



WORKING PAPER 2012-10-ccr

June 2012



## BUCHANAN ON FREEDOM



**Geoffrey Brennan**

*Australian National University, Australia*

*Duke University, Durham, North Carolina, USA*

*University of North Carolina-Chapel Hill, USA*



**Michael Brooks**

*School of Economics and Finance, University of Tasmania,  
Australia*



CONDORCET CENTER FOR POLITICAL ECONOMY  
UNIVERSITY OF RENNES 1 – CREM-CNRS

[www.condorcet-center.fr](http://www.condorcet-center.fr)

# **Buchanan on Freedom**

## **Geoffrey Brennan**

*Philosophy Program,  
Research School of Social Sciences,  
Australian National University, ACT 0200  
Australia*

*Political Science Department,  
Duke University,  
Durham, North Carolina,  
USA*

*Philosophy Department,  
University of North Carolina-Chapel Hill,  
Chapel Hill, North Carolina,  
USA*

## **Michael Brooks**

*School of Economics and Finance,  
University of Tasmania,  
PO Box 85,  
Hobart, Tasmania, 7001,  
AUSTRALIA*

## **Abstract**

Our object is to explicate Buchanan's conception of individual liberty and to trace its connection to the 'working themes' in his corpus-anarchy, contract, constitution, Pareto optimality, 'public choice' and so on. In doing so, we investigate a number of tensions in Buchanan's conception-between a libertarian affinity with anarchy and constitutional contractarianism; and that between procedural liberalism and classical liberalism.

**Keywords** Freedom, Liberty, Anarchy, Constitutional Contractarianism

## **JEL Classification**

D63 - Equity, Justice, Inequality, and Other Normative Criteria and Measurement,  
and

D79 - Analysis of Collective Decision-Making ; Other.

## 0 Apologia

The occasion for the current paper is the fiftieth anniversary of the publication of Buchanan and Tullock's *Calculus of Consent*. However, that work will not represent the primary object of our attention here. We shall instead be concerned with “liberty” and specifically with Buchanan’s thoughts on this subject—essentially because liberty is expressly mentioned in much of Buchanan’s work (even though, as we shall argue, his treatment of it remains tantalisingly elliptical).<sup>1</sup>

In choosing this topic, we ought to confess at the outset to an independent research agenda of our own. And it may help to locate our concerns to explain something of the nature and origins of that agenda.

One of the legacies of the behavioural economics “revolution”<sup>2</sup> has been an interest in a variety of so-called “soft” policy instruments—instruments that depend for their effects on certain systematic “irrationalities” in people’s behaviour (framing effects, anchoring biases and the like). Part of the justification for reliance on soft policies involves the claim that, in many instances, these soft policies are more friendly to liberty than their “hard” alternatives (like taxes and subsidies)—hence the idea that “libertarian paternalism is not an oxymoron”. But whether soft policies are indeed more accommodating to the requirements of liberty is a somewhat tricky question;

---

<sup>1</sup> This should not be taken as in any way denying the distinctive qualities of Tullock’s genius. It is however simply a fact that Tullock’s work is much less directly focused on liberty than Buchanan’s is.

<sup>2</sup> Just how much of a “revolution” the behavioural move represents is a debatable question. But that debate is not one we enter here.

and one that has generated its share of controversy. To analyse that question would seem to require not just a better understanding of how exactly soft policies operate (and whether indeed their “softness” is all of the same type) but also a clear conception of how liberty is properly to be understood and what exactly its requirements are. Of course, much of the latter work might be finessed if it could be shown that liberty were systematically related to other more familiar normative concepts in the economist’s kit-bag. And so the particular question of how liberty and Pareto optimality relate is one piece of this larger agenda. As it turns out, the systematic analysis of policies (and actions and institutions) in terms of a normative scheme that includes liberty *as such* as an independent value, is a demanding exercise and frankly is still in its infancy.

Buchanan is an obvious resource in this connection. Two of his books bear “liberty” in their titles—the 1975 *Limits of Liberty* and the 1977 collection *Freedom in Constitutional Contract*.<sup>3</sup> Moreover, Buchanan is clearly one of the most interesting and thoughtful exponents of the Pareto framework in modern economics. In that sense, it is natural for us to look to Buchanan’s writings to help us sort out our own ideas about freedom/liberty and how freedom/liberty fits into a broader constitutional contractarian scheme.

Even this more modest task is daunting. Buchanan’s *Collected Works* run to twenty volumes and those volumes cover only the work written before 2000. Some of Buchanan’s writings since that time have been concerned with his attitude towards and conception of liberty—and we will want to include that

---

<sup>3</sup> For the purposes of the current exercise we shall treat “liberty” and “freedom” as interchangeable terms for the same concept. Perhaps this usage does violence to certain subtleties, but we think it is obedient at least to Buchanan’s practice.

more recent material. We will deal mainly with the work that seems to us most relevant; but there is clearly a danger of omission, or misrepresentation and/or of bending Buchanan's views to suit our own prejudices. In that spirit, caveat emptor.

## **I Introduction**

If one were to ask where to locate Jim Buchanan in the standard catalogue of political positions, we think the answer would be clear enough. Certainly, he self-identifies as a classical liberal, as his most recent collection of articles (with its sub-title *The Normative Vision of Classical Liberalism*) makes totally clear. When, for example, he describes the 2002 London meetings of the Mont Pelerin society<sup>4</sup> as a “gathering of the clan” (or perhaps of the “tribe”), it is clear that this tribe is one to which he sees himself as belonging. And it is also clear that, for him, the defining feature of the “gathering” lies in its classical liberal commitments, and specifically *not* its conservative ones.<sup>5</sup>

Of course, Buchanan is a classical liberal of a somewhat distinctive stripe. For one thing, the normative position with which he is most clearly associated among those who know his work is “constitutional contractarianism”—so there is a natural question as to whether he sees this constitutional contractarianism as deriving from his classical liberalism (or perhaps vice versa). Moreover, he concedes that popular perceptions of his political commitments may diverge from how he sees them himself. As he puts it (Buchanan (2001 [1992]) p. 26):

---

<sup>4</sup> In Buchanan (2005) p. 62.

<sup>5</sup> Much of Buchanan (2005) is concerned to distinguish classical liberalism from conservatism and to allow Buchanan to identify himself firmly with the former position.

... the public's image of me ... is that of a right-wing libertarian zealot who is anti-democratic, anti-egalitarian and anti-scientific. [But,] I am... none of these things... Properly understood my position is both democratic and egalitarian, and I am as much a scientist as any of my peers in economics.

In the egalitarian connection, for example, he carries a strong distaste for second- (and later-) generation wealth—is indeed a supporter of essentially confiscatory estate duties (and presumably analogous gift duties). In a late essay, (2005, p. 101) he defines classical liberalism by reference to a ‘predisposition’<sup>6</sup> the characteristic feature of which is indeed egalitarian:

by a ‘liberal predisposition’ I refer specifically to an attitude in which others are viewed as moral equals and thereby deserving of equal respect, consideration and ultimately equal treatment.<sup>7</sup>

And he has consistently declared a “strong affinity” (Buchanan, 2005, p. 100) with the work of John Rawls and identified the Rawlsian project as close to his own “although our two efforts have been interpreted quite differently” (Buchanan, 2005, p. 100).

Taking Buchanan’s classical liberalism as given, one might expect that Buchanan’s work might begin with a clear definition of liberty and proceed to spell out the implications of that definition for institutional arrangements. But that is not how Buchanan proceeds. If some clear definition is required as to how liberty is to be understood (and measured, at least in broad comparative terms), we think it fair to say that Buchanan does not provide it. He does make strong

---

<sup>6</sup> And interestingly, not an institutional order.

