



James M. Buchanan's constitutional project: past and future

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Abstract

A substantial amount of James Buchanan's academic work was devoted to his constitutional project: the development of procedures for designing constitutional rules that would create a government sufficient to protect people's rights but that would constrain government from violating people's rights. Buchanan divides government functions into a protective state that preserves people's rights and a productive state that produces collective goods that individuals could not produce on their own or through market mechanisms. Buchanan uses the benchmark of hypothetical agreement with the constitutional rules to evaluate whether they further the interests of those who are subject to them. This paper presents Buchanan's constitutional project as a framework for analyzing constitutional rules and suggests how Buchanan's framework can extend his constitutional project.

Keywords Constitutional political economy · James M. Buchanan · Social contract theory · Classical liberalism

JEL Classification H11 · I3 · P16

1 Introduction

In an academic career that produced hundreds of articles and dozens of books, James M. Buchanan's work over a period of more than six decades¹ was focused heavily on his constitutional project. The key issue in Buchanan's constitutional project is well-summarized in the title of his mid-1970s' book, *The Limits of Liberty: Between Anarchy and Leviathan* (Buchanan 1975). Buchanan's work had a classical liberal focus from the outset. He believed that a "protective state" was necessary to preserve liberty, but was concerned about the possibility that a government strong enough to protect individual rights might use its power to violate individual rights. The goal of Buchanan's constitutional project was to identify constitutional rules that would enable government to protect rights and produce

¹ Buchanan's first academic publication (Buchanan 1949) appeared nearly seven decades before the last one I was able to locate (Buchanan and Yoon 2015), which was published 2 years after his death.

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collective goods for the benefit of its citizens, but that would constrain government so that it would not act against the interests of the individuals it governed. Buchanan's constitutional project was to identify constitutional rules that would maintain a civil society within the limits of liberty, which lie between anarchy and Leviathan.

Buchanan's massive body of work lays a solid foundation for finding the limits of liberty, but that foundation leaves some loose ends. Surely, Buchanan would agree with that conclusion. He continued working well into his 90s, and nobody who knew him would doubt that he would still be at work, further refining and extending his constitutional project, into his 100s had he not passed away. This paper summarizes the key elements in Buchanan's constitutional project, identifies some open questions, and points toward ways in which Buchanan's constitutional project can be extended, based on the foundation he has built.

While it surely is an oversimplification to condense Buchanan's body of work down to a research program summarized in the title of one book, many writers have noted the consistent focus in Buchanan's scholarship over the decades. Sandmo (1990, p. 51) says, "There is a unity of interest and purpose in [Buchanan's] writings that makes it natural to comment on his work more by theme than by article...." Reisman (2015, p. 10) makes a similar observation: "Despite the sheer volume of work and the number of years that went by, what is striking is that the message remained basically the same." Meadowcroft (2011, p. 35) agrees, saying "James Buchanan has been a remarkably consistent thinker." Romer (1988, p. 167) echoes that thought, observing, "Buchanan's work has displayed a remarkable consistency of theme and outlook over his career."

Wagner (2017, pp. 3–4) compares Buchanan's work to the growth of a tree, observing that it branched out from Buchanan's (1949) article on government finance. "While various of those branches of thought might have seemed to Buchanan to have little or no connection with his 1949 paper, it becomes apparent that they were connected when they are viewed from the end of his career." Buchanan (1992, pp. 17–18) makes the same observation about his work:

The coherence that the work does possess stems from the simple fact that I have worked from a single methodological perspective during the four decades that span my career to date, along with the fact that I have accepted the normative implications of this perspective. The methodological perspective and the normative stance are shared by few of my peers in modern social science.

Buchanan's methodological perspective and his normative stance are related in the individualistic approach he takes to public finance. He takes an idealistic view of government as an institutional structure that facilitates collective action so that individuals can achieve together what they would be unable to accomplish on their own. Describing Buchanan's view of politics as exchange, Gwartney and Holcombe (2014, p. 265) observe, "People engage in collective activities to accomplish together ends that they would be unable to accomplish individually, or through bilateral exchange." While recognizing the need to constrain government to prevent it from becoming an oppressive Leviathan, Buchanan also optimistically viewed government as a vehicle for collective action that can improve everybody's welfare.

Government allows people to escape from anarchy, which Buchanan, following Hobbes (1951), depicted as a war of all against all. But that idealistic approach to government is tempered by the recognition that those who hold governing power can use it against the public interest. His individualistic approach has a positive component—the analysis of individuals taking collective action within the set of institutions that define government—and

a normative component—the idea that they do so in order to further their own individual ends. Buchanan’s constitutional project goes beyond analyzing the way government actually does work to look toward identifying institutions that create desirable outcomes for those who interact subject to those institutions.

2 Liberty and government

Buchanan (2000, p. 117; *italics in original*) describes an ideal of classical liberalism that “is built on the central, and simple, notion that ‘we can *all* be free.’... A motivating element is, of course, the individual’s desire for liberty from the coercive power of others—an element that may be almost universally shared. But a second element is critically important: the absence of desire to exert power over others. In a real sense, the classical liberal stands in opposition to Thomas Hobbes, who modeled persons as universal seekers of personal power and authority.” Buchanan (2000, p. 117) goes on to say “that an idealized structure of social interaction is possible in which *no* person exerts power over another.” But, that vision of liberty is idealized because absent some further constraints, individuals who want to exert power over others always will exist. The protective state is necessary to preserve liberty.

