Homo Oeconomicus (2019) 36:41–69
https://doi.org/10.1007/s41412-019-00086-5

RESEARCH PAPER

Constitutionalizing *Leviathan*: A Critique of Buchanan's Conception of Lawmaking

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Received: 18 July 2019 / Accepted: 5 September 2019 / Published online: 12 September 2019

Abstract
This article examines James Buchanan's conception of lawmaking, with specific respect to the institutional features he proposes in order to promote individual liberty. Buchanan's constitutional framework is based on his perception of the nature of lawmaking and the sources of law. This paper argues that Buchanan's often implied assumptions concerning the lawmaking process severely limits the theoretical strength of his constitutional framework and ultimately undermines the effectiveness of the institutional promoters of liberty he proposes. More specifically, Buchanan's rigid legal positivism, combined with his peculiar form of political contractarianism, stifles his view of the sources of law; therefore, he is unable to provide a satisfactory normative account of the complex relationship between the lawmaking process and individual liberty within the constitutional order.

Keywords Buchanan · Exchange · Constitutional political economy · Generality of the law · Lawmaking · Liberty

JEL Classification H11 · K40

1 Introduction

This article examines James Buchanan's conception of lawmaking, with specific respect to the institutional features he proposes in order to promote individual liberty.[1] Buchanan's constitutional framework is based on his perception of the nature

[1] *Conception of lawmaking* is used subsequently as referring to a normative theory of the organization of the sources of law, a theory of the nature and validity of law, and a theory of the relationship between law and morality. *Liberty* is used as referring to noncoercive social relations. According to Brennan and Brooks (2013) this notion of liberty makes most sense of Buchanan's understanding of liberty.

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of lawmaking and the sources of law. Examining Buchanan's often implied assumptions concerning the lawmaking process reveals major weaknesses in his constitutional framework.[2] This paper argues that Buchanan's approach to the lawmaking process severely limits the theoretical strength of his constitutional framework and ultimately undermines the effectiveness of the institutional promoters of liberty he proposes. More specifically, Buchanan's rigid legal positivism, combined with his peculiar form of political contractarianism, stifles his view of the sources of law; therefore, he is unable to provide a satisfactory normative account of the complex relationship between the lawmaking process and individual liberty within the constitutional order.

Buchanan's constitutional framework shares two premises common to traditional forms of *legal positivism*: (1) constitutional law is a deliberate product of human authority,[3] and (2) no necessary connection exists between law and morality. At first glance, this seems to map on two methodological tenets of Buchanan's thought: *contractarian individualism* and *ethical subjectivism*. On the one hand, the idea of constitutional law being a deliberate product of human authority seems to resonate well with the principle that the ultimate criterion determining the legitimacy of social institutions is an agreement among individuals (contractarian individualism). Law is a deliberate product of human authority inasmuch as individuals agree to construct and design the constitutional order. On the other hand, the idea that law and morality are separate realms aligns with the assumption that no moral structure must predate the original social contract (ethical subjectivism). Law must be separate from morality because individual consent, rather than any form of objective moral criteria, is the sole source of legitimacy for legal institutions in Buchanan's framework. In short, traditional legal positivism appears to go hand in hand with the idea of the constitutional order as the product of unanimous constitutional agreement.

On closer scrutiny, however, Buchanan's positivist assumptions on lawmaking prevent his own constitutional framework from providing a satisfactory account of contemporary constitutional orders. His rigid form of legal positivism fails to recognize the role judges play in the production of legal rules, the inherently moral component of constitutional principles, and the essential role of private legal orderings. By neglecting the institutional heterogeneity of lawmaking processes, Buchanan's constitutional framework results in an inadequately constrained political monopoly of lawmaking, thereby failing to recognize effective institutional promoters of liberty against the risk of coercive abuses of political power.

The discussion is organized as follows: Sects. 2 and 3 briefly examine the contractarian foundations of Buchanan's conception of lawmaking. Section 2 considers the nexus between normative individualism and political contractarianism in Buchanan's political theory. I argue that Buchanan's constitutional contractarianism

[2] Buchanan never fully and comprehensively discussed his conception of the lawmaking process.

[3] Buchanan's guiding normative criterion is to construct constitutional law *as if* it were the outcome of a deliberate unanimous agreement among all members of the community. It is argued throughout this paper that this as-if construction implies a distorted conception of lawmaking.

does not necessarily follow from his commitment to the ideal of voluntary exchange. Section 3 identifies the strict relationship between political contractarianism and traditional legal positivism in Buchanan's intellectual scheme. Sections 4–7 take a closer look at various aspects of Buchanan's legal positivism. Section 4 emphasizes the weaknesses associated with Buchanan's formalistic account of both legal normativity and the constitutional contract. Section 5 argues that Buchanan's legal formalism prevents him from appreciating the relevant distinction between rules and principles in the constitutional framework. Recognizing the role of constitutional principles significantly reduces the theoretical relevance of Buchanan's distinction between the choice of the rules of the game and the choice within these rules. Section 6 explores Buchanan's conception of the generality of law principle as an example of the analytical limitations of his conception of lawmaking. Section 7 outlines Buchanan's failure to recognize the importance of private, decentralized legal orderings. Section 8 concludes the paper.

2 Contractarian Individualism and Political Contractarianism

The fundamental normative assumption underlying Buchanan's constitutional framework is that individual consent is the only acceptable value upon which social institutions can be built (Brennan and Buchanan [1985] 2000; Buchanan 1978b, 1991). The axiological supremacy of individual consent leads to the centrality of "exchange" in Buchanan's normative theory of collective institutions. All institutions are viewed as a means to organize *exchange activities* (Buchanan 1964, 1975b; Buchanan and Tullock 1962). Buchanan (1988, p. 61) states that "individuals enter into exchange, one with another, either to make direct trades of goods and services, or to create organizations… that, in turn, make such trades on their behalf". When this logic is recognized, politics "becomes a complex exchange process in which individuals seek to accomplish purposes collectively that they cannot accomplish non-collectively or privately in any tolerably efficient manner" (Buchanan 1988, p. 62). This idea is referred to as "politics-as-exchange" (Brennan 2012; Buchanan 1983, 1986b; Buchanan and Congleton [1998] 2003; Gwartney and Holcombe 2014; Marciano 2009).

The axiological supremacy of individual consent is not unique to Buchanan's work. Many authors within the classical liberal tradition share the same normative premise. Buchanan, however, takes this a step further by emphasizing a logical connection between normative individualism and the *contractarian* model of politics. He argues that, after the characterization of politics as an exchange mechanism is accepted, "the ultimate model of politics is contractarian. There is simply no feasible alternative" (Buchanan 1986a, p. 215). Buchanan (1988, p. 62) also states "the catallactic perspective on simple exchange of economic goods merges into the contractarian perspective on politics and political order". The idea that the contractarian model of politics is uniquely related to normative individualism has important implications for Buchanan's conception of lawmaking, particularly the way he perceives the institutional promoters of liberty. To maintain consistency with his own contractarian premises, Buchanan is compelled to identify legal features conducive

to liberty *exclusively* within the set of idealized choices individuals are assumed to make at the constitutional choice stage. Therefore, the only conceivable promoters of liberty are those that can be logically derived from the exchange between individuals at the constitutional level. In this respect, the link between contractarian individualism and social contract theory severely narrows Buchanan's ideas of what might protect liberty.

Before proceeding, it is worth emphasizing that political contractarianism is not a logical corollary of normative individualism. Buchanan's theory of social contract does not follow—as a logical consequence—from the politics-as-exchange idea. A brief historical digression illuminates this point. Buchanan makes frequent reference to the tradition of eighteenth-century philosophers, such as Bernard Mandeville, Adam Smith, and David Hume (Buchanan 1976a), who emphasized the transformation of private interest into stable and socially advantageous institutional orders (Ratnapala 2001). None believed in the social contract. According to these philosophers, the social and legal order cannot be legitimized by deriving it as the result of an individual constitutional calculus; it is rather the slow and gradual evolutionary consequence of the individual practice of contracting (Ratnapala 2001, 2013, p. 306–309; Thrasher 2015). Somewhat surprisingly, Buchanan's conclusions about the legal order depart drastically on this point from the key ideas of the eighteenth-century philosophers he regards as a source of intellectual inspiration. Therefore, as the following discussion suggests, Buchanan's constitutional contractarianism does neither add explanatory nor normative power to his theory of constitutional order. Instead, it prevents Buchanan from providing a satisfactory account of contemporary legal orders and designing effective legal institutions conducive to liberty.