<sup>7</sup> The Kantian redolence of this statement is notable and further evidence of the Rawlsian “affinity”. See Kliemt (2011) for a more extended discussion of the Kantian elements of the Buchanan project.

claims about what is *necessary* for the realization of freedom/liberty—but that is on the face of things a downstream question.

Consider, for example, Buchanan’s introduction to the collection *Freedom in Constitutional Contract* (Buchanan, 1977, p. x):

Individuals can secure and retain freedom in constitutional contract; they cannot do so in any other way. This statement summarizes my argument in this book and elsewhere. But what sort of freedom? And what kind of constitutional contract? These are relevant and important questions, but they are not answered here. Before we can begin to approach such questions, it is necessary to lay the ground rules for discourse and it is to this purpose that my efforts here are devoted.

And in a later essay in the same book (Buchanan, 1977, p. 288):

There should be relatively little dispute about the proposition that individual freedom, in any meaningful sense, is possible only under law, along with the implied consequence that the rules, “the law”, must be enforced by some collective entity, some state.

If these remarks are to be taken at face value, we think they have quite strong implications for how liberty is properly to be construed; and our aim in what follows is basically to spell out those implications. But the remarks also reveal something about how Buchanan views his own task in the analysis of freedom—a matter of “setting the ground rules for discourse”, of creeping up on the central issue of freedom somewhat indirectly.

We shall by necessity follow suit. We will here be concerned with four questions, on which we think Buchanan’s work throws interesting light:

1. Is liberty intrinsically social?
2. What is the status of ‘anarchy’ in Buchanan’s liberal scheme?
3. At the individual level, what is the relation between exchange and liberty?
4. At the collective level, what is the relation between unanimity, majority rule and liberty?



Our engagement with these questions forms the five substantive sections of this paper. Section VII offers a brief conclusion.

## **II Liberty in/through society?**

In the two quotations provided, Buchanan tells us a) that individuals *can* secure freedom through constitutional contract; and b) that they can *only* do so in that way.

It is not totally clear whether these are empirical or conceptual claims. If empirical, the idea could be that, though we might imagine individuals enjoying greater freedom in some circumstance other than “through constitutional contract”, such circumstances are simply infeasible. Such circumstances are not accessible to people of “our kind”.<sup>8</sup>

If conceptual, the idea would be that, at the basic level, freedom/liberty is intrinsically an objective to be pursued in association with others. Some normative concepts have this character—they are intrinsically relational. Equality is an example. So, perhaps relatedly, is “justice”. Imagine for example Robinson Crusoe on his island (before Friday’s arrival). We cannot speak of Crusoe acting “justly” or living under “conditions of justice”, because there is no-one to be just to—no-one with whom Crusoe’s relations can exhibit justice.

Perhaps liberty is like justice and equality in this respect—that, as it were, the properly specified *domain* of “liberty” is alternative institutional

---

<sup>8</sup> In general, Buchanan’s work is obedient to a foundational principle that the analyst should eschew all “romance” and treat people as they are (and laws as they might be). However, to the extent that the liberal order requires a significant number of individuals to hold the ‘liberal pre-disposition’ already mentioned, he seems to retreat from the ‘anti-romantic’ method.

arrangements under which the interactions between individuals exhibit the right “free” character, rather than free individuals as such. If that is so, then it raises a conceptual problem in discussing freedom in the Robinson Crusoe economy. One might think that individuals *could* be free in isolation—and indeed that Crusoe on his island is by definition free simply because he is not and cannot be coerced by any other agent. On the other hand, if non-coercive *relations* are thought of as the essence of liberty, then Crusoe cannot enjoy non-coercive relations because he enjoys no relations at all.

It is important to note that the idea of liberty as non-coercive relations rules out the idea of liberty as ‘freedom from interference’—at least unless ‘interference’ is given a thick normative interpretation. Put another way, we would need some principled way of distinguishing between ‘interference’ and ‘interdependence’ if we are to define liberty in non-interference terms. When Friday arrives to share the island with Crusoe, there becomes scope for a degree of specialisation and attendant mutual benefits from exchange. Friday and Crusoe become thereby mutually dependent: actions undertaken (or not) by Friday influence Crusoe’s well-being. If Friday decides not to go fishing on a particular day, this can leave Crusoe worse off than Crusoe would otherwise be. In that sense, Friday’s decision has “interfered” with Crusoe. In the absence of some fairly heavy duty concept like “rights”, it is not easy to see how one can distinguish between actions by Friday that reduce Crusoe’s liberty and those that do not.

When the inter-dependence is writ large—when Crusoe, Friday and thousands of others are knit together in the kind of large-scale trading nexus that Adam Smith envisages as “commercial society” [say in Ch. 1 of *The Wealth of*

*Nations*]—each individual will be dependent on “the assistance and cooperation of many thousands” for “what we very falsely imagine, [is] the easy and simple manner in which he is commonly accommodated” (1976 [1776], I.i.11). Yet precisely because each is so heavily dependent on others, he is vulnerable to changes in those others’ behaviour. So when Mr Duke contracts with the inventor of a machine that makes ‘ready-rolled’ cigarettes, he thereby renders obsolete the human capital acquired by the workers who hand-rolled cigarettes. Schumpeter was right to see that the free market order is a process of “creative destruction”<sup>9</sup>; and though the victims of that “destruction” may not have had their rights violated, they are surely made worse off. Dependence implies vulnerability to the actions of others. And if our definitions of ‘interference’ involve actions by one person that leave another worse off, then individuals are indeed “interfered with” in market process. Duke and his inventor colleague may not have violated any rules of market conduct, but between them their actions certainly leave some others worse off.

We shall have cause to return to some of the questions raised by these observations in later sections. At this point we want to offer a clarification. To say that freedom is first and foremost a property of institutions is not to deny that freedom is enjoyed by individuals. When Buchanan talks of “free institutions”, the institutions are deliverers of freedom to the individuals who operate within them, not independent bearers of freedom. A free society is one

---

<sup>9</sup> But wrong not to acknowledge Smith as the obvious source of the underlying logic. Indeed it is ironic that Schumpeter was rather dismissive of Smith’s role in the history of economic thought, since it is the “human capital” aspects of Smith’s account of markets that supplies Schumpeter with his most obvious examples of market ‘destructiveness’.

whose *subjects* are free—not one that is in, some Hegelian sense, *itself* free. Nevertheless, the individuals are connected via social structures—not isolated. In Buchanan’s view, “[e]conomics is, or should be, about individual behaviour *in society*” (Brennan and Buchanan, 1985, p. 1, emphasis added).<sup>10</sup> In this sense, we think the picture of freedom in terms of “non-coercive social relations” makes most sense of Buchanan’s position. If, as Buchanan claims, an essential feature of classical liberalism is, indeed, a disposition to see others as moral equals, then the presence of those others is an intrinsic feature of the concept.<sup>11</sup> This in itself may not tell us a great deal substantively: we still have to flesh out what is meant by coercion. But it does serve to establish that liberty is intrinsically a social concept; and that there is no one-to-one connection between liberty and independence from others.<sup>12</sup>

---

<sup>10</sup> This remark follows immediately on observations about the limits of appeals to “Robinson Crusoe” analogs.

<sup>11</sup> To say this is not to claim that sometimes securing reduced dependence among persons may not be a mechanism for securing greater liberty. What it is to deny is that securing greater independence is *prima facie* to secure greater liberty. The identification of liberty with social independence is, on this view (our own), just a mistake. And we think the best interpretation of Buchanan endorses that view. However, the case is not entirely crystal clear. In the Preface to *Limits of Liberty* he remarks that “men and women ... want to be free but... recognize the inherent limits that social interdependence places on them” [1975, p. xv], suggesting that social interdependence does indeed restrict freedom.