Buchanan dismisses the possibility of an orderly anarchy, concluding with Hobbes (1951) that in anarchy life would be solitary, poor, nasty, brutish and short. Referring to the individual who wants to preserve classical liberal values, Buchanan (1975, p. 6) says, “When he recognizes that there are limits to the other-regardingness of men, and that personal conflict would be ubiquitous in anarchy, the extreme individualist is forced to acknowledge the necessity of some enforcing agent, some institutionalized means of resolving interpersonal disputes.” Rothbard (1973) and Friedman (2014) make the case for an orderly and libertarian anarchy, but Buchanan (1975, p. 3) dismisses that view of anarchy out of hand, saying “The anarchist utopia must be acknowledged to hold a lingering if ultimately spurious attractiveness. Little more than casual reflection is required, however, to suggest that the whole idea is a conceptual mirage.”²

Buchanan (1975, p. 12) says, “To the individualist, utopia is anarchist, but as a realist he recognizes the necessity of an enforcing agent, a collectivity, a state.” The state is necessary because some people have a desire to exert power over others; that is, because absent the state people will not act in a manner consistent with the preservation of liberty. Brennan and Buchanan (1985, p. 5) reference Hobbes to say that we benefit from a set of rules that govern people’s interactions with each other because “without them we would surely fight. We would fight because the object of desire for one individual would be claimed by another. Rules define the private spaces within which each of us can carry out our own activities.” Buchanan concludes that not only is government consistent with liberty, it is necessary to preserve liberty.

² Reasons for the likely breakdown of orderly anarchy are given by Nozick (1974) and Holcombe (2004). Regardless of whether one agrees, Buchanan starts with the view that liberty will be compromised without a government to protect it.

3 The individualistic perspective

From his earliest work, Buchanan adopts an individualistic perspective toward government action. Government is not some exogenous entity that imposes rules on its subjects; it is the result of the collective action of those who are governed. From the beginning, Buchanan (1949, p. 498) has said “The state has its origin in, and depends for its continuance upon, the desires of the individuals to fulfill a certain portion of their wants collectively. The state has no ends other than those of its individual members and is not a separate decision-making unit. State decisions are, in the final analysis, the collective decisions of individuals.”

Economics as a discipline takes an individualistic approach to analyzing people’s behavior in markets. Buchanan extends the individualistic methodology to government action. In politics as in markets, only individuals act. Governments, in the aggregate, do not act. Rather, individuals make their own decisions and determine their own actions within an institutional structure that produces a collective outcome. Such an individualistic perspective unites all of public choice. Rather than viewing governments as actors, public choice looks at the way people interact within government institutions. Voters, members of interest groups, legislators, and bureaucrats act within an institutional structure that ultimately results in collective action. But that collective action is the result of individual decisions. The rules that constrain—or enable—Leviathan government, are the result of individual decisions, channeled through institutions.

Buchanan’s constitutional project takes individual preferences as given and looks at the designs of those institutions through which preferences are aggregated and through which those to whom the power of government is delegated use it to protect, or compromise, liberty. As noted earlier, the title of his book, *The Limits of Liberty: Between Anarchy and Leviathan*, is a good summary of his constitutional project.³

Buchanan (1964) outlines the methodological significance of his approach, and the way it differs from mainstream economics. Economics often is defined as the study of choice: explaining how individuals and entire economies choose to allocate scarce resources to alternative and competing ends. Buchanan argues that the focus of economics should be on exchange, not choice. Rather than evaluating how individuals choose, the focus should be on how they interact to improve their well-being, given the goals they want to achieve. Exchange shifts the focus of economics from individuals to the institutions that allow individuals to interact and trade with one another to make themselves better off.

Such an institutional focus naturally links the Pareto-improving characteristics of market exchange to Buchanan’s approach to political exchange. Market institutions allow individuals to engage in mutually agreed-upon exchanges that make all parties to them better off; political exchange should do the same, enabling people to achieve ends collectively that they would be unable to achieve by themselves or through market exchange. But building on Wicksell’s framework, political exchange will be Pareto-improving only when everybody involved agrees that they are better off as a result.

³ Acemoglu and Robinson (2019) focus on the same issue Buchanan does, referring to that space between anarchy and Leviathan as a narrow corridor in which liberty is preserved, and offer many examples of cases in which nations managed to find that corridor, along with examples of nations in the corridor that fell out of it. While the narrow corridor Acemoglu and Robinson refer to is what Buchanan call the limits of liberty, they make no reference to Buchanan’s work.

4 Politics as exchange

The theme of politics as exchange runs throughout Buchanan's work. Despite acknowledging the possibility of a Leviathan government compromising the liberty of those it rules, Buchanan depicts political activity within the framework of collective agreement—politics as exchange—as opposed to envisioning a government that enables some to coerce others. The government's use of coercion, in that vision, is only to restrain some individuals from violating the rights of others. Buchanan (1990, p. 1) says that his constitutional project emphasizes “cooperative rather than conflictual” interaction among individuals.

This idea of politics as exchange provides the foundation for Buchanan's vision of government as an institution that protects liberty by allowing people to escape anarchy. Buchanan and Tullock (1962, p. 19) write that “Men co-operate through exchange of goods and services in organized markets, and such co-operation implies mutual gain.... At base, political or collective action under the individualistic view of the State is much the same. Two or more individuals find it mutually advantageous to join forces to accomplish certain common purposes.” Buchanan's (1965) theory of clubs is a good example of a framework for describing that type of collective organization.

Buchanan traces the origins of his ideas on politics as exchange to Wicksell (1896/1958), who proposed that a system of just taxation would distribute the tax burden such that everyone would agree that the value of the benefits of government spending financed by a tax would exceed the amount they are taxed. Buchanan discovered (and translated from the original German) Wicksell's work during his graduate study at the University of Chicago, and said that it made more sense than all of the public finance he had learned up to that point. While the present paper discusses extending Buchanan's constitutional project, Buchanan himself might say that he was extending Wicksell's project.⁴

The key idea that Buchanan took from Wicksell is that taxes are the price people pay for governmentally supplied goods and services and, in a manner analogous to market exchange, if the value of those government goods and services exceeds the cost, a way is open for reallocating the cost such that every individual is better off as a result of the taxes they pay and the government output they receive in exchange.