3 A Political Monopoly on Lawmaking

3.1 Law as Political Enactment

The original concept of the social contract has profound implications for Buchanan's perspective on the sources of law. First, as noted earlier, the social contract injects the idea into his constitutional framework that there is no legitimate production of legal rules outside the institutional perimeter unanimously defined at the constitutional choice stage. Lawmaking must take place *entirely* within the politically legitimate constitutional framework.[4] This assumption leads to the most striking feature of Buchanan's approach to lawmaking: the concentration of lawmaking power within the political sphere. Somewhat surprisingly, a leading architect of the public-choice movement designs a constitutional normative framework organized around the monopolistic legislative role of political power. Second, as discussed later, as there is only one conceivable source of normative validity (the constitutional contract), the lawmaking process must be organized around a hierarchical, top-down

[4] Buchanan (1986a, p. 215, emphasis added) states, "politics includes…the *whole* structure of legal institutions, the law, as well as political institutions defined in the ordinary sense".

system of norms. This kind of "pyramidal" model of lawmaking raises concerns regarding the protection of individual liberty. Third, Buchanan's contractarianism entrenches "the idea that all law stems from the *will* of an identifiable lawmaker" (Ratnapala 2013, p. 301, emphasis added). Law is viewed as the deliberate, intentional product of a constitutional or post-constitutional legislator. In other words, law cannot exist before the deliberate intervention of the political authority; it can only have form as a constitutional or legislative enactment. This assumption is at odds with the traditional common law ideal of law as the "science" of judges, rooted in the customs of the people, and therefore placing limits on political lawmakers. Moreover, Buchanan's constitutional framework makes no room for the emergence of private legal orders through repeated spontaneous adjustments and mutually compatible choices on the part of individuals. He fails to recognize the vital importance of law formation processes that are independent of the political will expressed in the constitutional contract and based on the gradual, spontaneous emergence of legal rules (examined further in Sect. 7). Because these aspects of Buchanan's conception of lawmaking stem logically from his political contrarianism, it is worth briefly outlining the peculiar way Buchanan's project is positioned within the social contract tradition of political philosophy.

3.2 Neither Hobbes nor Locke

Buchanan makes explicit reference to the theory of social contract expounded upon by Thomas Hobbes and subsequently further developed by John Locke. From these classical social contract theorists, he takes the central idea, discussed above, of law as political enactment. Both Hobbes and Locke argued that the social contract establishes a supreme sovereign or legislature entrusted with the exclusive power to make law. They both "insisted that the *only* source of human law was the sovereign person or assembly" (Ratnapala 2013, p. 303, emphasis added). Unlike Hobbes and Locke, however, Buchanan's contractarian framework maintains an uneasy tension with the normative assumptions on which it rests.

Hobbes's chief normative concern was to protect people from perils associated with the lawless state of nature. He believed that only an *absolute* power could remedy the inconveniences of the state of nature and establish a social order. On these premises, he theorized a social contract whereby individuals give up their autonomy to an absolute sovereign power capable of protecting their rights. The unconstrained power conferred on the sovereign aligns with Hobbes's chief normative concern—the creation and maintenance of a social order. Like Hobbes, Locke saw the need to overcome the inconveniences of the state of nature. However, he recognized the threat that the establishment of an unrestrained sovereign power posed to individual liberty. Locke's normative concern was balancing the necessity of civic order with the necessity of protecting liberty from abusive political interferences. In accordance with these principles, the Lockean sovereign is not entrusted with absolute, unconstrained power. Locke emphasized that the natural rights of people predate the social contract. In balancing protection of natural rights with the need for civic order, Locke champions a *limited* sovereign power. Individuals maintain their right

to resist the sovereign power when it acts in violation of their natural rights. In Hobbes's and Locke's contractarian theories, there is coherence between normative concern and institutional framework. Hobbes's unconstrained *Leviathan* accords with the axiological priority given to security, while Locke's theory of natural rights and limited sovereign power is consistent with his defense of a constitutional state.

Like Hobbes, Buchanan understands the social contract as an agreement between *all* members of the community[5] to entrust the political power with the *exclusive* authority to make the law.[6] Certainly, Buchanan's and Hobbes's conceptualizations of the original position differ in many significant respects.[7] However, under both theoretical schemes, the social contract is the source of substantively unconstrained lawmaking mechanisms. Hobbes's social contract legitimizes a sovereign's unrestricted power to make and abrogate law. Buchanan's unanimous constitutional choice is virtually unconstrained by any normative substantive content that precedes attaining unanimous agreement. This contractarian methodology is consistent with the Hobbesian effort to legitimize an absolute power, but it is far less consistent with Buchanan's classical liberal commitment to individual liberty. The social contract provides insufficient protection to individual liberty unless accompanied by an explicit definition of the conditions required to substantially legitimize the social contract (Barry 1984, p. 581). Yet Buchanan rejects the Lockean idea of natural law and natural rights intended as substantive normative principles that preexist and constrain the social contract.[8] His positivist rejection of any natural law device entrusts the protection of liberty to the operation of either constitutional unanimity or other procedural constraints on post-constitutional lawmaking. As long as these procedural constraints are preserved, the lawmaking power of political agents is not limited by a preexisting moral structure. This point summarizes the fundamental philosophical criticism of Buchanan's project. Buchanan's political contractarianism

[5] Hobbes ([1651] 2017, p. 121) defines the social contract as the "covenant of every man with every man"; Buchanan (1986a, p. 221) repeatedly insists that at the constitutional stage, "all persons must be brought into agreement". Along the same lines, Brennan and Buchanan state, "The terms must be accepted by *all* persons who are to be designated members of the group affected. Contractual agreement among a subset of persons, with terms to be imposed on others, would negate the legitimacy of the whole construction" ([1985] 2000, p. 32, emphasis added).

[6] The monopolistic aspect of Buchanan's constitutional framework is implied in the constitutional unanimity constraint. Indeed, unanimity would be meaningless if sources located outside the constitutional framework (and operating under a less-than-unanimous regime) could create valid law.

[7] In Buchanan's framework, the original situation in which the conceptual unanimity prevails occurs when each individual has a veto against all decisions. Buchanan's starting point is therefore a collective choice under the unanimity principle. By contrast, the Hobbesian original situation is the state of nature in which everyone has the right to everything, and individuals are not protected by the right of veto.

[8] Buchanan's political philosophy is not fully coherent with his declared anti-natural-law premises. In Buchanan's contractarian setting, each and every person has a right to veto the contractual collective agreement at the constitutional stage. This way, the right to veto logically *precedes* the original contract. This aspect has led a few commentators to variously emphasize the moral or quasi-moral premise of Buchanan's philosophy. Barry (1984, p. 580) states, for example, that "the concept of agreement serves as a kind of ethical surrogate for natural law in Buchanan's thought". Kliemt (2019, unpublished) argues that the veto condition in Buchanan's framework expresses the Kantian abstract principle of interpersonal respect in procedural terms (*The logical foundations of constitutional democracy between legal positivism and natural law theory*, unpublished, p. 9).

attempts to combine the classical liberal commitment to liberty with a contractarian justificatory framework in which a substantively unconstrained social contract mandates a monopoly of creating valid law. The following sections illustrate how this project provides insufficient institutional arrangements to promote liberty.

4 Formalism in the Constitutional Contract

As a moral subjectivist, Buchanan aims to construct a constitutional order that does not permit any set of moral values to be implemented over all others. Based on this premise, as noted earlier, he rejects any notion of natural law, or natural rights, that predate the social order. He grounds his constitutional framework on a strict notion of agreement (Barry 1984, p. 580–581) that legitimizes juridical order, independent of any external moral structure or ethical truth. This conceptual framework leads Buchanan to endorse a rigid form of legal positivism based on a *formal*, process-oriented account of legal validity. Law is valid and legitimate to the extent that it is consistent with the constitutional contract; however, the substantive content of the constitutional contract is left largely undefined. This section argues that this peculiar combination of political contractarianism and legal formalism leads to logical inconsistencies and raises issues with the protection afforded to individual liberty.