<sup>12</sup> To reject the Crusoe possibility in relation to liberty is to meet one aspect of Philip Pettit’s (1997) critique of conventional classical liberalism. In fact, Buchanan’s definition of the “liberal predisposition” suggests that he might be sympathetic to some aspects of Pettit’s alternative “republican” version—though to explore this possibility would carry us well beyond the scope of the current essay.

### III The Status of Anarchy

Buchanan's most extended and most explicit treatment of freedom/liberty is that developed in *The Limits of Liberty*; and the conceptual framework in that book relies heavily on a constructed contrast between anarchy and civic order. Accordingly, Buchanan's picture of the status of freedom in anarchy presents itself as a natural point from which to explore his understanding of freedom more broadly.

Buchanan offers, as a kind of point of departure, the following remark: "To the individualist, the ideal or utopian world is necessarily anarchistic in some basic philosophical sense" [Buchanan, 1975, p. 2]. Since Buchanan has in the previous pages identified *himself* as an individualist, it is reasonable to interpret anarchy as descriptive of Buchanan's *own* "ideal or utopian world" (though it is not exactly clear what work the 'basic philosophical sense' proviso is doing). Moreover, it soon becomes clear what it is about anarchy that is attractive:

This world is peopled exclusively by persons who respect the minimal set of behavioural norms dictated by mutual tolerance and respect. Individuals remain free to "do their own things" within such limits, and cooperative ventures are exclusively voluntary. Persons retain freedom to opt out of any sharing arrangements which they might join. No man holds coercive power over any other man and there is no impersonal bureaucracy, military or civil, that imposes external constraint (Buchanan, 1975, pp. 2-3).

In this situation, individuals are, so the encomium goes, entirely "free". But immediately, Buchanan proceeds to distance himself from this "ideal". Although

"the anarchist utopia" has a "lingering attractiveness", that attractiveness "must be acknowledged" to be "spurious.... Little more than casual

reflection is required ... to suggest that the whole idea is a conceptual mirage" (1975, p. 3).

*Conceptual mirage?* Buchanan's arguments are as much pragmatic as conceptual. The relevant considerations are: that individuals are extremely unlikely to exercise the forbearance that such an order requires; that despite the many arenas in which human interactions operate in obedience to rules without external enforcement, deep disputes are bound to arise in the absence of formal dispute resolution processes (with enforcement teeth) and these disputes are likely to create violence; and so on. The anarchy "utopia" will, on such grounds, predictably descend into the Hobbesian war of all against all.<sup>13</sup> As we say, these are empirical claims. However, Buchanan does hint at a more conceptual argument. The thought is that, in anarchy, it is not so much that rights are *violated* as that there *are* no rights.

---

<sup>13</sup> Recent work on the economics of anarchy suggests the possibility that there may be more order under anarchy than depicted under the Hobbesian viewpoint. Eighteenth century pirates, (see Leeson, 2009, Ch. 3 for details), for example, created constitutional contracts that created order on the high seas, at least for some. We are not aware of what Buchanan makes of such research. Perhaps one can recognise that on board the pirate ships there was not a war against all—that it is not too romantic to observe that significant amounts of order are possible without the formal apparatus of government.

But that observation overlooks the obvious point that the pirates set out to prey on the crew and resources of other ships. Freedom of entry on the part of individuals to form a pirate crew does not extend to freedom of exit on the part of the prey. In short, the order under the pirates is not a liberal order that extended to all. Nevertheless, the research does raise interesting questions. See, for example, Leeson and Coyne (2012).

Without some definition of boundaries or limits on the set of rights to do things and/or exclude others from doing things, an individual as such could scarcely be said to exist (Buchanan, 1975, p. 15).<sup>14</sup>

For someone taking an “individualist” point of departure, this is a significant claim. If rights can only be *defined* in the context of collectively agreed and enforced rules, then the whole idea of an individualist anarchic utopia is misconceived: it is somewhat akin to the fantasy that most of us pursue as children, imagining that we might have been born to other parents, without the realisation that if we had been born to other parents we would not be us!

One might have anxieties too that, in any ordered anarchy, there would be other institutions of enforcement of whatever norms happened to emerge. Regimes of strong conformity might be imposed—with the lynch mob, or the “tyranny of popular opinion” that so concerned John Stuart Mill, operating in lieu of the institutions of the law. Or perhaps in the spirit of our earlier Crusoe example, people would respond to the presence of others by self-protection, seeking out insulated islands from which all others were totally excluded. Then, individuals would not be coerced, but neither would they or could they enjoy non-coercive relationships. Life may not be quite as “poor, nasty, brutish and short” as otherwise, but it would surely be “solitary”<sup>15</sup> and as we argued earlier, liberty as Buchanan takes it to be is meaningless for the totally solitary life!

---

<sup>14</sup> For Buchanan, as he earlier puts it, “... there is really no categorical distinction to be made between that set of rights normally referred to as human and those referred to as property” (1975, p. 14).

<sup>15</sup> In Ch XIII of *Leviathan*, Hobbes refers to life in the state of anarchy as “solitary, poor, nasty, brutish and short.” For some reason, many references to this claim seem to register only the final three elements of this lamentable quintet.

In a discussion of Hobbes elsewhere,<sup>16</sup> Buchanan seems to concede to Hobbes at least one claim that we think, on his own grounds, Buchanan ought to reject. The Hobbesian proposition is that “*the state of nature affords maximal natural liberty*” (Buchanan and Lomasky, 2000 [1984], p. 381). The immediate implication, given Hobbes’ diagnosis of life in the state of nature, is that “the leap into order can be accomplished if people trade off natural liberty for security”. In this context, a definition of liberty is offered “... as the absence of constraints on the individual’s choice among options” (Buchanan and Lomasky, 2000 [1984], p. 385).

Now, taken on its face, the definition of liberty as absence of constraint is intrinsically dubious because *all choice is by necessity constrained*: if there were no constraints, choice would be unnecessary—all options would be available. The obvious response to this quibble is to see the constraint-based conception of liberty as a *metric* of liberty: the less constrained the chooser is, the more liberty she has. This notion—what we might term the “opportunity set” approach to liberty—has received a certain amount of attention in the literature on liberty measurement and some scholars seem to take it seriously<sup>17</sup>. However, it does not sit easily with the Buchanan conception as elaborated elsewhere. Nor incidentally does it support the liberty/security trade-off claim.

Consider the latter issue first. Given Hobbes’ picture (broadly endorsed by Buchanan) of how life in anarchy goes, the opportunity set confronting

---

<sup>16</sup> And in a collaboration with Loren Lomasky. See Buchanan and Lomasky (2000 [1984]), pp. 381-4.

<sup>17</sup> See Pattanaik and Xu (1990); Carter (2004); Sugden (1998; 2006); Dowding (1992); Van Hees and Wissenburg (1999).



individuals in the state of nature lies well inside that confronting individuals within a well-ordered society—even one ruled by an arbitrary despot. This indeed seems to be precisely Hobbes' point. So the idea that liberty is maximised in the state of nature—and the related idea that the leap out of the state of nature involves giving up liberty for some other valued thing (order/security/well-being)—simply cannot be sustained on the basis of an opportunity set metric of liberty. To be sure, Buchanan and Lomasky restrict the claim about maximal liberty to “*natural*” liberty—to be distinguished from “civic” liberty—but it is simply unspecified what “natural liberty” can be, other than the liberty enjoyed in the state of nature!