That line of reasoning leads to an insight that is, perhaps, underappreciated in Buchanan's work. Buchanan (1949, p. 497) says “It is important to note that the optimum values for the tax variables cannot be determined independently except for given values for the expenditure variables.” Even in the twenty-first century a robust literature on optimal taxation purports to specify optimal tax systems without considering how those tax revenues actually are spent. Buchanan insists that because taxes are the price people pay for government goods and services, they cannot be evaluated independently of what those tax revenues purchase. The idea of politics as exchange appears in Buchanan's first published

⁴ Buchanan claims to have discovered Wicksell's work on taxation after completing his dissertation, a claim I have heard him make in presentations several times. Buchanan (1992, p. 5) says, “Having finished my work, including the German language examination, I had the leisure of a scholar without assignments in the Harper Library stacks during 3 months of the summer of 1948. By sheer chance, I pulled Knut Wicksell's 1896 dissertation on taxation from the shelves, a book that was untranslated and unknown. [A footnote appears here to Wicksell (1896)]. 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 express in the public-finance mindset of the time.” Yet that exact treatise is listed as a reference in Buchanan (1948), his doctoral dissertation. So, he is claiming in Buchanan (1992) to have discovered Wicksell's work after completing his dissertation, even though he referenced Wicksell (1896) in his dissertation.

article and, based on Wicksell's foundation, points toward the contractarian framework that he would continue developing throughout his career.

In depicting politics as exchange, Buchanan recognizes that one feature of market exchanges is that all parties to the exchanges agree to them. So, Buchanan and Tullock (1962) emphasize, the political decision rule that is analogous to market exchange is unanimity. If the political process requires unanimous agreement, then collective choices really do appear to be analogous to market exchanges in which Pareto improvements are made.⁵ But as often is true in politics, not everybody agrees, so Buchanan (1962a) recognizes a built-in (negative) externality in democratic decisions. Only with a unanimous decision rule can it be assured that the political process actually does make everybody better off.

5 Constitutional and post-constitutional decisions

Buchanan's constitutional project is based on the division of collective decision-making into constitutional and post-constitutional decisions. Constitutional decisions are those that determine the rules under which people interact, whereas post-constitutional decisions are those that are made under the prevailing constitutional rules. The unanimous agreement that Buchanan seeks in his constitutional project is agreement on the constitutional rules, while recognizing that under those rules, some post-constitutional decisions might result in some individuals having costs imposed on them in excess of the benefits they receive in certain situations. Still, the rules can be optimal overall, even though in certain circumstances following them results in imposing net costs on some individuals.

Buchanan (1962b, p. 248) offers an example of traffic signals. If a driver comes to an intersection facing a red light, the rule is that the driver stops until the light changes to green. If a driver is stopped at a red light with no other traffic in the vicinity of the intersection, it appears suboptimal for the driver to have to stop. The driver is incurring a cost with no offsetting benefit. In the larger context in which traffic signals enable an orderly flow of traffic that enhances welfare, the rule provides aggregate benefits in excess of its costs, even though in some circumstances following the rule imposes more costs than benefits. The exchange that Buchanan references takes place at the constitutional level. Everyone agrees on the rules, even while recognizing that once the rules are in place, their post-constitutional implementation may sometimes result in some individuals incurring costs in excess of benefits in certain situations. Individuals accept that outcome because overall they anticipate that the rules they agree to will, on net, benefit everybody.

Buchanan and Tullock (1962, Chap. 6) make the argument that all citizens could, in theory, agree unanimously to governmental actions that in some instances would make some of them worse off. The argument is that they benefit in the aggregate from government's activities, and if actual unanimous approval were required for everything government does, it would nearly be impossible to reach agreement on anything. People who want

⁵ Note that to ensure that collective decisions are in the interest of all individuals, unanimous agreement must be required as a decision rule. Holcombe (1986) notes that if a less-than-unanimous decision rule is in effect, everyone might agree because it often is costly to be in the minority, rather than that the decision furthers everyone's interest. With simple majority rule, for example, one's vote rarely will determine the outcome of a vote, but always will determine whether the voter is in the majority or in the minority. So, everyone might agree to a decision that makes some of those agreeing worse off.

the benefits of government would, therefore, unanimously agree to enable the government to do certain things even when they would be made worse off by some of them.⁶

Buchanan and Tullock (1962) lay out the constitutional/post-constitutional principles of Buchanan's framework formally. Buchanan and Tullock (1962, Chap. 6) describe a generalized theory of constitutions that connects Buchanan's "politics as exchange" principle of unanimous agreement with the majoritarian democracy that defines modern governments, and the United States government in particular. Buchanan and Tullock note explicitly that they are describing a theoretical foundation that is consistent with the Constitution of the United States.

Buchanan and Tullock note that everybody might agree to undertake post-constitutional collective action even when they are sometimes made worse off by those post-constitutional actions if, on average, they expect collective action to improve their well-being. A rule of unanimity carries with it heavy decision-making costs because it is difficult to assemble individual proposals that meet with everyone's approval. But if over a large number of decisions, people expect on average to benefit from collective action, they would favor allowing collective action to take place without requiring unanimous approval of every individual decision, to lower collective decision-making costs.

Buchanan's traffic light example fits well here. People agree to abide by traffic signals when they drive because the orderly flow of traffic provides net benefits to everyone, even though sometimes stopping at a red light can impose costs on the stopped driver and, moreover, aggregate costs exceed benefits in some cases. The constitutional/post-constitutional distinction is a key element in Buchanan's constitutional project because he views the constitutional rules that fall within the limits of liberty to be those to which everyone would agree. In the politics as exchange framework, exchange takes place at the constitutional level.

6 The social contract

Gordon (1976) refers to Buchanan (1975), along with Rawls (1971) and Nozick (1974), as the new contractarians. The common element is that all of them hypothesize a social contract, the terms of which individuals are in agreement.⁷ Buchanan (1975, pp. 38–39) asks, "Does a 'social contract' in which all members of the community agree to make all collective choices relating to the provision and cost-sharing of a purely public good embody coercion as meaningfully defined? Ex ante, each participant knows that he will secure gains under such a contract, gains over and beyond those secured when none of the pure public good is provided.... Hence, it would seem that an agreement to join a collectivity that would make its decisions only under a rule of unanimity could be reached noncoercively." That conclusion raises two questions. First, how can people be said to be in

⁶ Rothbard (1973) and Friedman (2014) question whether government really does make people better off, and whether government is necessary for the creation of an orderly society. Pinker (2011) provides a good argument—and lots of evidence—that a strong state is necessary to create an orderly society. The point here is not to take sides, but to note that Buchanan and Tullock lay out the argument, which is supported by Pinker (2011) and which Buchanan (1975) discusses further and defends.