4.1 A Formalistic, Self-Defeating Account of Legal Validity

Buchanan envisages a legal order organized around multiple levels of norms in which the validity of each level hinges upon the validity of the superior level in the hierarchy. For example, in his works on constitutional political economy, Buchanan emphasizes the existence of two levels of rules: constitutional and post-constitutional (Buchanan 1975a; Brennan and Buchanan [1985] 2000). Post-constitutional rules are valid only to the extent that they are created by a decision-making procedure unanimously agreed upon at the constitutional level. Constitutional rules are binding because they are chosen unanimously by individuals who hold a complete right of veto over the *collective* choice. Unanimous agreement provides the basis for the validity of the constitutional contract. In this way, Buchanan's notion of legal validity is both *recursive*, in that the validity of a norm is relative to the validity of a hierarchically superior norm, and *process-oriented*, as the requirements of normative validity established by the superior norm are procedural in nature. These two aspects of legal validity are related to the principles of political contractarianism and ethical subjectivism, respectively. The recursive definition of legal validity ensures that legal norms ultimately trace back to the constitutional contract. The process-oriented nature of validity upholds the ethical neutrality of the constitutional order. In this specific respect, Buchanan's legal positivism is similar to Hans Kelsen's normativism.[9] Kelsen attempts to construct a rigorously formal conception of law as a

[9] The similarities between Buchanan and Kelsen have also been emphasized in Kliemt (2019, unpublished) *The logical foundations of constitutional democracy between legal positivism and natural law theory*, unpublished, pp. 5–6).

normative sphere whose validity is rooted *within* the legal system, independent of any moral, political, or sociological consideration. Under this view, the reason for the validity of a norm can only be the validity of a higher norm that authorizes its creation.

Kelsen's account of legal validity is often criticized on the grounds that a conflict exists between the formalistic, recursive definition of validity and the positivistic rejection of absolute moral principles. According to Bulygin (1990), "if the validity of a norm is relative to the validity of another norm, then the chain of validity must be infinite" (pp. 41–42). To avoid infinite regress, an absolutely valid norm must be introduced, which confers lawmaking authority to the first legislator enacting a legal norm. In Kelsen's legal theory, this function is fulfilled by the basic norm whose function is "to confer law-creating power on the act of the first legislator and on all the other acts based on the first act" (1945, p. 116). However, this hypothesis is at odds with the positivistic assumption that validity cannot be rooted in any absolute principle external to the legal order. Buchanan's legal formalism suffers from a similar criticism.

In Buchanan's framework, the validity of post-constitutional rules is relative to the validity of constitutional rules, which are derived from unanimous agreement at the constitutional stage. In order to state that constitutional rules are valid *because* they are unanimously agreed upon, a valid rule must be first established stating that unanimously agreed-upon constitutional rules are valid. There must be a higher norm bestowing validity on the constitutional contract. But what secures the validity of this higher norm demonstrating the legitimacy of the original contract? Again, this opens up the problem of infinite regress. To escape, the existence of a meta-rule fulfilling the function of conferring lawmaking authority on the first legislator must be assumed. This would be a rule conferring authority on the constitutional convention, thereby providing a reason for the normative validity of the constitution. To fulfill this function, the validity of the meta-rule must be *absolute* and must precede logically the constitutional contract. However, recognizing the existence of an absolutely valid norm external to the constitutional contract (and therefore independent of the unanimous agreement) would contradict the positivistic idea that no natural law must preexist the social contract. Thus, in Buchanan's framework, it seems impossible to coherently justify the validity of the legal order without either falling into infinite logical regress or contradicting the positivistic premises that Buchanan persistently defends. As such, in Buchanan's positivistic framework, the ultimate source of legal validity rests on logically weak grounds.

The logical inconsistency of Buchanan's legal validity concept seems to reflect the jurisprudential logical incoherence of his political contractarian framework. Scholars, in the tracks of Hume (1748), have long recognized that political contractarian theories are incoherent in that they assume an *original* contract that must precede all social institutions (Hardin 1988, p. 517; Kliemt 1987, p. 513; Miller 1981, pp. 79–80). According to Kliemt (1987), "without the *institution* of contract there could be no specific contract especially no original contract" (p. 513). In assuming a contract that precedes all social institutions, contractarian theories assume away the very problem they intend to solve. From this perspective, the recursive definition of normative validity suffers from a similar criticism to that of social contract theory.

The assumption of a basic norm conferring validity to the legal order is as difficult to justify as the assumption of an original contract preceding all social institutions.

Although it might be tempting to interpret Buchanan's understanding of lawmaking as closer to Hart's, rather than Kelsen's, legal positivism to solve the problem of the basic norm, Hart's conceptualization of the basic norm is difficult to reconcile with Buchanan's theory of the social contract. According to Hart (1994), the validity of laws rests on the acceptance by judges and other officials of a "rule of recognition", which provides the criteria for recognizing legitimate sources of law and thereby identifying valid legal rules (p. 94). Hart (1994) defines the rule of recognition as "a form of judicial customary rule", which exists "only if it is accepted and practiced in the law-identifying and law-applying operations of the courts" (p. 256). In this sense, he provides a "conventionalist" account of the basic norm (Green 1999), which is quite distinct from Buchanan's theory of constitutional contract. The rule of recognition is not a hypothetical, abstract norm; rather, it is a social fact, or customary social norm, whose existence critically depends on its acceptance by courts. In this respect, Hart's conventional theory is difficult to reconcile with Buchanan's political contractarianism. In Buchanan's conceptual framework, unanimous consent is not assumed as a social fact or a social norm followed by judges. Unanimity is rather treated as the self-evident ultimate justificatory principle that is independent of unanimity de facto and recognized as such by courts. Based on these considerations, a more accurate view of Buchanan's legal positivism is the analogy with Kelsenian legal formalism. Kelsen attempts to derive the normative validity of the legal order *from within* the legal order itself by referring to the notion of a basic norm independent of any moral content. Analogously, Buchanan tries to ground the binding force of the constitutional framework from within the constitutional framework itself by adopting unanimous constitutional agreement as its basic norm, independent of any autonomous, substantive normative content.

4.2 A Formalistic Account of the Constitutional Contract and the Institutional Promoters of Liberty

Buchanan's formalistic understanding of the constitutional contract affords only weak institutional arrangements promoting liberty. His contractarian method provides a purely procedural device for creating rules from people's preferences. Whether a given social contract is considered the source of constitutional rule validity depends entirely on its procedural dimension, not its merits.[10] Under this premise, the *substantive content* of unanimous agreement is immune from any moral criticism—*any* constitutional order is legitimate to the extent that it emerges from the unanimous consensus of all members of the community. As Barry (1995) observes, "if the contractarian method is to be a purely 'neutral' device for generating rules, institutions and policies out of people's subjective choices, then *whatever* does emerge must be, for procedural reasons, legitimate" (p. 125, emphasis added). In

[10] On the distinction between source-based and merit-based accounts of legal validity, see Gardner (2001).

this respect, failure to specify the substantive content of the constitutional contract is the major drawback of Buchanan's procedural contractarianism.

The features of the constitutional choice setting provide a significant "filter" on the content of the constitutional contract. First, individuals are conceived as holding a veto right against any action, whether collective or individual. Every action is forbidden unless explicitly authorized by all members of the collectivity. It has been argued, in this respect, that Buchanan translates the Kantian norm of interpersonal respect into the procedural framework itself by way of the unanimity requirement (Brennan and Kliemt 2019, pp. 806–807; Kliemt 2014, pp. 397–398). It is as if a camouflaged form of substantive constraint is built into the constitutional procedure. It is conceptually implausible that holders of veto rights would ever assent to an unrestrained intrusion into their private sphere (Brennan and Buchanan [1985] 2000, pp. 34–35). Second, at the constitutional choice stage, individuals are situated behind a veil of uncertainty. Rules are characterized by a high level of generality and embody an extended time dimension. Therefore, individuals are faced with genuine uncertainty regarding the impact that the choice of rules will have on their personal interest. Taken together, unanimity and veil of uncertainty would ensure that self-interested individuals at the constitutional choice stage would agree on patterns of outcomes that are consistent with the precepts of fairness (Buchanan 1976b, p. 22).