Moreover, elsewhere [in *Cost and Choice*, 1969, p. 54] Buchanan implicitly rejects the opportunity set metric. He argues there that a possible advantage of excise taxation over income taxation is the former may give the taxpayer “greater liberty”, in that any individual is “free” to pay the tax or not in the excise case (and more so than in the income tax case). Setting out the analytics of this case here would involve us in unnecessary complications, but it can be verified that under aggregate equi-revenue assumptions the conclusion cannot be established on the basis of opportunity set comparisons.

We think there are, in any case, good independent reasons for rejecting the opportunity set metric. As emphasized by Hayek (1960)<sup>18</sup> infringements of liberty in the political sense can only come from the actions of other humans. The opportunity set metric does not distinguish between constraints imposed by other persons and constraints *simpliciter*. It has the effect of treating, say, bad

---

<sup>18</sup> Though it has a long history in the literature on liberty and claims many distinguished advocates.

weather (surely a constraint) as an assault on one's liberty, as if the weather were, on this inclement occasion, exercising 'coercive power' over the agents subject to it. Our own inclinations strongly follow Hayek here. And we believe that in general Buchanan also follows Hayek in this.

If we do reject the opportunity set metric, might there still be some sense in which a Hobbesian state of nature *is* a situation of maximal liberty? One clear possibility here is that the interactions that characterise the Hobbesian state of nature, though they involve general mutual harms, are not *coercion*. In order to have coercion, so the thought might go, one must have prior *rights*: coercion is precisely the violation of those rights. So no rights means no coercion; and no coercion means no violations of liberty. And if there are no such violations then individuals are maximally free.

Note though that this line depends on a certain semantic obfuscation. If there are no violations of liberty in the state of nature, there are no instantiations of it either. If liberty is the enjoyment of non-coercive relations, then there is no liberty in the state of nature because non-coercive relations are conceptually impossible.

We do not want to become mired down in semantic issues here. But there is a matter of substance at stake. Do "rights" exist in the state of nature, prior to civil order, or are rights actually constructed *by* civil order? If the former, then there is a meaningful concept of 'natural liberty'; but the interactions that occur in Hobbes' state of nature will involve violations of it. If the latter, then there is a sense in which the state of nature involves zero coercion—but as we have said, it is a pretty uninteresting sense.

There is a related question as to the terms in which “rights” are conceived—whether as legal (ie instantiated in some institutional order), however exactly enforced; or as purely “moral”. Put another way, the constitutional exercise of making/choosing rules can be thought of either as *constructing* rights, or as fine-tuning and institutionally embedding them. Of course, the distinction is one of degree rather than categorical. The “moral law” might be a vague shadowy thing whose substance only becomes clear in its institutional instantiation. Or (as most scholars in the “natural rights” tradition—including Locke specifically had it) the moral law may be fairly clear and the role of laws and institutional rules is to *enforce* it.

Where in this spectrum Buchanan lies is not always clear. But we think the evidence suggests something pretty close to the constructivist end of the spectrum. Buchanan self-proclaims a kind of moral scepticism<sup>19</sup>, reluctant to offer his own (substantive) normative judgements. As he states, at the outset of *Limits of Liberty* (1975, p. 3):

Those who seek specific prescriptions of the “good society” will not find them here. A listing of my own private preferences would be both unproductive and uninteresting.

The clear implication is that prescriptions (of the good society) are essentially “preferences” and that Buchanan’s normative judgments have no more status than his (or anyone else’s) tastes for apples. There is, we think, some ambiguity here between two different distinctions that might be in play—one relating to the epistemic status of normative judgments (realist vs non-realist); and the other relating to “constitutional” vs “in-period” prescriptions. We think Buchanan tends to run these two distinctions together; and believe that the

---

<sup>19</sup> See for example the essays in *Moral Science and Moral Order* vol 17 of the Collected Works.

former is less relevant to his overall position than the latter. In any event, the insistence that “individual liberty is only possible under law” (and related quotations offered earlier) suggests the constructivist position.

However, we ought to reserve as a place-holder the possibility of two potentially different concepts—“in-period or substantive liberty” (which on our argument presupposes a *moral* theory of substantive rights); and “constitutional liberty” (under which the domain of normative evaluation concerns the processes applied for constitutional decision-making.) The weight of Buchanan’s understanding of classical liberalism is we think heavily oriented towards the latter. But whether he entirely dispenses with the former is an open question which we will want to pursue in what follows.

In order to underline the differences exposed by our interpretative exercise here, consider Figure 1, which sets out the contrast between Buchanan’s position in the *Limits of Liberty*—panel a—with the *logic* of his work on liberty—panel b. The two-panels share a common set of axes with liberty on the vertical and the degree of preference satisfaction represented on the horizontal. The status quo for an individual under a thick veil of uncertainty is represented by S and the outcome expected from the constitutional rules is suggested by C.

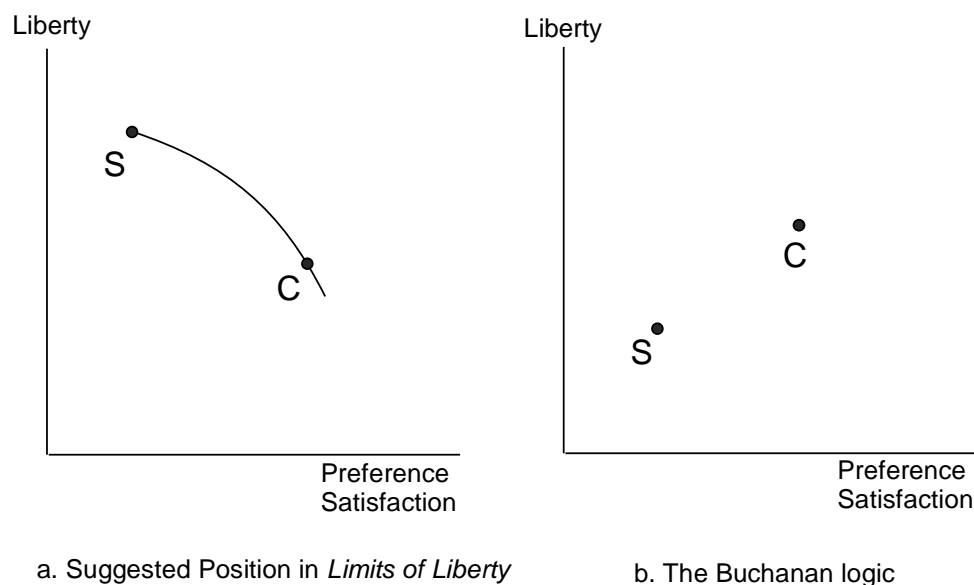


Figure 1: A Contrast of Expression and Underlying Logic

A cursory examination of the two panels suggests a stark contrast between the two lines of argument. In panel *a* there is a trade off between liberty and preference satisfaction. The notion that there is such a trade off is perhaps made no more clearly than noting that the subtitle of the *Limits of Liberty* was *Between Anarchy and Leviathan*.<sup>20</sup> Evidently, the stated line of argument in the *Limits* is that a constitutional set of rules lies between the maximal liberty of anarchy and the coercion of a Leviathan government. But our view is that it is panel *b* that represents the relation consistent with Buchanan’s account of the nature of liberty. There is no trade off—the constitutionally chosen set of rules results in the emergence of an economic order that normatively dominates the status quo on both the liberty and preference satisfaction margins. Manifestly, the two visions of the leap from anarchy are worlds apart. Of course, panel *a*

---

<sup>20</sup> It is on the public record (Brennan, 2000, p.1) that Buchanan created titles for his works with the utmost care—not any set of words would do—the title and subtitle had to capture the principal thrust of the work and do so with a certain pizzazz.

would represent the true relation between S and C if any and all government action were intrinsically coercive. But that is a position that, though hardly unknown in libertarian circles, Buchanan explicitly rejects.

