question of who, in the real world of politics, can be expected to share in the burden of promoting such constitutional provisions or constitutional reforms, i.e., provisions or reforms that serve the common interest of all citizen-members of the polity or, in other words, that provide a genuine pure public good for the community. As Brennan and Buchanan (*ibid.*, pp. 161–162) again recognize:

It should be evident, however, that the basic analytics of ‘positive public choice’ cannot be readily extended to explain changes in the basic rules of political order that are necessarily ‘public’ in scope.... To the extent that ‘investment’ in institutional analysis, design, argument, dialogue, discussion, and persuasion is costly in a personal sense, the individual of the orthodox model will forgo such investment in favor of more immediate gratification of privately directed desires.

And it may seem like conceding defeat when the two authors conclude that in

deriving some conceptual explanation of why individuals might be expected to seek out, design, argue for, and support changes in the general rules of the sociopolitical order ... it is necessary to resort to some version of ‘general interest’ or ‘public interest’ as the embodiment of a shared moral norm. (*ibid.*, pp. 162–163)

Yet, the difficulty that Brennan and Buchanan describe is not an inherent limitation of the contractarian-constitutionalist paradigm, a limitation that would need to be rectified by modifying its theoretical premises. It instead reflects a problem inherent in the reality of democratic politics, a problem that cannot be theorized away. It points to the indispensable role of an *ethics of democratic citizenship* without which a democratic polity cannot function sustainably as a “cooperative venture for mutual advantage”. While it is the very purpose of constitutional framing to assure that the within-rules democratic process works to citizens’ common benefit without having to rely on the “public spirit” of the agents populating the system, the very task of securing and maintaining a constitution that is to serve that purpose cannot be expected to be taken care of adequately in a polity in which the awareness of, and the willingness to meet, the duties a system of self-government demands from its members is lacking. The recognition of the essential role that, in this sense, an ethics of citizenship must play in a democratic polity provides a reason for adopting measures

that are conducive to encouraging and cultivating such an ethics,⁸¹ an ethics that works against the large-number dilemma that the production of any public good—in this case the maintenance of a constitution that serves the common interest of all members—poses. As Brennan and Buchanan (2000 [1985], p. 164) emphasize, because the costs involved in cooperative behavior typically differ between choices within and choices among rules, soft incentives may suffice to induce “moral conduct” at the constitutional level of choice, while they might not be effective otherwise:

In the first of these two settings ... the relative costs of choosing courses of action that further the shared “public good” may simply be too high ... to shift behavior significantly away from economic self-interest. In the second choice setting, by contrast, the costs of furthering the “public good” may be significantly lower, so much so that the same person who behaves in accordance with narrowly defined self-interest within the given set of rules may well behave in accordance with precepts of shared norms when making genuinely constitutional choices.⁸²

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⁸¹ The British political theorist Bernard Crick has published extensively on citizenship as an educational task in democratic society. See, e.g., Crick (2000, 2007).

⁸² Buchanan (1999a [1979], p. 255): “The American Experience, perhaps unique in history, has embodied the attitude that *we create* the institutions within in which we interact, one with another, that we construct the rules that define the game that we all must play. But we can never lose sight of the elementary fact that the selection of the rules, ‘constitutional choice,’ is of a different attitudinal dimension from the selection of strategies within defined rules.”

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