However, the benchmark of constitutional unanimous agreement under the veil of uncertainty is hardly an effective promoter of liberty. The veil of uncertainty only rules out the possibility of individuals advancing their particular self-interest. Set aside the case of particularized interests, and the outcome still depends on the distribution of preferences and moral sentiments across actors (Barry 1995, p. 124; Fiskin 1989). There is no assurance that the normative status of the constitutional outcome would be consistent with the axiological priority of individual freedom (Holcombe 2011; Gwartney and Holcombe 2014). Because the exchange game occurring at the constitutional choice stage may have multiple bargaining equilibriums (D'Agostino et al. 2017; Fiskin 1989), the problem remains of how to ensure that any of the possible equilibrium points will be consistent with the principle of liberty. In this respect, conceivable unanimity is woefully incomplete as a criterion for preventing government coercion from going beyond the limits of liberty. Although the scope for potential agreement is wider at the constitutional level than at the post-constitutional stage, divergent abstract views of how the community should be governed are likely to persist at the constitutional level. Therefore, given the difficulties of reaching unanimous agreement on a variety of fundamental issues (including, e.g., distributional issues or civil rights issues), unanimity is likely to be attained on *negative* provisions aimed at protecting the negative freedom of individuals. Unanimity is hardly reached on *positive* provisions, which typically involve significant distributional implications (Hardin 1988). In addition, constitutional unanimity is unable to provide guidelines on the "horizontal" application of liberty rights—that is, the question of how far a constitution must protect basic individual liberty rights against infringement by other private actors exercising their own legal rights. These considerations suggest that the unanimity criterion is unable to limit a massive transfer of lawmaking power to post-constitutional lawmakers. Given conflicting preferences at the constitutional choice stage, unanimity is likely to result in a set of constitutional

provisions that are unable to effectively constrain post-constitutional lawmaking. The assumption that anything hypothetically agreed to under a veil of uncertainty remains within the limits of liberty is highly problematic.

5 Chosen Principles and Unchosen Rules

The preceding discussion demonstrates that Buchanan's legal formalism deprives his constitutional framework of a solid jurisprudential ground upon which effective institutional promoters of liberty can be established. This section develops a closely related criticism that Buchanan fails to appreciate the relevance of the distinction between constitutional *principles* and constitutional *rules*. This is a serious problem in Buchanan's conceptual framework because recognizing the fundamental role principles play in modern constitutions calls into question the theoretical relevance of the distinction between choice of rules and choice made within these rules, which is a cornerstone of Buchanan's constitutional contractarianism.

5.1 The Relevance of Constitutional Principles

Buchanan repeatedly insists on the importance of categorically separating choice *of* rules from choice made *within* rules (Brennan and Buchanan [1985] 2000; Buchanan 1977a, 1981, 1986a, 1988). In Buchanan's view, this distinction is a fundamental criterion of the constitutional order's legitimacy. Its importance stems directly from the "exchange" approach to politics. Because politics is fundamentally conceived as a complex exchange process, political action is legitimate only to the extent that it is agreed upon by *all* members of the community (Buchanan 1986a, 1988). Because unanimous agreement cannot be reached on all decisions, unanimity is required only at the constitutional level; departures from unanimity are allowed at the post-constitutional level as long as decisions meet constitutional constraints. As such, legislation created *within* the procedural constraints agreed on at the constitutional level can be said to be imposed within the limits agreed by the governed. Based on this premise, Buchanan (1986a, 1988) argues that a political order can be classified (and legitimized) as contractarian *only* if choices made through the operation of ordinary politics are consistent with choices crystalized in constitutional law.

The distinction between choice of rules and choices within rules rests on the assumption that constitutional rules are apt to provide clear, well-defined constraints on the post-constitutional exercise of legislative power. This assumption, however, fails to recognize the heterogeneous structure of constitutional provisions in contemporary legal orders. Often, constitutional provisions take the form of principles rather than well-specified rules.[11] Legal scholarship has long asserted that legal principles do not provide a fully determinate prescriptive content; instead, they are

[11] The distinctions between rules and principles, together with their jurisprudential implications, are the subject of a vast amount of literature (see, for example, Celano 2005; Ferrajoli 2010; Raz 1972; Sanchis 2003; Sunstein 2018; Pino 2011).

"grounds for making new rules" (Raz 1972, p. 841). The principles' main feature is the *indeterminacy* of the normative criterion specifying their content. Because of their substantive indeterminacy, the concrete application of principles may involve different—potentially conflicting—normative criteria from which the interpreter must choose. In this respect, the widespread presence of principles in contemporary constitutional texts poses a strong challenge to the theoretical relevance of the categorical distinction between choice of rules and choice within rules. In turn, this casts doubt on the overall theoretical consistency of Buchanan's constitutional contractarianism and highlights the limitations of his constitutional proceduralism in promoting liberty.

5.2 Constitutional Principles and Constitutional Contractarian Logic

In Buchanan's view, as noted before, the constitution affords protection to individual liberty by establishing the post-constitutional procedures that grant and constrain lawmaking authority. Under Buchanan's contractarian logic, post-constitutional compliance with constitutional constraints provides assurance that lawmaking is exercised with the *consent* of the governed. Because all members of the community choose the post-constitutional decision-making procedures unanimously at the constitutional level, the *outcomes* generated through these procedures are regarded as being *within* the bounds of the community members' expectations. This way, the contractarian test is supposed to provide the primary criterion for promoting liberty against *coercive* intrusions of privacy.

This brief account of Buchanan's contractarian logic suggests that the constitutional features conducive to liberty he has in mind hinge on two key elements: (1) unanimous constitutional agreement, and (2) procedural constraints to lawmaking power. However, he misses an important dimension of contemporary constitution making by failing to appreciate that *disagreement*, not just agreement, can fundamentally shape the content and structure of constitutional frameworks (Waldron 1999). Buchanan certainly appreciates that people may disagree at the constitutional level on several important dimensions (Vanberg and Buchanan 1989). However, he analyzes disagreement in order to identify the conceivable outcomes of unanimous constitutional choice, which means he tends to assume that individuals at the constitutional choice veto everything that is not agreed to unanimously. Instead, constitution-makers often crystallize disagreement between moral and ethical conceptions into substantively undetermined constitutional principles. That is, the lack of unanimity on how to combine often-competing ethical conceptions of the "social good" generates constitutional provisions centered on *indeterminate* moral directives. These provisions are susceptible to being interpreted or applied at the post-constitutional stage in a variety of competing and often contradictory directions (Pino 2011; Sanchis 2003, p. 127). From this perspective, it is fair to say that constitutional principles are not the result of choices of rules; rather, they reflect the impossibility of making choices at the constitutional stage. As Sunstein (2018) contends, constitutional principles are "incompletely theorized agreements" (p. 35) because people who accept them do not always agree on the rule that specifies the

prescriptive content of the principles, calling into question what is achieved when the procedural contractarian test is applied to constitutional principles.

The pervasiveness of principles in constitutions undermines the relevance of the distinction between choice of rules and choice within rules. When principles (rather than rules) are chosen, post-constitutional actors (not individuals at the constitutional choice stage) do the substantive work of choosing the rule. The lack of unanimous constitutional consent generates a *transfer* of unrestrained lawmaking authority that is not captured by the categorical distinction between choice of rules and choice within rules. When principles are chosen, a post-constitutional actor will choose the substantive rule *without* the consent of individuals affected by the choice. It would then be rather fictitious to say the choice is made *within* the constitutional rule, as there is no constitutional rule delimiting the substantive content of the lawmaking output generated by the post-constitutional actor, nor is there a constitutional procedural rule. In fact, when constitutional principles are involved, both the substantive principle and who will choose the rule are uncertain. Courts, legislatures, or a combination of the two can concretize constitutional principles at the post-constitutional stage.

The difference between rules and principles suggests that the underlying fallacy of Buchanan's distinction between choice of rules and choice within rules is that it rigidly identifies the object of the constitution-making process as unanimous agreement on procedural constraints to political lawmaking power. However, often the constitution-making process is driven by disagreement on substantive, moral, and ethical principles (Celano 2005). Constitutional disagreement does have institutional relevance, as it translates into substantively indeterminate legal principles, which result in delegating a large portion of *unrestrained* lawmaking power to post-constitutional actors. Principles transfer—not restrain—power (Pino 2011).

It would be fictitious to say that post-constitutional actors exercise power within unanimously agreed-on constitutional rules, unless a purely formalistic notion of unanimous consent is acceptable. Of course, under Buchanan's procedural logic, constitutional principles could be conceived as being unanimously agreed on at the constitutional choice stage. From this perspective, it is tempting to argue that the substantive outcomes generated by post-constitutional actors on the grounds of these constitutional principles would still pass the contractarian test. However, this would require overlooking the structural difference between rules and principles and ultimately extending contractarian justification to *any* lawmaking output. The categorical separation between choices of rules and choices within rules fails to account for a large portion of unrestrained lawmaking authority allocated to the post-constitutional choice stage. By focusing on the conceivable outcomes of unanimous constitutional agreement, Buchanan neglects the fact that constitutional actors often transfer the game to the post-constitutional stage, rather than providing rules constraining the game.