#### **IV Exchange and Liberty**

For most classical liberals—and certainly the variant that inhabits the Mont Pelerin Society—market exchange is taken to be the paradigmatic case of non-coercive relations among individuals. Just what the connection between exchange and liberty is, however, is an interesting question and becomes especially interesting when viewed through Buchanan’s constitutional contractarian lens.

There are two ways in which we might view the connection between markets and liberty. One is via “instantiation”, the other via “constitutional choice”. Consider instantiation first. Most economists feel a natural affinity with Adam Smith when he remarks that, “... the obvious and simple system of natural liberty ...” is one when “[a]ll systems of preference or of restraint [are] completely taken away...”. For Smith, liberty (natural or otherwise) is realized when “[e]very man... is left perfectly free to pursue his own interest in his own way...—... as long as he does not violate the laws of justice...”. (Smith 1776 IV. ix. 51, 1976, 687). But, as Buchanan observes in “The Relevance of Pareto Optimality”<sup>21</sup>, every man *will* pursue his own interest in his own way, within the

---

<sup>21</sup> The year 1962 was a “bumper year” in Buchanan output. It saw not just the publication of the *Calculus* but also of the important “Externality” paper with Stubblebine, and this “relevance” paper in which he attempted, for the first time, to spell out the contractarian imperative for the constitutional move.

confines of whatever constraints he finds himself confronting. Therefore, the chief question arising from the Smithian position is what the laws of justice may contain. If, for example, justice were conceived in broadly Rawlsian terms and included the imposition (say) of a revenue-maximising income tax regime<sup>22</sup>, then that revenue-maximising tax would constitute no barrier to ‘natural liberty’ as Smith defines it: under that tax regime, each *would* be free to pursue his own interest in his own way, subject to the laws of justice. The worry here is that the content of justice is really doing all the work: exchange and its relation to liberty is pushed out of the picture. And in particular, depending on what justice requires and what agency is entitled to enforce it, the Smithian definition of the system of natural liberty might prove accommodating to all kinds of government “interventions”.

Buchanan’s strategy in establishing the liberty credentials of markets is structurally very akin to Rawls’. That is, he appeals to the constitutional level of decision-making where the basic institutions of society are to be chosen by unanimous consent among all citizens. It is that unanimity rule applied here where exchange makes its prime appearance. Following in the spirit of Wicksell<sup>23</sup>, the thought is that unanimity has a special relation with the Pareto criterion: whatever object of choice emerges from a process in which all affected players can exercise a veto is *prima facie* one in which all gains from exchange are exhausted. On this basis, it is the institutional choices—the rules of the game—that are endorsed unanimously at this constitutional level that possess

---

<sup>22</sup> As Phelps (1973) argues is required by maximin.

<sup>23</sup> The status of Wicksell as a Buchanan hero is legendary.

the relevant contractarian normative authority. And the institutional rules so endorsed possess that authority *uniquely*.

Consider specifically the contrast between market choices and unanimous constitutional choices. In the latter, all affected parties are given a right of veto.<sup>24</sup> In market choices by contrast, at least some affected parties effectively have no voice at all. That is, individuals who are not party to a transaction can be made worse off. It is common in the face of this possibility to make a conceptual distinction between “technological” and “pecuniary” externalities in market transactions, and a related distinction between Pareto relevant and Pareto irrelevant externalities. And we can admit that, if transactions costs were zero, all parties *would* have a voice because any affected parties could seek to compensate agents for refraining from actions by which they would be harmed. But as Buchanan takes it, the distinction between pecuniary and technological externalities—and indeed the identification of the latter in the presence of significant transactions costs—are epistemically overwhelming tasks. On this basis, the appropriate arena of contractarian norms lies at the constitutional level. If decisions about the proper scope of markets are taken at that constitutional level under conditions of unanimity, then markets to that extent carry the imprimatur of contractarian endorsement. Market exchange gains its contractarian credentials, on this view, not so much from securing Pareto

---

<sup>24</sup> In Brennan and Lomasky (2000 [1984]), a distinction is drawn between ex ante and ex post veto—and the possibility that what emerges from unanimous choice among large numbers of individuals acting collectively might not actually be “efficient”. But this is a quibble we finesse here.



optimality in each instance but because the market system is the object of unanimous choice at the constitutional level.

But of course, it is an open question just how extensive the reliance on markets will be under such a constitution. The unanimously decided rules of the game will include three elements, at least:

1. A specification of the rules for exchange and the scope of decentralized market decision-making;
2. A corresponding specification of the rules for and scope of collective decision-making; and
3. a specification of the precise property and personal rights regime on the basis of which markets and political processes will operate.

There seems to be an interesting difference between Wicksell and Buchanan here. In the Buchanan scheme these three elements are determined simultaneously and have similar contractarian status. Wicksell envisages (quasi)-unanimity to be employed for in-period political decisions about public goods supply (and taxes). But in the Wicksellian scheme, the underlying property rights system, determining the incomes on the basis of which those in-period taxes are to be levied, has to be decided at a separate and prior level. That is, the prior property rights system in Wicksell has to be “just”, but there is no presumption that the justice thereof is settled by unanimous consent under ‘veil of ignorance’ conditions. In the Buchanan scheme, however, it seems as if the questions of mine and thine—the precise details of the personal and property right law—are settled as part of the rules of the game *alongside* choices about the domain of collective decision-making and the rules by which those ‘political’ decisions will be made. Many commentators (of a free market kind) complain

that by assigning the determination of the basic property rights structure to a unanimous decision process effectively collectivizes the starting point for property rights determination. Doubtless, some move to private property will be endorsed under the conditions of constitutional choice as Buchanan envisages them. Constitutional contractors will, Buchanan believes, recognize the enormous benefits that accrue from the institutions of private property and will, behind the veil of ignorance, seek to maximize those benefits. But the agreements they secure will take place from a position of equal standing. In that sense, Buchanan's classical liberalism is an expression not just of a disposition towards "moral equality": the institutional decisions are drawn from a fundamental position of equal standing—albeit equal standing in a context, by stipulation, of considerable ignorance about one's future personal location in the economic/political structure. The affinity here between Buchanan and Rawls is quite notable, even if predictions about the ultimate constitutional preferences differ.

Given that Buchanan's perspective on markets is itself constitutional, one interesting question relates to Buchanan's attitude to Coase's analysis of property rights. Coase (1960), it will be recalled, considers the question of how courts should allocate property rights in cases where there are (significant) positive transactions costs. Coase's conception of property rights is exclusively as an instrument to further exchange—and specifically not to "secure justice" (however exactly justice is construed). Coase reckons that judges should<sup>25</sup> decide cases according to the Learned Hand rule of minimising social cost—

---

<sup>25</sup> And arguably largely *do*.

allocating title to the higher-value user. Buchanan (2001 [1974]) is clearly uncomfortable with this scheme. On Buchanan's picture, the basic property rights structure is determined as a constitutional level matter, and whatever the parties to the constitution decide in relation to property rights is normatively decisive. Presumably, parties at the constitutional level will have an eye to the gains from exchange likely to be available from the entire range of transactions relevant in any class of cases and will determine property rights with such considerations in mind. But in the Buchanan view, it is the entire *class* of cases—not the particular tort case subject to judicial discretion—that is the basis of property right determination.<sup>26</sup> And for Buchanan there is, we think, no necessary presumption that the considerations that weigh in property rights determination will be exclusively 'efficiency oriented'<sup>27</sup>. But determination of the relevant property law is for Buchanan a constitutional matter: and the role of judges is to interpret and implement the law so determined. Judges should enforce the constitutional outcome and in so doing they will administer "justice"—not seek "efficiency"! In any event, rights are a matter for

---

<sup>26</sup> This appears to be the normative framework that undergirds the line of argument employed in Buchanan and Faith (2001 [1981]), where a *general* case is made for liability as opposed to property rights.