⁷ Gordon does say that Nozick's theory really is a theory of contracts, whereas Buchanan and Rawls have a theory of contract. As argued below, this may give Nozick's theory a more solid public choice foundation.

unanimous agreement with a social contract when in fact they did not explicitly agree to it? Second, what are the terms of that contract to which they are bound?

Buchanan's answer begins with a depiction of Hobbesian anarchy, in which without government, life would be a war of all against all. As noted above, Buchanan dismissed the possibility of a liberal social order without government to enforce the rules, so in principle, everyone would agree to abide by those rules that enforced the social order. Furthermore, people would also want rules to constrain government from violating their liberty. In keeping with his idea of politics as exchange, the social contract consists of those rules to which everyone would agree.

In the absence of an actual agreement, Buchanan (1975) says that people should be viewed as in agreement with the constitutional rules if they would agree to them in a hypothetical renegotiation of the rules from an anarchical status quo. He envisions a hypothetical state wherein no rules are in place and people have no social standing—a Hobbesian anarchy—and from there having everyone participate hypothetically in a renegotiation of the rules under which they will be governed. He says that people can be considered as in agreement with the rules if they would agree in such hypothetical renegotiation from anarchy.⁸ Buchanan (1975, p. 75) says, "Individuals must ask themselves how their own positions compare with those that they might have expected to secure in a renegotiated contractual settlement." Agreement is implied if their current positions are within the bounds they might have anticipated if the rules were renegotiated.

The basic logic behind Buchanan's criterion for agreement is that, if everybody is sufficiently better off with the rules than without them, they would consent. What are those rules? Buchanan does not specify particular rules that form the social contract, but argues that if people would agree to them, then they conform to the idea of politics as exchange. As with any contract, the terms of the contract are those to which the parties to the contract agree voluntarily.

Buchanan (1975, p. 32) says, "The final or ultimate constitutional contract will define the rights assigned to each person in the inclusive community. And each person will find his own position improved over that which he might have enjoyed in any one of the natural distributions noted above, because he will not have to exert or contribute effort to defense and predation, either as an individual on his own account or as a contributing member of a subset of the total community." Buchanan's criterion is that everyone is in agreement with the social contract—a hypothetical renegotiation from anarchy—if they would find themselves better off by agreeing than remaining in a Hobbesian state of nature.

Buchanan does not want to speculate on the specific set of rules to which, in theory, people would agree. Buchanan (1975, p. 75) says, "That set of rights which might be widely accepted as being within the limits of what we may call here the 'renegotiation expectations' of individuals will not be uniform over communities and over time.... This suggests that there can be no resort to idealized general standards through which a legal or constitutional structure in a particular community at a particular stage of historical development might be judged."

Buchanan's constitutional project builds on that foundation in his later work, so it is worthwhile to examine the two big questions regarding Buchanan's social contract: Is his criterion of agreement from hypothetical anarchy sufficient to say that agreement to

⁸ Such renegotiation from anarchy is similar to Rawls's (1971) designing of a social contract from behind a veil of ignorance, but also different in some significant ways, which Holcombe (2015) discusses, but the differences are of minor importance here.

a social contract exists and, if so, what are the terms of the contract? Buchanan is fairly clear in the quotation in the previous paragraph that he sees the terms as subject to change depending on whatever terms to which people would agree.

7 The terms of the contract

A major ambiguity in Buchanan's constitutional project is the lack of a specific set of terms that constitute the constitutional contract. Does he mean that everybody agrees with every provision of the renegotiated contract, or does he mean that, taken as a whole, people believe its provisions will improve their well-being beyond Hobbesian anarchy sufficiently that they will accept some provisions they do not support in order to get others that they do? Using such contractarian logic, Buchanan and Wagner (1977) say that people would agree to a constitutional balanced budget constraint, but, first, we know that in the real world not everybody supports a balanced budget constraint on government, or it would already be in the Constitution and, second, because one set of constitutional rules applies to everyone, surely people would agree with a set of constitutional rules that contain some provisions with which they disagree in order to get a constitution approved with provisions they view as more important and, in keeping with Buchanan's project, allows them to escape from Hobbesian anarchy.

Realistically, because one set of constitutional rules will apply to everyone, everyone must know that nobody will get a set of rules that is entirely to their liking, but that bit of realism has not been dealt with by Buchanan. One might argue that Buchanan and Congleton (1998) deal with the issue in their argument that if rules are sufficiently general and sufficiently durable, a set of rules can be found that is in everyone's long-run interest. Although that argument has some logic in the abstract, when one thinks about issues like social insurance, government regulation of business, abortion, foreign policy, or just the scope of government more broadly, the distribution of actual views in the real world is wide enough that it is unrealistic to think that everybody would agree with every constitutional rule if they were voted on individually.

A more realistic view of the constitutional contract, consistent with Buchanan (1975), is that it falls within the bounds of what one would expect in a renegotiation from anarchy. Citizens will expect that while they may oppose certain constitutional rules, on balance the overall constitutional contract falls within the limits of what they would expect if it were renegotiated from Hobbesian anarchy. This appears to be a very weak criterion for determining the contract's terms. A reasonable conjecture is that faced with the alternative of Hobbesian anarchy, the actual constitutional rules in almost every country in the world would pass the test. Despite Buchanan and Wager's (1977) suggestion otherwise, one would have to conjecture that starting from Hobbesian anarchy, Buchanan would see current conditions in the United States as within the bounds of renegotiation, even though no explicit balanced budget rule is in place.⁹ Current conditions are far superior to Hobbesian anarchy.