5.3 Institutional Implications of Constitutional Principles

From an institutional standpoint, the most important implication of legal principles is increased judicial lawmaking power. The widespread presence of principles

introduces three major sources of the expanded role of courts. First, in contemporary constitutional systems, the test for constitutional validity is often substantive, *not* merely procedural. The validity test rests on two distinct legitimizing principles: (1) conformity to constitutional procedural constraints and (2) conformity to the moral values embedded in the constitutional principles (Celano 2005; Pino 1998). It is not sufficient for legislative rules to be enacted in conformity with procedural rules established by the constitution; they must also conform to substantive values embedded in constitutional principles. This way, the role of the constitution is not limited to procedurally limiting the political–legislative process; it extends to substantively informing the political process by providing normative ethical guidelines. Second, because legal principles embody a plurality of moral values that often conflict with one another, judges must engage in a *balancing* exercise in which competing moral values are assessed (Celano 2005; Pino 2011; Sweet and Mathews 2008) This balancing exercise requires judges to perform normative evaluations that are political in nature.[12] Third, constitutional principles progressively display the tendency to produce *horizontal direct effects* on private litigation. That is, constitutional rights are not only used as a basis for constitutional claims aimed at invalidating pieces of legislation; they are also invoked as judicially enforceable in private litigation.[13] The horizontal direct effects of constitutional principles further exacerbate the tendency toward the judicialization of the legal order.

The preceding considerations regarding the pervasive roles of principles and their institutional implications reveal two gaps in Buchanan's framework. First, Buchanan's categorical distinction between choice of rules of the game and choice within the rules fails to capture the threefold tendency toward judicialization identified above. This is a major challenge as the expanded role of judges is in conflict with the consensualist principle informing Buchanan's constitutional framework. While Buchanan expressly envisions departures from the unanimity rule at the post-constitutional level, he is picturing the majoritarian political decision-making process. He certainly would not support the creation of substantive legal principles by judges based on the balancing of competing moral values. He envisages a constitutional order based on the categorical separation of three functions: (1) the judicial enforcement of existing rules, (2) the legislative body carrying out ordinary politics within existing rules, and (3) changing constitutional rules through well-defined procedures (Buchanan 1986a, 1988). In this simplified framework, the judiciary is confined to the role of the enforcer of the constitutional contract, intended as the source of procedural constraints (i.e., the rules of the game).[14] By contrast, contemporary constitutional orders are characterized by a complex relationship between legal and moral principles, which involves an expanded lawmaking role for judges. Because constitutional principles include moral concepts, the determination of the validity

[12] Judicial balancing is the subject of a large debate in comparative constitutional scholarship (see Francisco 2017; Jackson and Tushnet 2017; Petersen 2017).

[13] For a survey and discussion of the impacts of constitutional rights on private law, see Barak (1996).

[14] That Buchanan fails to recognize the lawmaking power of judges is confirmed by the fact that he does not apply his "exchange" framework to judges (see Considine 2006).

of legal rules depends on an interpretive exercise that necessarily requires judges to engage with moral reasoning (Pino 2011, p. 23).[15]

Second, Buchanan's reluctance to impose substantive normative preconditions on constitutional agreements results in a conceptual framework that is unable to capture analytically the observed evolution and functioning of contemporary constitutional juridical orders. Constitutions do not merely provide morally neutral constraints on the political–legislative process. Rather, they embody a plurality of competing moral values and act as the source of substantive legal principles aimed at *promoting* a transformation of the structure and content of the post-constitutional legal order. In this respect, the normative deficit of Buchanan's proceduralism is conducive to an *analytical* deficit. Buchanan's ethical subjectivism leads to a formalistic proceduralism that fails to offer any direction on the allocation of lawmaking powers among alternative sources of law. Without the analytical recognition of the constitutional principles and the related lawmaking role of judges, Buchanan deprives the constitutional framework of its prescriptive force.[16] He depicts an image of the legal order that resembles, in many respects, the old European "legislative" state, based on the supremacy of legislation and procedural constitutional constraints, with judges as *bouche de loi*. This way, his constitutional political economy fails to appreciate the complexity of the relationship between lawmaking and freedom in contemporary constitutional orders. Quite tellingly, Buchanan himself feels the need to introduce substantive limits that effectively restrain the outcomes of post-constitutional political lawmaking. For example, he champions the introduction of constitutional limits on deficit spending (Buchanan 1997b). However, these quantitative constraints appear to be ad hoc choices dictated by the empirical observation of structural tendencies in the political process rather than supported by a coherent and comprehensive normative lawmaking design. The plea for introducing limits to policy outcomes in the constitution contradicts his rigorously neutral proceduralism and demonstrates the limited prescriptive power of his constitutional framework.

[15] One could interpret Buchanan's theory as involving a plea for detailed rules in the constitution and against the use (or abuse) of constitutional principles, which can be perceived as weakening the constitution's normative force. However, this would make Buchanan's position even weaker. In fact, the indeterminacy of the constitutional principles is often the best protection against the obsolescence of the constitutional text. In this sense, principles can be seen as protecting and reinforcing the normativity of constitutions (see Pino 2011).

[16] Future research should be directed toward incorporating into the constitutional political economy framework a more nuanced account of the institutions of the judicial system. Based on the growing recent empirical literature concerning the incentive structure embedded in the judicial organization (e.g., Amaral-Garcia et al. 2009; Epstein et al. 2013; Epstein and Knight 1997; Sunstein et al. 2007), constitutional political economy should address the issue of what institutional arrangements could change those incentives in view of promoting individual liberty.

6 Generality as an Illusionary Promoter of Liberty

Buchanan proposes the principle of generality of law as one major feature protecting individual liberty against coercive governmental intrusion in the private sphere (Buchanan 1993a, b, 1997a; Buchanan and Congleton [1998] 2003). The introduction at the constitutional level of a generality norm would constrain lawmakers to enact laws that are *equally applicable* to all members of society and to refrain from making laws that apply selectively to specific persons or groups. Buchanan and Congleton [1998] 2003) state that generality "constrains agents and agencies of governance to act nondiscriminatorily, to treat all persons and groups of persons alike, and to refrain from behavior that is, in its nature, selective" (p. 20). In keeping with the positivistic premises illustrated above, generality introduces a purely formal constraint to lawmaking. In addition, Buchanan justifies its adoption on a strict contractarian basis. He argues that "in reflective equilibrium and behind a veil of ignorance/uncertainty, persons could never agree to the establishment of political institutions that are predicted to discriminate explicitly in their operation" (Buchanan and Congleton [1998] 2003, p. 15). A law that fails to satisfy the generality requirement will not pass the contractarian test. A closer examination of the principle, however, suggests that the generality constraint fails to act effectively as an institutional promoter of liberty. The purely formal nature of the generality norm, derived from Buchanan's contractarian and rigidly positivistic premises, undermines its effectiveness as an institutional feature conducive to liberty.

6.1 Generality and Freedom

The principle of generality does not provide any protection against intrusion into the private sphere because although generality rules out discrimination and ensures *equal* treatment across individuals in the community, it does nothing to prevent enacting rules that (although nondiscriminatory) potently intrude on the private sphere. Buchanan shows that he is aware of this limitation: "The intrusiveness or nonintrusiveness of law is not addressed by the generality or equality principle, as such" (Buchanan and Congleton [1998] 2003, p. 11). At the same time, however, he believes legal orders that pursue social purposes through coercive state interventions must *necessarily* put generality in second place to attain those purposes coercively (Buchanan and Congleton [1998] 2003, p. 13–14). Yet, ample reasons exist to conclude that the generality of law is compatible with a legal order designed to pursue social purposes, such as, for example, a socialist regime that engages in wholesale involuntary transfers of property rights (Hamowy 1961, 1971). Generality rules out *discriminatory* coercion but not coercion per se.

Examining the concept more thoroughly reveals that generality imposes an *impartiality* constraint on what constitutes legal right. In its ideal form, generality requires the law to be applied equally to *all* members of the community, thereby prohibiting lawmakers from enacting laws that apply only to specific sets or groups of people. In practice, however, legal rules often apply to specific sets of people. Lawmakers typically define *categories* of persons and implicitly provide that the law

applies equally to all persons included in those categories. In this context, generality must be interpreted as laying down the obligation to treat equally all persons who belong to a given category (Perelman 1963, p. 40; Ross 1974, p. 272). To the extent that each member *within* a given category is treated as every other member of that category, the requirement of generality is fulfilled. In this respect, generality is *formal* because it does not indicate (1) the criteria for defining the relevant categories nor (2) the treatment to be prescribed for each relevant category (Perelman 1967). By leaving (1) and (2) unspecified, generality provides a weak protection against discriminatory infringement of liberty on the part of the lawmaker.