<sup>27</sup> If, for example, there are prevailing norms about 'mine' and 'thine' that pre-exist the constitutional contract (however vague and disparate those norms might be), then these might well play a role in determining the content of the 'rights' which the constitutional contractors settle on. And certainly, the constitutional bargains will reflect the particular distribution that emerges in the Hobbesian state—even though that distribution may have no intrinsic normative authority (no authority that is beyond the fact of being the point from which constitutional bargaining begins).

constitutional determination—and once set, the role of the courts is to enforce them, independent of the efficiency implications. Following the Buchanan logic, a judge who assigned rights according to the Learned Hand rule, would in at least some cases be acting unjustly, violating the existing rights structure—and in that sense *coercing* the losing party. In other words, such judicial action would be violating the *liberties* of citizen-litigants. In that sense, in the relevant transaction-costs world, the objects of preserving liberty on the one hand and simulating market outcomes on the other, would be in tension. Buchanan supports the former; and Coase the latter.

## **V Unanimity, Majority Rule and Liberty**

We said in the previous section, that in Buchanan's constitutional scheme, there are three distinguishable elements. In the *Calculus*, the primary focus of analysis is on one aspect of the second of these elements—and specifically, the proportion of the citizenry who must agree for an in-period collective decision to be implemented. The conceptual status of unanimity at the constitutional level is indisputable; but Buchanan's insight is that unanimity is subject to a kind of self-defeatingness: unanimity as a rule for *in-period* collective decisions would be unanimously rejected at the *constitutional* level. What would be unanimously accepted depends among other things on the precise domain of collective decision-making—a more restrictive rule would apply to decisions bearing heavily on rights issues, and a less restrictive rule for decisions relating to public goods provision.

Later, in the *Limits*, Buchanan distinguishes explicitly between the “protective” and the “productive” state—the former associated with the

enforcement of the basic rights (3 above) and the latter concerned with government action under 2 above.<sup>28</sup> As Holmes and Sunstein (2000) emphasize, the protective state will require resources—so even at this level, rudiments of 2 obtrude. That is, there will have to be rules specifying the terms on which such resources can be acquired—something like a “fiscal constitution” or, more accurately perhaps, elements of the constitutional contract dealing with “the power to tax” (and perhaps the “power to regulate”).

Broadly, the considerations relevant to 2 will track the welfare economics literature on public goods, market failures and externalities. An activity will be assigned to the market if the degree of “market failure” is less than the degree of “political failure” associated with the provision of that good. In-period politics will “fail” because the relevant collective decision rule will fall short of unanimity—because at the in-period level there are very significant ‘transactions costs’ in forming unanimously acceptable proposals. But markets will also fail and for much the same reason—because there are significant transactions costs in organising contracts to which all citizens are effectively party. Politics and markets, on this picture, are alternative ways of organising exchange and the institution that does better in a particular case is the one to which that activity

---

<sup>28</sup> It might be thought that research in the new institutional economics, which finds that exchange relationships occurred without the formal apparatus of government, disproves the need for a protective agent, at least in the domain of market exchange. Not so. All it shows is that *some* trade could be governed by the trade associations.

should be assigned.<sup>29</sup> In some ways, the language of “failure” here is unhelpful, because the benchmark against which “failure” is measured is an infeasible benchmark in both cases. Constitutionally viewed markets and politics are equally exercises for the pursuit of gains from exchange: or to put the point in Rawlsian terms, society is a “cooperative venture for mutual advantage”<sup>30</sup> whether one has its political or its market operations in sight. And if the constitutional compact *is* consistent with the requirements of unanimity at that level<sup>31</sup>, then *neither market process nor political process involves a violation of liberty*. Property rights themselves and exchange on the basis of them are *optimally* protected via the unanimously constructed constitutional rules. What is optimal here involves something that falls short of what would be ideal if, say, transactions costs were zero—there will be majoritarian interventions that would not occur in an ideal world. There will be market transactions that reduce aggregate preference satisfaction and some activities that would involve benefits for everyone that will not be pursued. And there will be explicit violations of the

---

<sup>29</sup> The point applies generally and not just to questions of welfare failures—if there is liberty that has coevolved under the natural equilibrium, then a proper comparison of relevant alternatives (perhaps with in-period liberty in a democratic setting) would have to take that fact into account.

<sup>30</sup> In *A Theory of Justice* (1972, p. 4).

<sup>31</sup> The astute reader will detect a shift of position in this formulation. It is one thing for the constitutional order to be the object of explicit unanimous choice—something that can presumably be observed— and another for it to be “consistent with the requirements of unanimity” which sounds like an analytic requirement waiting to be explicated by the social scientist/philosopher. There is of course a well-known critique of the entire “social contract” tradition based on just this issue. Neither Buchanan nor we have anything to contribute to this critique.

rules that it will cost too much to determine and rectify. But within all that “failure”, the in-period outcomes will over the long haul be not only the best that can reasonably be expected, but also involve individuals living with the most liberty that this world offers.

But of course, things are quite otherwise if the constitution is *not* chosen under unanimity at the constitutional level. And one way of interpreting the Buchanan agenda (both in the *Calculus*, with Tullock, and in other works, some of them in other collaborations) has been to indicate general considerations why it seems implausible to think that the *actual* constitution satisfies this unanimity test. So, for example, in the *Calculus*, the claim is that the widespread use of simple majority rule for collective decisions flies in the face of the recognition that simple majority rule is but one possibility among many—and one with no obviously compelling features. The failure of most constitutions to specify the dividing line between political and market processes effectively assigns to in-period political process the power to settle that issue for itself, with perhaps predictable biases. The failure of most constitutions to include clear rules for the terms on which resources can be appropriated by the fisc—effectively assigning to majority rule decisions on taxing procedures that ought to be determined by relative unanimity—seems a clear violation of constitutional contractarian requirements. And so on. In such cases, the in-period rules can be said to be illiberal.

Accordingly, Buchanan is able to identify within the prevailing order lots of scope for violations of liberty, as he conceives the notion, where the process or lack thereof provides the dividing line between constitutional and in-period liberty. Of course, as he himself claims, he has no privileged view as to what

would emerge from a genuinely unanimous constitutional contract. As viewed through his paradigm diagnosis is merely a set of suggestions—observations of the kind: surely, this, and that, feature of the way we operate sits oddly with what we would plausibly agree to in constitutional contract? Surely, this particular outcome is an instance of coercion—a violation of liberty—viewed through the constitutional contractarian lens?

Whether in the real world there is any necessary presumption that such violations of liberty (rights violations under a non-optimal constitution) are more likely to occur in political process than in market process is an open question. Perhaps so. But it is to be emphasized that the benchmark that Buchanan offers—his own version of a ‘feasible utopia’—is a rather abstract animal. Ultimately it depends on the values and preferences and beliefs (about the world and about institutional operations) that ordinary people carry into the constitutional process with them. In his scheme, the ‘classical liberal’ elements appear in terms of the insistence that the constitutional determination process must secure agreement from all affected parties. Beyond that requirement, everything else is ultimately just whatever emerges.

## **VI Constitutional Reform?**

Of course, what individuals will choose in their constitutional deliberations depends on their beliefs about the working properties of market and political processes under various specifications. And the vast bulk of Buchanan’s work has been devoted to giving an account of those working properties. But it is a central part of our message in this paper that he has done so with an eye to institutional effects on preference satisfaction—not with an eye to liberty.