⁹ Buchanan and Devletoglu (1970) criticize the student protests of the late 1960s, but it is easy to depict those protests as a demand for renegotiating the social contract. Social justice, racial equality, and the end to the military draft were major issues. While Buchanan's constitutional project rests heavily on rejecting the constitutional contract if it falls outside the bounds of an expected renegotiation, Buchanan did not see a real-world parallel when student protesters were demanding just such a renegotiation.

Even the idea that everyone is treated the same under the constitutional contract is subject to question. The British seem to be very accepting of a system in which some people are deemed royalty and have privileges not given to most citizens. This is consistent with Buchanan's view that "there are no idealized general standards" by which constitutional rules can be judged.

Buchanan's specific form of hypothetical agreement likewise is likely to be a factor in the terms of the contract. A parallel often is drawn between Rawls (1971), who draws up a social contract behind a veil of ignorance, and Buchanan's (1975) renegotiation from anarchy. While at first the two ideas seem close, at least two noteworthy differences can be identified. First, Rawls overcomes the problem of obtaining unanimous agreement from a group of people having different preferences essentially by making everyone the same. From behind a veil of ignorance, nobody knows anything about any of their personal characteristics, so no issue of collective decision-making arises. In a society of n individuals, the decision-maker behind the veil of ignorance is one- n^{th} of everyone after the veil is lifted. Everyone is the same in all respects, so everyone would agree to the same provisions from behind a veil of ignorance. In a renegotiation from anarchy, people still retain their individual identities. Everyone is different, making the possibility of unanimous agreement problematic.

A second difference is that from behind a veil of ignorance, people know nothing about their individual characteristics or their socially ascribed characteristics. In a renegotiation from anarchy, they keep their personal characteristics (physical characteristics, intelligence, abilities, and so on) but lose their socially ascribed characteristics.¹⁰ They lose their positions in society in a state of anarchy, but still know their gender, race, and other personal characteristics. People would be in different bargaining positions when negotiating the constitutional contract if they knew their personal characteristics, as if renegotiating from anarchy, than if they did not, as if negotiating from behind a veil of ignorance.

If people renegotiated the constitutional contract from Hobbesian anarchy, those who were more intelligent would have clear negotiating advantages, and those who were physically intimidating might, too, when compared to negotiations behind a veil of ignorance. One would expect different outcomes under those two hypothetical situations, which further illustrates the ambiguities in determining the characteristics of a unanimously approved real-world social contract.

It also is easy to imagine that people who are physically powerful, or very intelligent, would want to renegotiate a contract made behind a veil of ignorance after the veil was lifted, once they could see that their personal characteristics conveyed advantages to them that they could not see from behind the veil. The question thus is raised of whether the terms of a social contract negotiated under such hypothetical conditions would be stable in the real world. Rawls (1971) says that from behind the veil, people would agree to maximize the well-being of the least well-off. However, renegotiating from anarchy, when people know their personal characteristics, that maximand might not appear so agreeable to everyone.¹¹ The larger point is, the agreement is hypothetical in any event, and different terms are likely to be agreed to if changes are made to those hypothetical circumstances under which bargaining takes place.

¹⁰ North et al. (2008) make the distinction between personal characteristics and socially ascribed characteristics. In anarchy, people have personal characteristics but no socially ascribed characteristics.

¹¹ Buchanan (1975, p. 175) does take issue with the conclusion Rawls draws, but for different reasons.

Another issue, related to Buchanan's classical liberal inclinations, is that the terms of the constitutional contract are whatever people might agree to, and Buchanan recognizes that those terms can vary in different times and places. Holcombe (2018b) notes that people might agree to very illiberal constitutional rules. Buchanan's criterion of renegotiation from anarchy might end up producing a constitutional contract well outside the limits of liberty. What if everybody agrees that they want to live under a socialist dictatorship? Buchanan (2005, p. 19) admits of the possibility himself, saying that people support collectivism and government control of their lives "because only under the aegis of collective control, under 'the state,' can individuals escape, evade and even deny personal responsibilities. In short, persons are afraid to be free."

As it stands, Buchanan's constitutional project offers very vague guidance as to the actual provisions of the constitutional contract; Buchanan himself offers an argument that the constitutional contract to which everyone agrees may well fall outside the limits of liberty. If Buchanan's constitutional project is aimed at designing rules to which everyone agrees, it offers little guidance about the specific rules that might constitute the constitutional contract. A further (but normative) issue is that the rules to which people actually agree may lie outside the limits of liberty.

8 Hypothetical agreement with the contract

Buchanan's politics as exchange framework depends on mutually beneficial agreement among those who are engaging in collective action. In the absence of actual agreement, Buchanan's device of a hypothetical renegotiation from anarchy provides the benchmark for agreement in his constitutional project. Such an interpretation presents additional challenges to his constitutional project. To say that people hypothetically would agree to the constitutional contract is to say that they did not actually agree. The framework might be used for rhetorical purposes, as Rawls does to argue that people would agree hypothetically to a social contract that maximizes the well-being of the least well-off, but such an argument can easily be dismissed, as Buchanan does, by saying that there is no way to know in advance the terms to which people would agree. To say that people are in agreement is almost meaningless when there is no way to identify to what they agree.

A significant implication for someone concerned about the limits of liberty is that this argument of hypothetical agreement can be used to claim that people are in agreement with a constitutional contract when, in fact, they are not. As Yeager (1985, 2001) emphasizes, everything that government does is based on force. If people would pay their taxes voluntarily to finance government, governments would not have to force them to pay. If people would comply voluntarily with government regulations, government would not have to threaten sanctions on those who violate them. That is true no matter how much one supports the government's actions. Even for those who think everyone should pay their taxes and obey the laws, the threat of force still underlies all of government's activities.