In defining the relevant categories, the lawmaker must identify the set of *attributes* a person must possess to fall within that category. However, due to the many attributes that can be used to define categories and classify people, lawmakers are often (if not always) able to circumvent the generality constraint by contriving a set of descriptive attributes that apply exclusively to a targeted group (Hamowy 1971). As Hamowy (1971) states, "by prohibiting *certain* things from being done by anybody, the government is in a position to strike at any particular person or group by legislating against the behavior which is peculiar to that person or group" (p. 363). Therefore, imposing a generality requirement hardly protects against discrimination if the normative criteria are not specified beforehand for delimiting the set of attributes the lawmaker must take into account in defining the relevant categories. According to Raz (2009), "racial, religious, and all manner of discrimination are not only compatible but often institutionalized by general rules" (p. 216). The protection of liberty is not effectively promoted by the requirement of equal application of the law; it rather requires that any differentiation among the people be motivated by placing the persons in light of certain normatively acceptable notions of equality.

Finally, categories are often defined by making reference to classes of *actions*. Here too, the legislator may impose any kind of prohibition while satisfying the generality requirement, inasmuch as the prohibition is applied equally within the relevant category. In this case, the range and nature of allowable actions (not only the range of persons to whom the prohibition applies) are important for the purposes of promoting individual freedom. Yet, the definition of the appropriate range and nature of allowable actions hinges upon prior normative specifications.

The previous considerations suggest that generality fails to effectively promote liberty unless there are suitable constraints to the presupposed category definitions. This consideration reveals another major challenge to Buchanan's theoretical framework: the criterion underlying the definition of categories is *substantive* and therefore dependent upon moral judgments. The *defining* characteristics of categories cannot be created without positing a certain scale of values. Therefore, a call for a generality constraint must presuppose the prior establishment of normative premises in light of which generality can operate. This is something Buchanan's framework cannot provide. Buchanan conceptualizes generality as a constitutional constraint; therefore, the evaluative premises of the generality requirement must be assumed to be unanimously defined at the constitutional level. As I have repeatedly emphasized, the procedural nature of Buchanan's constitutional framework means that it cannot provide useful indications on the choice of the appropriate normative criteria guiding the lawmaker's categorizations. We are therefore left with a constitutional

constraint whose effectiveness in promoting liberty hinges on the undemonstrated assumption that unanimous consent converges on useful and relevant normative criteria for defining the relevant categories.

Given the formalistic premises under which Buchanan's constitutional contract is conceived and the need for value judgments to operationalize the generality constraint, the entire discussion on generality seems to be based on an unresolved methodological dilemma. Either we want to preserve the idea of generality as an effective constitutional constraint to post-constitutional lawmaking (but then normative principles constraining the categorization exercise must be defined, which would be in conflict with positivism), or we choose to be consequent positivists (but then we must rule out the potential effectiveness of the generality constraint in any practical constitutional application). Buchanan and Congleton ([1998] 2003) are aware of the challenge.[17] Yet, the way out that they propose is not fully convincing. They assume, perhaps too optimistically, that unanimous consent will be attained on those normative specifications required to operationalize the generality norm.

An example may help to illustrate the point. Buchanan and Congleton ([1998] 2003) examine the issue of how to define equal treatment after the generality norm is applied to the distribution of the fiscal burden in view of financing a jointly consumed public good (p. 60). In this context, they argue that "persons may be deemed to be treated in accord with the generality norm when their coerced exactions in payment for sharing do not depart significantly from equality in *labor time* required to meet these exactions" (Buchanan and Congleton [1998] 2003, p. 60, emphasis added). For example, a tax scheme that requires "each person to donate the equivalent of 1 month's income for financing the jointly shared public good" would satisfy the generality norm (Buchanan and Congleton [1998] 2003, pp. 61). This simple example shows the limitations of their account of generality. First, the normative postulate underpinning this tax regime is the idea that generality is met when equal tax treatment is applied to people who have equally contributed to the shared public good, where contribution is measured in labor time. This normative underpinning is likely to become the subject of disagreement among community members, for example, regarding the notion that contribution to the public good can appropriately be measured in terms of labor time. Others may disagree on what type of labor should count toward measuring the contribution or how the differences in the nature of various labor activities should be factored into the calculation. Still others may raise the more fundamental objection that it is not one's contribution to the shared good that should be taken into account to determine tax treatment; it should rather be the varying degree of individual need for the public good, or the intensity of the individual demand as determined by a variety of socioeconomic factors. These considerations suggest that while generality requires the prior specification of normative

[17] They raise the definitional issue: "We seek a measure—a yardstick—that may be used to compare persons, one with another, as participants in political association, and, particularly, as subjects to coercion by collective authority. How does the political treatment accorded to one person compare with that accorded to another, and especially as we recognize that persons differ in their capacities as well as their preferences?" (Buchanan and Congleton [1998] 2003, p. 59).

value judgments in order to be operationalized, constitutional unanimity on these normative specifications may be difficult to attain. Furthermore, after agreement on the categorization criteria is reached, there is no assurance that the fiscal burden would be reasonable from the perspective of liberty. Buchanan and Congleton ([1998] 2003) make the example of a tax of $10,000 imposed on a person earning $120,000 annually and a tax of $1000 on a person earning $12,000. However, the generality constraint would be equally satisfied by a tax regime imposing a tax burden equal to 5 months of income (i.e., a tax of $50,000 imposed on a person earning $120,000 annually and a tax of $5000 on a person earning $12,000). This suggests that in order to constrain the post-constitutional lawmaking effectively, some form of reasonable standard of lawmaking should complement the principle of generality (Melkevik 2016). However, this would be in conflict with the categorical distinction between choice of rules and choice within rules that lies at the core of Buchanan's framework. The reasonable standard of lawmaking would entail a shift of a significant portion of substantively unconstrained decision-making power on judges.

6.2 Generality and Rent-Seeking

Another important aspect of Buchanan's conception of generality warrants discussion. When viewed from a public-choice perspective, generality pertains to the extent of the spectrum of *interests* legislators must have in mind when creating the rule. Requiring legislators to address the generality of the people subject to the law, rather than focusing on a narrow set of interests, engenders greater uncertainty regarding the personal impact of legislation. This makes it more difficult to identify the winners and losers associated with a given lawmaking outcome *ex ante*. This way, general rules reduce the incentives to promote involuntary transfers of wealth to groups of organized minorities. Furthermore, the introduction of a generality constraint reduces the size of the outcome set attainable by majoritarian post-constitutional lawmaking, thereby reducing the rent-seeking efforts by interest groups. Although this analysis of generality is useful, it suffers from methodological limitations that trace back, once again, to Buchanan's conception of lawmaking. Buchanan's tendency to equate law and legislation prompts him to provide a single-institutional analysis of generality (Komesar 1994). He focuses on generality as a constraint *only* on legislation, without engaging in a comparative institutional inquiry into what legal source would be better suited to effectively enforce the generality of law.[18] As such, he fails to realize that adjudicative processes often ensure greater generality of rules compared to legislation, as judges are subject to different types of institutional constraints than politicians.

Unlike legislators, judges are confronted with logical rather than political limitations.[19] Logical constraints tend to be more severe, and judicial decisions are circumscribed by logical consistency requirements. The procedural rules regulating the adjudication process are specifically designed to induce logically consistent legal decisions

[18] In *Politics by Principle,* Buchanan and Congleton (1998) connects *stare decisis* with generality (pp. 12–13), but he does not engage in a comparative institutional analysis.

[19] Obviously, political considerations do inform judicial reasoning.

rather than produce acts of will (MacCormick 1994). Furthermore, the doctrine of precedent requires judges to make decisions that are consistent with earlier decisions in similar cases. This involves a balancing of reasons within the context of the facts of the case (Horty 2011; Lamond 2005). Somewhat paradoxically, the fact-specific nature of the case-by-case decision-making process encourages courts to adopt a higher degree of generality in the production of law than broader constitutional rules do when legislators create law. Epstein (1982) has convincingly argued that "the systematic demand for formal generality and neutrality in the common law" (p. 1719) provides effective institutional barriers against the wealth redistribution through the manipulation of common law rules. He also observes that "the ability to work substantial transfers of wealth between social classes is… severely hampered by the demand for public justification by written opinion that lies at the heart of the common law process" (Epstein 1982, p. 1719). By contrast, legislators are empowered to produce legislative rules within the larger limits of constitutional principles. As previously noted, the stringency of the constitutional requirement of generality is a function of assessments that are largely *political* in nature. As the political process is structurally inclined toward producing private divisible goods, the political nature of the generality constraint makes it inherently ineffective. Despite the generality requirements, legislators are likely to create rules that benefit narrowly focused interest groups, provide divisible private benefits, and are inadequately limited by a restraint that is political in nature (Aranson and Ordeshook 1985).