Liberty has entered the normative scheme at the more abstract level of specifying the requirements of constitutional decision-making.

We want to close our discussion with some observations about Buchanan's remarks on "reform".

First, a general point. When Buchanan talks of the constitution, it is in the spirit of formal Constitutional documents—at least in one important sense. Alternative "constitutions" are for Buchanan explicit objects of choice—and it is important for his scheme that they be so. They cannot be unwritten codes that have merely evolved and remained exempt from explicit endorsement. And yet, at many points—often in final chapters, when the issue of "policy upshots" is in view—what emerges is something else: a plea for a new (or renewed<sup>32</sup>) 'constitutional awareness'. Recall in this connection, Buchanan's presentation of classical liberalism, with which we began, with its emphasis on a specific "predisposition." There is an interesting question as to whether such awareness or predispositions, or "civic religions", as in Brennan and Buchanan (1980), are matters of choice in any ordinary sense. Presumably, for example, people view others as moral equals not out of an act of explicit collective choice, but because that view is normatively compelling.

In discussing what can be done to ensure the viability of the liberal order, Buchanan (2005, p. 19) claims that "[m]an must be educated, both in ethics and in political economy...". Presumably a collective decision will be taken on the

---

<sup>32</sup> The distinction between "new" and "renewed" here is interesting. The picture often suggested by Buchanan is of an earlier period in US history when the 'constitutional consciousness' was more vibrant than currently. The constitutional 'revolution' is often described as an exercise in rediscovery.

lesson that can be taught. The nature of the institutions that best give expression to that predisposition and the processes by which such institutions are appropriately selected may be issues of intellectual persuasion and ‘reasoned speculation’. But it is not obvious that the underlying ethical impulse is appropriately modelled as an exercise in broadly rational choice. That impulse seems better thought of as given to us by evolution and history.

Relatedly, there is something of a tension in the Buchanan scheme that can be perhaps best seen by considering the following scenario. Suppose a group of individuals come together under the veil of uncertainty and in fact manage to unanimously agree on this or that rule. One might be inclined to claim that all is well and good—individuals were free to veto any proposal and if there is an agreement then the Pareto criterion and constitutional liberty have been instantiated. But suppose that many of the individuals at the forum are of a conservative disposition and create hierarchical rules, under which individuals are not treated as moral equals. If constitutional liberty is just a matter of the instantiation of unanimous decisions, then one would seem hard-pressed to criticize this feature in the rules. On the other hand, if liberty is more than a procedural issue it must also have substantive content. Think of the issue this way. If Buchanan himself as participant in the constitutional forum has constitutional preferences over the set of rules, those ‘preferences will presumably be classical liberal ones.<sup>33</sup> But if that is so, then classical liberalism

---

<sup>33</sup> When discussing constitutional outcomes, Buchanan (2005, p. 4) raises the possibility that “... some persons ... [may] not simply place much value, if any at all, on individual liberty ...”. And goes on to observe “[c]ontinuing frustration with the apparent failure of members of the body politic to understand what seems genuinely to be in their own enlightened self-interest may

must have substantive content at the in-period level. Some in-period rules will be more coercive than others in terms of the extent to which they violate the basic precepts of the classical liberal order.

Two questions follow directly. First, what is the relation between in-period liberty so specified and preference satisfaction? They cannot be coterminous. That would be to reduce liberty to whatever people happen to want, and to rule out by fiat the possibility that they may not desire liberty.

Second, is there not an intrinsic tension between the procedural liberal and the classical liberal?

Actually, we think that there are, hovering in the Buchanan corpus, three separate notions of liberty. First, (and not necessarily in order of importance to the liberty agenda) is the procedural liberalism instantiated by unanimity at the constitutional forum. Second, there is in-period liberty, which exists at the post-constitutional stage when various agents use their power to impose outcomes under rules that are *not* consistent with the requirements of unanimity at the constitutional level. Third, there is classical liberalism, which is the substantive expression of the "... attitude in which others are viewed as moral equals and thereby deserving of equal respect, consideration and, ultimately, equal treatment" (Buchanan 2005, p. 101).

Buchanan (2005, p. 19) has recently claimed that individuals "... must be educated, both in ethics and in political economy ...". The idea that education, rather than persuasion, is appropriate to ethics sits oddly with Buchanan's

---

tempt the classical liberal either to join the ranks of those who would impose changes even in the absence of consensus or to acknowledge, with the conservatives, that a hierarchical classification, ... must be made. ... The dilemma for the contractarian classical liberal cannot be resolved."

claims elsewhere—and we do not know exactly how to interpret the claim. But education in political economy is a different matter. What exactly they need to be educated *about*, though, is an important issue. One thing they may want is to know how institutions map into future expected well-being. But another they may want is to know how alternative institutions affect their *liberty*. And here they seem more likely to have substantive than procedural liberty in mind. Unfortunately, however, we cannot see that Buchanan’s work makes much progress on that question.

One additional remark worth making is that if liberty has substantive normative value then it will actually affect the way the analytical tools should be applied by the constitutional economist.<sup>34</sup> It is common knowledge, for example, amongst the public choice cognoscenti that in the analytics of the *Calculus* decision-making costs and external costs are the essential ingredients of reckoning the ‘optimal collective-decision-making rule’. But Buchanan and Tullock’s perspective implicitly adopted the normative position that in the construction all that matters is the relative positions of the two cost curves and that costs should be minimised.

But as we have attempted to explain, participants at the forum may have moral positions over liberty (and for the record we are open to the view that they may have yet other ideals that do not mesh with the notion of preference satisfaction) that are distinguished from ‘preference satisfaction’ as conventionally interpreted in economics. And to the extent that the participants do have constitutional preferences over liberty—that consent/voluntariness in

---

<sup>34</sup> See Brennan (forthcoming) for a slightly different formulation of the argument about what ought to be counted for the purpose of designing optimal rules.

transactions plays some independent role and that coercion is a *prima facie* bad—then external costs are different from decision-making costs along the liberty dimension. Decision-making costs are made voluntarily. The citizen is generally free to opt out of participating in the political process at the post-constitutional stage. External costs are costs that are imposed on the citizen involuntarily.<sup>35</sup> It then follows that external costs should either be weighted by a liberty infringement factor greater than unity or there should be a “coercion” cost curve added to the ordinary external cost curve to reflect the full costs of in-period rules. ‘Optimal’ decision-making rules should become more inclusive than the argument in the *Calculus* suggests.

One might respond that any preference the agent has for liberty/antipathy to coercion is already embedded in the external cost curve. That Buchanan with Tullock foresaw our point when they argue that the expected external costs curve will be higher and the decision-making rule more inclusive when the domain of in-period decision making is over rights as opposed to other affairs of the state. If, however, Buchanan simply lumps antipathy to coercion into all other external costs—that coercion is just a matter of measuring the expected costs to the agents at the forum—then liberty has no independent normative status from other matters conventionally interpreted under preference satisfaction category. But for the classical liberal, liberty is not just a matter of preference satisfaction. The fact that individuals may be ‘willing’ to sell themselves into slavery will not be decisive in dissuading the classical

---

<sup>35</sup> We are assuming that externalities exist because transactions costs are positive. In such a setting individuals will use political resources to capture other agents’ resources and the interaction is coercive.

liberal that the enforcement of such arrangement is anything but illiberal. The protective state cannot use its resources to enforce a contract, even one voluntarily agreed to, that prevents the slave's ability to exit without losing its claim to be part of the liberal order. And if that is so, the classical liberal will not be content with a mere adding up of the expected costs the participants expect to bear under various rules.