The argument for government coercion, following Hochman and Rodgers (1969), is that government coercion overcomes a free-rider problem. In prisoners' dilemma situations, everyone would agree to abide by government rules if all other people also would abide by them, but everyone has an incentive to be a free rider—to engage in non-cooperative behavior and take advantage of the cooperative behavior of others. So, everyone agrees to be coerced, as long as everyone in the group is subject to the same coercion, which

overcomes the free rider problem and allows the group to escape a prisoners' dilemma situation because government forces everyone into the cooperative option.

The problem with that argument, Holcombe (2011) notes, is that it depicts actual coercion as hypothetical agreement. No matter how much people like their governments, they did not agree to them (naturalized citizens may be an exception), and depicting coercion as agreement runs the risk of justifying government activity that is well beyond the limits of liberty. If someone in the real world claims to be opposed to paying taxes, a contractarian counterargument is that the person is just trying to be a free rider, and would agree in a renegotiation of constitutional rules from a state of anarchy. Coercion is hypothetically described as consent.

Rothbard (1983, pp. 162–163) says, "Taxation is theft, purely and simply, even though it is theft on a grand and colossal scale which no acknowledged criminals could hope to match." Regardless of whether one agrees with Rothbard, it is clear that Rothbard believes what he is saying, so he clearly does not agree to be coerced into paying taxes. But the contractarian argument is that he would agree in a hypothetical renegotiation from anarchy; therefore, he is in agreement. The contractarian arguments of Buchanan and Rawls justify coercion by misrepresenting it as agreement. This is a dangerous path for someone who wants to preserve liberty.

9 Public choice and constitutional economics

Buchanan (1979, p. 184) says "In a summary definition, public choice is the analysis of political decision-making with the tools and methods of economics." Using that definition, Buchanan's constitutional project falls largely outside the bounds of public choice, because it describes a process by which individuals hypothetically could agree to constitutional rules, rather than looking at the actual processes by which constitutional rules are designed through collective decision-making. How much difference is there between analyzing rules that might be agreed to unanimously under hypothetical conditions that could never be realized versus analyzing rules that are designed by a social planner?

Beyond a doubt, Buchanan envisioned his constitutional project as related to real-world constitutional rules. Discussing *The Calculus of Consent*, Buchanan (1975, p. 6) says "Gordon Tullock and I indulged our fancies and deployed our professional talents in deriving a logically consistent basis for a constitutional and democratic political structure, one which seemed to possess many of the features of the polity envisaged by the Founding Fathers."

The principles underlying Buchanan's constitutional project are expressed in the Declaration of Independence of the United States, which says that liberty is an inalienable right of all people, and that to secure people's rights, "governments are instituted among men, deriving their just powers from the consent of the governed..." The Declaration of Independence explicitly recognizes consent as the appropriate benchmark for evaluating constitutional rules, and Buchanan's constitutional project is, as he says, built on the political philosophy of the American Founders. But, as Holcombe (2018c) observes, that project is not entirely consistent with his vision of public choice, in that it rests on an analysis of rules that people hypothetically might agree to rather than the process by which actual constitutional rules are designed.

Buchanan's constitutional project lays a foundation for understanding how constitutional rules can be designed to further everyone's interest; that is, rules to which everyone could agree. Building on that foundation, one way to advance Buchanan's constitutional project

is to use it as a basis for analyzing real-world institutions and procedures for designing constitutional rules. A public choice approach to constitutional rules would look at the actual process of political negotiations that leads to the constitutional rules within which people interact. Buchanan takes an individualistic approach to analyzing constitutional decision-making, as discussed earlier, but he focuses on the preferences of individuals and how rules can be designed to satisfy those preferences, rather than looking at the choices individuals would make given the constraints they face, in the design of a constitutional contract.

An early example of a public choice approach to constitutional economics, well-predating the public choice revolution, and even predating Buchanan's birth, is Charles Beard's analysis of the Constitutional Convention. Beard (1913) makes the case that the provisions of the Constitution were designed to advance the interests of those who wrote it. Beard's public choice approach to the collective decision-making that created the Constitution evaluates the actual process through which constitutional rules were enacted. Fortunately, as Beard recognizes, the Constitution's authors were people who had made their own fortunes and had an interest in protecting property and liberty. Beard's historical analysis might be viewed as empirical support for Buchanan and Tullock's (1962) theoretical analysis of constitutional rules and as empirical support for Buchanan and Congleton's (1998) argument that sufficiently forward-looking rules can be designed to promote everyone's welfare.

Some more recent examples of public choice analyses of the evolution of constitutional rules are Congleton (2011), who looks at the bargaining process that led to modern parliamentary democracies in Europe, and Holcombe (2002), who describes the evolution of constitutional rules in the United States. Olson (1982) describes the evolution of the relationships between interest groups and government that undermines constitutional constraints and modifies the constitutional contract. These books look at the actual bargaining processes that have determined how actual constitutional rules were designed, and how they have evolved as the result of an actual bargaining process. Stated differently, they apply Buchanan's vision of public choice to the constitutional decision-making process.

A public choice approach to constitutional decision-making also can look at the actual effects of constitutional rules. Voigt (1997, 2011) reviews a substantial literature that evaluates the effects of constitutional rules empirically. Understanding the effects of different constitutional rules seems a necessary first step in choosing constitutional rules, but Buchanan's project was more oriented toward identifying procedures by which rules can be chosen that meet with the approval of those governed by them rather than identifying specific rules. Indeed, Buchanan (1975, p. 175) criticizes Rawls (1971) for going beyond discussing procedures for choosing rules to suggest what rules would be chosen.

One might hope that those who are involved in the bargaining process have a sufficiently long time horizon that they will agree on rules that make everyone better off, as Buchanan and Congleton (1998) explain is possible, and that they understand the reasons that constraints on the powers of government benefit everyone, as explained by Brennan and Buchanan (1985).¹² Buchanan was well aware of the possibility of rent seeking (Tullock 1967; Krueger 1974), regulatory capture (Stigler 1971), and the undue influence concentrated interests can have on public policy (Olson 1965, 1982), all of which can lead to zero-sum and negative-sum outcomes. Those consequences are the result of political and

¹² Buchanan's first book, an introductory economics textbook, notes the importance of constitutional constraints on government. Allen et al. (1954, p. 373) say, "Democracy in the sense of participation in the governing process by the whole body politic can function effectively only if the area of governmental decision is severely restricted." Brennan and Buchanan (1980) might be viewed as a development of that idea.

economic elites working together for their mutual benefit, as Holcombe (2018a) describes, and clearly are not the result of some conceptual agreement among the governed.