7 Unrecognized Private Legal Orderings

Buchanan's approach to lawmaking leaves no room for the emergence of legal rules through evolutionary processes. He expresses a skeptical attitude toward the idea that the spontaneous coordination principle can be applied to the realm of law (Buchanan 1977b, 2011). This perplexing attitude toward legal rules that evolve spontaneously without conscious design or intent stems from the assumption that law is an indivisible public good that can *only* be created through collective decision-making processes. This conception of law is the logical consequence of his contractarian understanding of legal institutions. Buchanan (1975a) says that "to the extent that law embodies the contractual origins… or that law may be conceptually explained on the 'as if' presumption of such origins, law-abiding exerts a pure external economy" (p. 108). However, once subjected to close scrutiny, the arguments he raises against the plausibility of efficient spontaneous legal orders again reflect his rigid positivistic conception of lawmaking. This conception prevents him from capturing the structural heterogeneity of alternative lawmaking mechanisms and from fully appreciating the comparative advantages of decentralized, evolutionary, legal orders in affording protection of liberty.

7.1 Legal Rules as Non-partitionable Goods

As previously mentioned, Buchanan's (2011) skepticism toward the operation of invisible-hand processes in the legal realm hinges on the purported *indivisible*, or

"non-partitionable", nature of law. Buchanan examines the institutional conditions under which markets generate efficient results and inquires whether these conditions may hold with respect to the private production of legal rules. The source of market efficiency lies in the presumption that in a market setting, "the existence of any opportunity for rents… will attract the attention of potential arbitrageurs who will act so as to insure dissipation of the differential opportunity" (Buchanan 2011, p. 2). This dynamic occurs under the assumption that goods and services are "partitionable", that is, susceptible to market exchange among separate consumers. Only under the partitionability assumption can entrepreneurs–arbitrageurs exploit opportunities provided by unexploited rents. However, Buchanan notes that the law exhibits characteristics of non-partitionable goods. Legal rules are both non-excludable and non-rival, as their application is generalizable to *all* members of the community. Therefore, the particularized access (to legal treatment) cannot be traded between members of the body politic (Buchanan 2011, p. 4).

Because of the non-partitionability feature of law, there is nothing in the legal realm that is "comparable to the profit-loss dynamic of the market that will insure any continuing thrust toward more desirable outcomes" (Buchanan 2011, p. 6). The structural non-partionability of legal rules (and the consequent impossibility of a market for the access to individualized legal treatment) undermines the prospects of rents that may otherwise attract legal entrepreneurs willing to invest whatever they deem differentially profitable to promote the implementation and creation of efficient legal rules. Based on these considerations, Buchanan (2011) concludes that "the analogy between the spontaneous emergence of law through case-by-case adjudication and the spontaneous emergence of resource allocation through markets is misleading" (p. 5–6).

Buchanan's emphasis on the non-partionability of legal rules suggests he fails to fully appreciate the structural differences between legislative and non-legislative processes and rules. While indivisibility is an invariant feature of legislative rules, it is not a feature of adjudicative outcomes. Judges' decisions produce *both* retrospective solutions to the particular contented issue before them *and* prospective rules applicable to future similar cases. While the holding of a decision is binding for all similar future cases, the resolution of the pending dispute produces immediate legal effects *only* between the litigating parties. This explains the persistent incentives for private actors to resolve disputes through private litigation. When the assumption of the non-partionability of legal rules is set aside, Buchanan's (2011) argument that a "thrust toward more desirable outcomes" (p. 6) is not present in the legal arena becomes groundless. He overlooks the central role of private litigants within the adjudication process in the context of private law. The adjudication process is activated by the decision of private parties to bring their case to trial. Judges only rule in *litigated* cases. Hence, the decisions of private parties to commence a judicial proceeding *select* the flow of legal matters adjudicated by judges. In this sense, the judge-made law is, to a great extent, an unintentional by-product of the type of disputes private parties are willing to litigate and bring before the courts. From this perspective, any tendency toward the efficiency of the judge-made law could be explained as the result of an "evolutionary" mechanism triggered by independent individual decisions to litigate. This is not to support the efficiency of the

common law hypothesis, but just to emphasize that Buchanan's non-partitionability argument neglects the private aspect component of judicial lawmaking (Landes and Posner 1979). Whether judge-made law exhibits a tendency toward generating efficient results remains the subject of debate.[20]

7.2 Conceptualizing the Efficiency of Spontaneously Emergent Rules

Buchanan (2011) raises a second argument against the plausibility of the analogy between spontaneous emergence of resource allocation through markets and spontaneous emergence of law by asserting that "the evolution of law… cannot be assessed against a scalar akin to that which informs observation and understanding of market order" (p. 6). While the unintentional result of participants' self-interested behavior causes markets to move the allocation of resources toward the Pareto frontier, this mechanism cannot work in the realm of the evolution of law. According to Buchanan (2011), "there is no comparable scalar for the judge who must choose among conflicting claims but who has no independently determined criterion that may be invoked" (p. 6).

The emphasis on the unavailability of a scalar against which the outcomes of the evolution of law can be assessed suggests that Buchanan's argument is shifting toward an "objective" conception of efficiency, understood as a property of outcomes independent of the voluntary exchange process. This notion of efficiency stands in stark contrast to the subjectivist understanding of efficiency that underlies Buchanan's constitutional political economy (Buchanan 1975a, 1978a, 1984). According to the subjectivist notion of efficiency, exchanges are efficient to the extent that they instantiate a consensual interaction, irrespective of their adherence to an objective scalar that is measurable by an external observer (Coleman 1988). In this view, efficiency is not associated with objectively measured properties of the outcome; it is inferred from the consensual structure of the process from which the outcome is generated. Buchanan's argument that the evolution of law cannot be assessed against a scalar akin to that which informs the understanding of the market order (i.e., the Pareto frontier) seems to propose an understanding of exchange as a

[20] The efficiency of the common law hypothesis is the subject of a large debate in the law and economics literature. See the following seminal contributions: Cooter and Kornhauser (1980), Goodman (1978), Posner (1977), Priest (1977) and Rubin 1977. For a very useful critical perspective, see Garoupa et al. (2016). Confusion must be avoided between two separate problems that are often conflated in the debate surrounding the efficiency of the common law hypothesis: (1) whether the judge-made law exhibits a structural tendency toward economic efficiency as compared to legislation, and (2) whether the common-law system possesses comparative advantages in terms of efficiency over the civil law system. The former issues focus on the comparison between two lawmaking processes (courts v legislation), while the second involves a comparison between two historically alternative forms of the judicial lawmaking process (common law vs. civil law). This paper does not take a position on either of these issues. It simply argues that one weakness of Buchanan's project is to fail to properly characterize the functioning of the judicial lawmaking, thereby failing to incorporate into his normative framework the potential comparative advantages of alternative lawmaking mechanisms. This does not automatically involve supporting the proposition neither that judge-made law is conducive to efficiency nor that common-law systems enjoy comparative efficiency advantages vis-à-vis civil law systems.

vehicle toward improved aggregate gains from exchange rather than an instantiation of consent.[21] This is problematic because by focusing on the consequentialist consideration of aggregate gains, the analysis fails to appreciate the normative organizational implications on promoting liberty.

7.3 The Neglected Role of Legal Pluralism as an Institutional Promoter of Liberty

Buchanan's (1954) public-choice scholarship provides magisterial insights into the pervasive coerciveness and uncertainty built into political lawmaking. However, even though his positive analysis fully accounts for political coerciveness, his normative framework does not afford the conceptual resources to acknowledge the potential comparative advantages (in terms of promotion of liberty) that may be associated with a number of institutional features of decentralized evolutionary legal orders. Evolutionary orders are centered on the processes of interindividual cooperation and adjudication of private disputes. In this sense, the ultimate source of law is the impersonal, *noncoercive* convergence of multiple individual claims (Leoni 1961). Although there is no guarantee that judges in a decentralized system are always (not even often) personally motivated to promote the ideal of liberty, the institutional features of the adjudication process—especially in decentralized judicial systems—may limit the judge's power to impact negatively on the development of the law. As previously noted, judges exercise their power upon the initiative of the parties to a dispute, and their decision is effective mainly in regard to these parties. In addition, judicial decision-making is circumscribed by logical consistency requirements. These limitations constrain, at least partly, the domain of judges' coercive powers. It is therefore plausible to conjecture that under certain circumstances the allocation of portions of lawmaking authority to judges may result in comparative advantages over centralized legislation in terms of promotion of liberty (Bertolini 2014, 2016; Leoni 2012; Ratnapala 2001).

