

## *James Buchanan and Contractarian Anarchy*

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**Abstract:** This paper traces the normative side of James Buchanan's individualist-subjectivist-contractarian position. The literature on anarchy and radical self-governance treats Buchanan's position, and social contract theory more generally, as a rival rather than allied branch of analysis. However, I argue that Buchanan's normative position, if taken to its logical conclusion, yields conclusions commensurate with anarchy. Buchanan's theory of individual sovereignty suggests that political action is justified only to the extent that it adheres to a social contract that meets the requirements of conceptual unanimity. It also suggests individuals have the right to secede from communities they feel no longer adhere to the social contract. These beliefs form the foundation of a social contract theory deserving the label "anarchic."

**Keywords:** anarchy, Buchanan, federalism, individualism, secession, self-governance, social contract, sovereignty

*“To the individualist, the ideal or utopian world is necessarily anarchistic in some basic philosophical sense.” — James Buchanan*

## 1. Introduction

Is the contractarian political economy of James Buchanan at odds with anarchy, i.e. self-governance in absence of a sovereign? James Buchanan's own writings on the subject seem to answer a definitive “yes.” In Buchanan's (1972) analysis of the protection of property rights under anarchy, he argues that prisoners' dilemma scenarios abound. The way “out of the jungle” is through the contract theory of the state, which, in providing an external enforcer, can sustain the Pareto-superior equilibrium associated with property rights protection. He is even more explicit in his most extensive treatment of the subject, *The Limits of Liberty*. Buchanan (2000 [1975]: 5-6) acknowledges that an anarchic society, where nobody holds coercive power over any other, is a worthy ideal but cannot be realized in practice: “The anarchist utopia must be acknowledged to hold a lingering if ultimately spurious attractiveness. Little more than casual reflection is required, however, to suggest that the whole idea is a conceptual mirage... If there is even one person who thinks it appropriate to constrain others' freedom to their own life-styles, no anarchic order can survive in the strict sense of the term.” Having ruled out the possibility of “ordered anarchy,” Buchanan proceeds to elucidate his version of contractarian political economy. What follows is a delicate balancing act between the choice of rules during the “constitutional moment” wherein the enforcement and dispute resolution rights of individuals are ceded to the state, and the difficulty of constraining the state to its constitutionally-mandated activities once such power has been granted. Although Buchanan's

later writings suggest he thought the case against ordered anarchy might not be as open-and-shut as he previously supposed (e.g. Buchanan 2004, 2005), he remained a staunch social contractarian.

The modern literature on the political economy of self-governance has largely agreed that Buchanan's contractarianism (and social contract theory more generally) is a competitor to, and not reconcilable with, ordered anarchy. The response essays in Stringham (2005) and the literature surveyed in Powell and Stringham (2009) largely focus on mechanisms that enable social cooperation under the division of labor to proceed, and even flourish, without a monopoly enforcer. While the extent to which these results are generalizable is hotly debated, the conclusion of this literature with respect to Buchanan's work is clear: There is no need for a hypothesized “constitutional moment” where the rules of the game are formally set. The claim that the market process cannot be the source of its own order is, at least in certain settings, demonstrably false (Boettke 2005).

The incompatibility of Buchanan's social contractarianism and ordered anarchy affirmed above resulted from differing positive positions in political economy. But does this conclusion hold if we turn our attention to the normative side of Buchanan's works? Buchanan often described himself as a “philosophical anarchist,” a position that is evident in his sympathy with the normative vision of a radically free society. This stems from Buchanan's normative dedication to the sovereignty of the individual:

*“The justificatory foundation for a liberal social order lies, in my understanding, in*

*the normative premise that individuals are the beings who are entitled to choose the organizational-institutional structures under which they will live. In accordance with this premise, the legitimacy of social-organizational structures is to be judged against the voluntary agreement of those who are to live or are living under the arrangements that are judged. The central premise of individuals as sovereigns does allow for delegation of decision-making authority to agents, so long as it remains understood that individuals remain as principals.” (Buchanan 1999: 288)*

Buchanan’s emphasis on agreement is the normative foundation for his contractarianism, and thus the exchange of rights and duties during the constitutional moment during which the social contract is drafted. His position is noteworthy when juxtaposed with the two most popular works on society without a sovereign. Rothbard’s (1982) *The Ethics of Liberty* and Friedman’s (1989 [1973]) *The Machinery of Freedom* provide a natural rights and consequentialist defense of a society without a sovereign, respectively. Buchanan’s dedication to individual sovereignty prevents him from embracing a theory of the good external to the evaluations of individuals. Rothbard’s theory, founded on natural law that commands the assent of all based on reason, and Friedman’s, which rests on evaluation of consequences by someone external to the social process, thus are unacceptable to Buchanan.