Buchanan (1975, p. 8) himself raises questions about the applicability his politics-as-exchange approach, saying, “So long as collective action is interpreted largely as the embodiment of individual behavior aimed at securing the efficiency attainable from cooperative effort, there was a natural tendency to neglect the problems that arise in controlling the self-perpetuating and self-enhancing arms of the collectivity itself. The control of government scarcely emerges as an issue when we treat collective action in strictly contractarian terms. Such control becomes a central problem when political power over and beyond plausible contractarian limits is acknowledged to exist.” Many public choice models lean toward describing a Leviathan government that uses coercion to benefit the few at the expense of the many rather than a contractarian government that acts under unanimously agreed-to rules.

Buchanan (1975, pp. 6–7) recognizes that possibility clearly, saying about *The Calculus of Consent* that “The framework for analysis was necessarily contractarian, in that we tried to explain the emergence of observed institutions and to provide norms for changes in existing rules by conceptually placing persons in idealized positions from which mutual agreement might be expected.... I have come to be increasingly disturbed by this basically optimistic ontology.... Zero-sum and negative-sum analogues yield better explanatory results in many areas of modern politics....”

Buchanan is aware that his “politics as exchange” contractarian framework is not always descriptive of actual political institutions. Using his constitutional project, based on exchange, as a foundation, one promising avenue for extending that project is to apply a more explicit public choice analysis to it—an analysis that recognizes the short-run interests as well as the long-run interests of those who actually are involved in the bargaining process.

10 Conclusion

Buchanan’s constitutional project began, as he describes, with the ideas of Wicksell (1896, 1967), who used agreement as a benchmark for evaluating the activities of government. Over his long career, he continued to build on Wicksell’s framework and his own earlier work; it thus is no exaggeration to call his constitutional project the work of an entire lifetime. That project is incomplete, in that it leaves some questions unanswered and allows room for further development. Some major questions are, what determines the real-world terms of the constitutional contract, what real-world indicators can be used to signify agreement with the contract, and how the real-world interests and actions of those who participate in the creation of constitutional rules affect the terms of the constitutional contract.

Buchanan’s constitutional project offers substantial insights into the design of constitutional rules, starting with the clear distinction between constitutional and post-constitutional decisions (Buchanan and Tullock 1962). The benchmark of agreement, while leaving some loose ends, presents a criterion by which constitutional rules can be evaluated (Buchanan 1975). Buchanan built on these fundamental ideas to explore the characteristics of rules that would satisfy the benchmark of agreement (Brennan and Buchanan 1985; Buchanan and Congleton 1998). Surely, many directions remain for researchers to build upon Buchanan’s foundation.

One promising direction would be to take a more explicitly public choice approach to the evaluation of constitutional rules. Do institutional structures exist that would facilitate people actually agreeing to the same set of rules that they would agree to in a hypothetical renegotiation from anarchy? How have actual processes that have produced constitutional rules corresponded with Buchanan's benchmark of agreement? Buchanan explicitly draws inspiration from the American Founding Fathers, and while public choice economists have analyzed actual constitutions from the United States and other countries, that analysis could be connected more closely to Buchanan's constitutional project, and could benefit from building more directly on Buchanan's insights.

In the 1970s macroeconomists pushed that field's frontiers by searching for explicit microfoundations of macroeconomics. In parallel fashion, one way to build on Buchanan's constitutional project would be to develop more explicit public choice foundations for constitutional political economy. Some examples were cited earlier, showing that Buchanan's constitutional project provides a solid foundation for the further development of constitutional political economy.

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References

- Acemoglu, D., & Robinson, J. A. (2019). *The narrow corridor: States, societies, and the fate of liberty*. New York: Penguin Books.
- Allen, C. L., Buchanan, J. M., & Colberg, M. R. (1954). *Prices, income, and public policy: The ABC's of economics*. New York: McGraw-Hill.
- Beard, C. A. (1913). *An economic interpretation of the constitution of the United States*. New York: Macmillan.
- Brennan, G., & Buchanan, J. M. (1980). *The power to tax: Analytical foundations of a fiscal constitution*. Cambridge: Cambridge University Press.
- Brennan, G., & Buchanan, J. M. (1985). *The reason of rules: Constitutional political economy*. Cambridge: Cambridge University Press.
- Buchanan, J. M. (1948). *Fiscal equity in a federal state*. Doctoral Dissertation. Chicago: University of Chicago.
- Buchanan, J. M. (1949). The pure theory of government finance: A suggested approach. *Journal of Political Economy*, 57(6), 496–505.
- Buchanan, J. M. (1962a). Politics, policy, and the Pigouvian margins. *Economica*, 29(113), 17–28.
- Buchanan, J. M. (1962b). The relevance of Pareto optimality. *Journal of Conflict Resolution*, 6, 341–354.
- Buchanan, J. M. (1964). What should economists do? *Southern Economic Journal*, 30(3), 213–222.
- Buchanan, J. M. (1965). An economic theory of clubs. *Economica*, 32, 1–14.
- Buchanan, J. M. (1975). *The limits of liberty: Between anarchy and Leviathan*. Chicago: University of Chicago Press.
- Buchanan, J. M. (1979). *What should economists do?* Indianapolis: Liberty Press.
- Buchanan, J. M. (1990). The domain of constitutional economics. *Constitutional Political Economy*, 1(1), 1–18.
- Buchanan, J. M. (1992). *Better than plowing and other personal essays*. Chicago: University of Chicago Press.
- Buchanan, J. M. (2000). The soul of classical liberalism. *The Independent Review*, 5(1), 111–119.
- Buchanan, J. M. (2005). Afraid to be free: Dependency as desideratum. *Public Choice*, 124(1/2), 19–31.
- Buchanan, J. M., & Congleton, R. D. (1998). *Politics by principle, not interest: Toward nondiscriminatory democracy*. Cambridge: Cambridge University Press.
- Buchanan, J. M., & Devletoglu, N. (1970). *Academia in anarchy: An economic diagnosis*. New York: Basic Books.