Furthermore, within the classical liberal tradition, it is recognized that decentralized systems are more "robust" to the risk of catastrophic results as compared to centralized systems (Paganelli 2006). Decentralized systems are characterized by multiple decision centers; therefore, the impact of decisions tends to remain at the local level. By contrast, "with centralized decisions, consequences are global by definition" (Paganelli 2006, p. 204). Therefore, "if an error is made with a centralized decision, the entire system is affected and likely to face disasters" (Paganelli 2006, p. 204). This analytical truth applies to the relationship between lawmaking and individual liberty. While legislation can be subject to sudden, dramatic changes, change in evolutionary orders is a slow, incremental process that proceeds in response to the trial-settlement choices of private parties and within the limitations imposed by the

[21] Brennan (2012) identifies two possible ways of interpreting the normative role of exchange in the politics-as-exchange model: either as the instantiation of consensual interaction between individuals or as providing an institutional mechanism toward the overall enhancement of the aggregate gains from exchange in the market system. In the former view, the absence of coercion is crucial to exchange; in the latter view, the aggregation of gains is critical.

doctrine of precedent.[22] Because of their decentralized nature, spontaneous orders may be less easily conducive to widespread nonconsensual redistributions.

Ultimately, whether and under what conditions decentralized evolutionary legal orders prove to be effective in promoting liberty as compared to centralized enacted legal orders remains an open question that is subject to a long-lasting debate. While a general a priori response to this question may be difficult to provide, it is plausible to suggest that some degree of legal pluralism may be conducive to improvement in terms of promotion of liberty. More specifically, a carefully designed degree of polycentrism among the various sources of law (e.g., legislation, judge-made law, and private spontaneous legal orderings) could act as an institutional promoter of liberty, by optimizing the relative advantages of alternative sources of law. This raises the challenging question of how to promote (or maintain) a desirable degree of legal pluralism and what would be the proper role of constitutions in a legal pluralist setting.[23] While these remain open questions, Buchanan's exclusive focus on the *constitutional* restrictions on the power of government fails to acknowledge at all the potential role spontaneous legal orders could play in complementing his constitutional contractarian approach to the promotion of liberty (Vanberg 1994).

8 Conclusions

Buchanan's constitutional contractarianism rests on a conception of lawmaking that resembles the Kelsenian form of legal positivism in a number of important respects. This conception of lawmaking does not necessarily follow from Buchanan's commitment to normative individualism as a logical consequence. Yet, I argue, that it significantly undermines the ability of his constitutional framework to afford effective institutional protections to individual liberty. To maintain consistency with his

[22] It should be recognized that there is a close relationship between the content of the doctrine of precedent and the degree of centralization of the judicial system. In highly centralized, hierarchical systems the doctrine of precedent establishes, to a varying degree, the binding force of superior courts' decisions over lower courts' decisions (e.g., *stare decisis* in common law jurisdictions, or *jurisprudence constante* in civil law jurisdictions). While this doctrine constraints the decision-making power of individual courts or judges, it increases the stability of precedents by extending their binding force to future similar cases. This latter effect may reduce the relative advantages (in terms of promotion of liberty) of judicial lawmaking over political lawmaking. For example, by increasing the stability of legal precedents the practice of *stare decisis* increases the expected value of the rent extractable from a favorable legal precedent, thereby increasing the rent-seeking pressures associated with litigation. By contrast, in decentralized judicial systems the constraining effect of the doctrine of precedent is more limited, given that the judicial apparatus is organized around a complex system of rival courts, with overlapping and competing jurisdictions. In decentralized judicial systems, the possibility by private parties of choosing between alternative jurisdictional *fora* triggers a competition among courts with partially overlapping jurisdictions. Judicial competition limits the judge's coercive power. For an excellent discussion of the relationship between degree of centralization of judicial system and doctrine of precedent focused on the historical evolution of the US system, see Zywicki (2002).

[23] The incorporation of instances of legal pluralism into the constitutional framework involves a more nuanced notion of constitutional consent, which is not limited to consent attained in a "constitutional assembly" (real or hypothetical), but it includes consent embedded in legal principles emerged over time through repeated spontaneous adjustments and mutually compatible choices on the part of individuals.

own constitutional contractarian premises, the *only* conceivable features conducive to liberty in Buchanan's framework are those that can be conceptually derived from the unanimous agreement between individuals, who are at the constitutional level willing to restrict their own universal veto in exchange for the same willingness of other individuals. However, Buchanan's constitutional contractarianism—combined with his rigid legal positivism—affords merely *formal* constraints on the post-constitutional lawmaker. In several instances, these formal constraints are likely to amount to no restriction at all.[24]

Based on these premises, I identified four major shortcomings of Buchanan's constitutional framework that ultimately trace back to his traditional positivistic conception of lawmaking. First, Buchanan's recursive definition of legal validity closely resembles the Kelsenian conception of legal norm validity; therefore, his definition is unable to coherently justify the validity of the legal order without either falling into infinite logical regress or contradicting its positivistic premises. The inconsistencies of Buchanan's account of legal validity reflect the theoretical weaknesses of his political contractarian framework. The assumption of the existence of a basic norm conferring validity to the legal order is as difficult to justify as the assumption of an original contract preceding all social institutions. Furthermore, Buchanan's formalistic account of legal normativity is coupled with a formalistic conception of the social contract, which is conceived as resulting from a substantively unconstrained bargaining game. The veil of uncertainty and the unanimity constraints cannot assure that anything hypothetically agreed to at the constitutional level remains within the limits of liberty. This way, Buchanan's legal formalism is unable to provide a solid jurisprudential ground upon which effective institutional promoters of liberty can be established.

Second, Buchanan fails to appreciate the relevance of the distinction between constitutional principles and constitutional rules. This distinction rests on the assumption that constitutional rules are apt to provide clear, well-defined constraints on the post-constitutional exercise of legislative power. However, constitutional principles are substantively undetermined and result in delegating a large portion of unrestrained lawmaking power to post-constitutional actors. This suggests that when principles are chosen, a post-constitutional actor chooses the substantive rule without the consent of individuals affected by the choice. It would be fictitious to say that the post-constitutional choice is made *within* the constitutional rule, as there is no constitutional constraint delimiting the substantive content of the lawmaking output generated by the post-constitutional actor. The pervasive presence of principles in constitutions undermines the theoretical relevance of the categorical distinction between choice of rules and choice made within rules.

Third, Buchanan's commitment to legal generality fails to act as an effective institutional promoter of liberty. Generality requires the lawmaker to provide equal legal treatment to all persons who belong to the same category. As such, it rests on a

[24] This does not imply that a concern for liberty necessarily excludes placing independent value on constitutional consent. A combination of procedural and substantive constraints may still be regarded as a coherent institutional framework.

categorization exercise that is based on selective normative judgments concerning the defining characteristics of the relevant categories. In the absence of substantive constraints on the set of criteria available to the lawmaker for defining the relevant categories within which the generality principle operates, generality is hardly an effective protection against actions of the lawmaker going beyond the limits of liberty. This consideration poses a major challenge for Buchanan's project. Buchanan's constitutional framework is procedural in nature and cannot provide useful indications on the choice of the appropriate normative criteria guiding the lawmaker's categorizations. Furthermore, Buchanan's exclusive concern for legislation leads him to neglect the comparative advantages of judge-made law in promoting the generality of lawmaking.

Finally, Buchanan's traditional positivist account of the constitutional order fails to capture the institutional heterogeneity of the lawmaking processes, ultimately neglecting instances of legal pluralism. His focus on the constitutional constraints neglects the role that spontaneous orders can play in effectively promoting individual liberty. Furthermore, Buchanan's emphasis on the non-partionability of legal rules suggests that he fails to fully appreciate the structural differences between legislative and nonlegislative processes and rules. This leads him to ignore alternative ways though which individual consent can inform the lawmaking process outside his rigid intellectual edifice based on democratic constitutional unanimity.

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