### **VII A Tentative Summing Up<sup>36</sup>**

The Buchanan project is a normative project. Unlike many economists who conceive their enterprise as essentially a science, Buchanan has always viewed his enterprise as halfway between true science and art;<sup>37</sup> as he puts it (2001 [1992], p. 22):

The social science works in the hope that improvement in the processes of social interaction will emerge upon agreement both on diagnosis and on effective reform.

And though Buchanan has sometimes been reluctant to own the normative element, almost all commentators see it and remark upon it. Of course, his normative project involves a substantial amount of purely positive analysis—

---

<sup>36</sup> As we indicated elsewhere, Buchanan's writings are extensive and wide ranging. In this paper we admit that we have not been able to follow or comment on all of the trails marked by Buchanan's various observations, some quite extensive, on the matter of liberty. We think we have raided the obvious works. Nevertheless, our final remarks should be interpreted as a speculative summary for the simple reason that there is no reason to believe that Buchanan has finished with the topic himself.

<sup>37</sup> See for example the essay "From the Inside Looking Out" where this distinction is explicitly explored and Buchanan's conception of his own location within it clearly stated.

shrewd observation and substantive theorising. But the core commitments to individual liberty and a preoccupation with “precepts for living together” (Buchanan 1975, p. xv) are never far from view.

Our object in this short piece has been to explicate Buchanan’s conception of individual liberty and to trace its connection to the ‘working themes’ in his corpus—contract, constitution, Pareto optimality, ‘public choice’ and so on. Buchanan has not been interested so much with developing a clear definition of liberty—perhaps he sees that task as being one for the (appropriately informed) philosopher. But he has been concerned to see how individual liberty might be given institutional expression—how it might be thought of within a broad constitutional scheme, in which the relations between individuals are governed by free exchange among moral equals. Unfortunately, the focus of his attention in this respect has been rather *too* constitutional to provide much help to anyone interested in the ways in which institutions or policies bear on substantive liberty. The requirement of free exchange among moral equals remains in his approach a feature of relations among *constitutional contractors*. There remains the question of whether that is enough to satisfy the requirements of classical liberalism, substantively construed.

## References

- Brennan, G. (2000). Onwards and upwards: James Buchanan at 80. *Public Choice*, 104, 1–18.
- Brennan, G. forthcoming. Politics as exchange. *Public Choice*, Special Issue.
- Brennan, G. and Buchanan, J. M. (1980). *The power to tax: Analytical foundations of a fiscal constitution*. Cambridge: Cambridge University Press.
- Brennan, G and Buchanan, J. M. (1985). *The reason of rules: Constitutional political economy*. Cambridge: Cambridge University Press.
- Brennan, G. and Lomasky, L. (1984). Inefficient unanimity. *Journal of Applied Philosophy*, 1, 151-63.
- Brennan, G. and Lomasky, L. (1993). *Democracy and decision: The pure theory of electoral preference*. Cambridge: Cambridge University Press.
- Buchanan, J. M. (1999[1962]). The relevance of Pareto optimality. *Journal of Conflict Resolution*, 6, 341-54. Reprinted in *The collected works of James M. Buchanan: Volume 1. The logical foundations of constitutional liberty*. (pp. 210-29). Indianapolis: Liberty Fund.
- Buchanan, J. M. (1969). *Cost and choice: An inquiry in economic theory*. Chicago: Markham Publishing Company.
- Buchanan, J. M. (1975). *The limits of liberty: From anarchy to leviathan*. Chicago: University of Chicago Press.
- Buchanan, J. M. (2001 [1974]). Good economics—bad law. *Virginia Law Review*, 60, 483-92. Reprinted in *The collected works of James M. Buchanan: Volume 18. Federalism, liberty, and the law*. (pp. 327-37). Indianapolis: Liberty Fund.



- Buchanan, J. M. (1977). *Freedom in constitutional contract*. College Station: Texas A&M Press.
- Buchanan, J. M. (2001 [1992]). From the inside looking out. In M. Szenberg. (Ed.) *Eminent economists: Their life philosophies*. Cambridge: Cambridge University Press, 98-106. Reprinted in *The collected works of James M. Buchanan: Volume 19. Ideas, persons, and events*. (pp. 18-27). Indianapolis: Liberty Fund.
- Buchanan, J.M. (2005). *Why, I, too am not a conservative: The normative vision of classical liberalism*. Cheltenham: Edward Elgar.
- Buchanan, J.M. and Faith, R. (2001 [1981]). Entrepreneurship and the internalization of externality. *Journal of Law and Economics*, 24, 95-111. Reprinted in *The collected works of James M. Buchanan. Volume 17. Moral science and moral order*. (pp. 169-187). Indianapolis: Liberty Fund.
- Buchanan, J.M and Lomasky, L. (2000 [1984]). The matrix of contractarian justice. *Social Philosophy and Policy*, 2, 12-32. Reprinted in *The collected works of James M. Buchanan. Volume 17. Moral science and moral order*. (pp. 379-402). Indianapolis: Liberty Fund.
- Buchanan, J. M. and Tullock, G. (1962). *The calculus of consent: Logical foundations of constitutional democracy*. Ann Arbor: University of Michigan Press.
- Carter, I., (2004). Choice, freedom and freedom of choice. *Social Choice and Welfare*, 22, 61-81.
- Coase, R. (1960). The problem of social cost. *Journal of Law and Economics*, 3, 1-44.

- Dowding, K. (1992). Choice: Its increase and its value. *British Journal of Political Science*, 22, 301-314.
- Hayek, F. von (1960). *The constitution of liberty*. Chicago: University of Chicago Press.
- Holmes, S. and Sunstein, C. (2000). *The cost of rights: Why liberty depends on taxes*. New York: W. W. Norton.
- Hobbes, T. (1943 [1651]). *Leviathan*. London: J.M. Dent, Everymans Library.
- Kliemt, H. (2011). Bukantianism—Buchanan's philosophical economics. *Journal of Economic Behavior and Organization*, 80, 275-79.
- Leeson, P. (2009). *The invisible hook: The hidden economics of pirates*. Princeton, New Jersey: Princeton University Press.
- Leeson, P. and C. Coyne. (2012). Conflict-inhibiting norms. In M. Garfinkel and S. Skaperdas, (Eds.) *Oxford handbook of the economics of peace and conflict*. (pp. 840-60). Oxford: Oxford University Press.
- Pattanaik, P. K. and Xu, Y. (1990). On ranking opportunity sets in terms of freedom of choice. *Recherches Economiques de Louvain*, 56, 383–90.
- Pettit, P. (1997). *Republicanism: A theory of freedom and government*. Oxford: Oxford University Press.
- Phelps, E. S. (1973). Taxation of wage income for economic justice. *Quarterly Journal of Economics*, 87, 331-354.
- Rawls, J. (1972). *A theory of justice*. Oxford: Oxford University Press.
- Smith, A. (1976 [1776]). An inquiry into the nature and causes of the wealth of nations. Volumes I & II. (Eds.) R. H. Campbell and A. S. Skinner. Indianapolis: Liberty Press/Liberty Classics.

Sugden, R. (1998). The metric of opportunity. *Economics and Philosophy*, 14, 307–337.

Sugden, R. (2006). What we desire, what we have reason to desire, whatever we might desire: Mill and Sen on the value of opportunity. *Utilitas*, 18, 33-51.

Sunstein, C. and Thaler, R. (2003). Libertarian paternalism is not an oxymoron *University of Chicago Law Review*, 70, 1159-1202.

Thaler, R. and Sunstein, C. (2008). *Nudge: Improving decisions about health, wealth, and happiness*. New Haven: Yale University Press.

Van Hees, M. and Wissenburg, M. (1999). Freedom and opportunity. *Political Studies*, 47, 67–82.