- Buchanan, J. M., & Tullock, G. (1962). *The calculus of consent: Logical foundations of constitutional democracy*. Ann Arbor: University of Michigan Press.
- Buchanan, J. M., & Wagner, R. E. (1977). *Democracy in deficit: The political legacy of Lord Keynes*. New York: Academic Press.
- Buchanan, J. M., & Yoon, Y. J. (2015). *Individualism and political disorder*. Cheltenham: Edward Elgar.
- Congleton, R. D. (2011). *Perfecting parliament: Constitutional reform, liberalism, and the rise of western democracy*. Cambridge: Cambridge University Press.
- Friedman, D. D. (2014). *The machinery of freedom: A guide to radical capitalism* (3rd ed.). Chicago: Open Court.
- Gordon, S. (1976). The new contractarians. *Journal of Political Economy*, 84(3), 573–590.
- Gwartney, J. D., & Holcombe, R. G. (2014). Politics as exchange: The classical liberal economics and politics of James M. Buchanan. *Constitutional Political Economy*, 25(3), 265–279.
- Hobbes, T. (1951 [orig. 1651]). *Leviathan*. New York: E.P. Dutton.
- Hochman, H. M., & Rodgers, J. D. (1969). Pareto optimal redistribution. *American Economic Review*, 59(4, Part 1), 542–557.
- Holcombe, R. G. (1986). Non-optimal unanimous agreement. *Public Choice*, 48(3), 229–244.
- Holcombe, R. G. (2002). *From liberty to democracy: The transformation of American government*. Ann Arbor: University of Michigan Press.
- Holcombe, R. G. (2004). Government: Unnecessary but inevitable. *The Independent Review*, 8(3), 325–342.
- Holcombe, R. G. (2011). Consent or coercion? A critical analysis of the constitutional contract. In Alain Marciano (Ed.), *Constitutional mythologies: New perspectives on controlling the state* (pp. 9–23). New York: Springer.
- Holcombe, R. G. (2015). Unanimous consent and constitutional economics”. In Jac Heckelman & Nicholas Miller (Eds.), *The Elgar companion to social choice and voting* (pp. 35–53). Cheltenham: Edward Elgar.
- Holcombe, R. G. (2018a). *Political capitalism: How economic and political power Is made and maintained*. Cambridge: Cambridge University Press.
- Holcombe, R. G. (2018b). Can consent limit liberty? An analysis of James M. Buchanan’s classical liberal contractarianism. In P. J. Boettke & S. Stein (Eds.), *Buchanan’s tensions: Reexamining the political economy and philosophy of James M. Buchanan*. Fairfax, VA: Mercatus Center.
- Holcombe, R. G. (2018c). A public choice analysis of James M. Buchanan’s constitutional project. In R. E. Wagner (Ed.), *James M. Buchanan: A theorist of political economy and social philosophy* (pp. 539–576). London: Palgrave-Macmillan.
- Krueger, A. O. (1974). The political economy of the rent-seeking society. *American Economic Review*, 64(3), 291–303.
- Meadowcroft, J. (2011). *James M. Buchanan*. New York: Continuum.
- North, D. C., Wallis, J. J., & Weingast, B. R. (2008). *Violence and social orders: A conceptual framework for interpreting recorded history*. Cambridge: Cambridge University Press.
- Nozick, R. (1974). *Anarchy, state, and utopia*. New York: Basic Books.
- Olson, M. (1965). *The logic of collective action*. Cambridge: Harvard University Press.
- Olson, M. (1982). *The rise and decline of nations: Economic growth, stagflation, and social rigidities*. New Haven, CT: Yale University Press.
- Pinker, S. (2011). *The better angels of our nature*. New York: Viking.
- Rawls, J. (1971). *A theory of justice*. Cambridge, MA: Belknap Press.
- Reisman, D. (2015). *James M. Buchanan*. Houndmills, Basingstoke, UK: Palgrave Macmillan.
- Romer, T. (1988). Nobel laureate: On James Buchanan’s contributions to public economics. *Journal of Economic Perspectives*, 2(4), 165–179.
- Rothbard, M. N. (1973). *For a new liberty*. New York: Macmillan.
- Rothbard, M. N. (1983). *The ethics of liberty*. Atlantic Highlands, NJ: Humanities Press.
- Sandmo, A. (1990). Buchanan on political economy: A review article. *Journal of Economic Literature*, 28(1), 50–65.
- Stigler, G. J. (1971). The theory of economic regulation. *Bell Journal of Economics and Management Science*, 2(1), 3–21.
- Tullock, G. (1967). The welfare costs of tariffs, monopolies, and theft. *Western Economic Journal*, 5(3), 224–232.
- Voigt, S. (1997). Positive constitutional economics: A survey. *Public Choice*, 90(1/2), 11–53.
- Voigt, S. (2011). Positive constitutional economics II: A survey of recent developments. *Public Choice*, 146(1/2), 205–256.
- Wagner, R. E. (2017). *James M. Buchanan and liberal political economy: A rational reconstruction*. Lanham, MD: Lexington Books.

Wicksell, K. (1896). *Finanztheorie Untersuchungen*. Jena: Gustav Fischer.

Wicksell, K. (1967). A new principle of just taxation. Translated by James M. Buchanan. In R. A. Musgrave & A. T. Peacock (Eds.), *Classics in the theory of public finance* (pp. 92–118). New York: St. Martin's Press.

Yeager, L. B. (1985). Rights, contract, and utility in policy espousal. *Cato Journal*, 5(1), 259–294.

Yeager, L. B. (2001). *Ethics as a social science*. Cheltenham: Edward Elgar.

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