Buchanan’s positive disagreements with these works are well-documented (Buchanan 1974, 2000 [1975]: 9), and this disagreement itself has normative implications. Rothbard assumes that the moral law will command universal assent (or else hostile actions from those who do not assent to the moral law

will be crushed by those who do), resulting in a uniform legal code across society. Friedman instead considers legal pluralism, with agreements between competing defense agencies yielding heterogeneous law. It is important to realize, regardless to what extent legal structures as envisioned by Rothbard or Friedman can actually exist, that competition in legal code provision resulting in libertarians’ vision of a free society is a hypothesis, not a conclusion.<sup>1</sup> Given this, it is worthwhile to consider to what degree Buchanan’s normative position is compatible with a free—that is, anarchic—society.

I will address this question by taking Buchanan’s normative priors of individual sovereignty and contractarianism-from-agreement and pushing them to their logical conclusion. I will not attempt any defense of these priors, instead focusing on where the logic of Buchanan’s position leads. The exercise is heavily influenced by Lomasky’s (2005) “Libertarianism at Twin Harvard” and Stringham and Zywicki’s (2011) “Hayekian Anarchism.” Lomasky’s paper, which explores the degree to which Rawls’ and Nozick’s social theories can yield the conclusions of the other, motivates my concern with examining whether Buchanan’s normative position can result in conclusions more popularly held by Buchanan’s social-intellectual “adversaries.” Stringham and Zywicki’s paper, which shows how Hayek’s arguments can be used to support conclusions Hayek explicitly rejected, provides intellectual symmetry to my attempt to separate Buchanan’s personal conclusions from the conclusions one can reach by following Buchanan’s position to its logical conclusion.

Having outlined and motivated the paper’s thesis, in the next section I will elaborate on Buchanan’s normative priors. In Section

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1 For example, people may be willing to pay more for paternalistic laws than those who oppose them are willing to pay to defeat them.

3 I discuss the federalism and exit in post-constitutional choice, showing how they can yield an anarchist social contract. In Section 4 I anticipate possible objections. In Section 5 I conclude. While I occasionally may discuss positive aspects associated with these ideas, it is only because I will use them to better elaborate the normative issues involved.

## 2. Foundations

The foundations of public choice economics and the economics of nonmarket decision making—methodological individualism, rational choice, and politics as exchange—laid down by Buchanan and Tullock (1999 [1962]) are primarily known as the “tight priors” of modern political economy. However, these premises can also be treated as the foundations of Buchanan’s normative individualism-subjectivism-contractarianism. This section explores these foundations as laid out in Brennan and Buchanan’s (2000 [1985]: Ch. 2) treatment of the normative presuppositions of constitutional political economy.

Brennan and Buchanan first make the important distinction between noncontractarian and contractarian constitutionalists (Brennan and Buchanan 2000 [1985]: 24-25). This point is crucial since the distinction highlights the authors’ commitments to individualism. For example, one could be a natural law constitutionalist, or a conservative constitutionalist. These positions would recognize the distinction between the choice over rules on the one hand, and strategic behavior within the established rules on the other. But their normative justification for the established rules of conduct arises from “right reason” in the first case, and tradition/evolutionary selection in the second. In contrast, “[t]he critical

normative presupposition on which the whole contractarian construction stands or falls is the location of value exclusively in the individual human being” (Brennan and Buchanan 2000 [1985]: 25). Any source of values external to the individual evaluator is not permitted. This core proposition simultaneously roots the individualism and subjectivism of contractarian constitutionalism.

Of course, society is made up of many individuals. If the source of value lies in the individual, how are different individuals’ values, which almost certainly will differ, to be reconciled? Privileging one individual or group of individuals over others, by virtue of their virtue, enlightenment, etc., cannot be permitted, since this implicitly abandons the subjectivism-individualism prior. Each individual, then, must be treated equally: “Consistency requires that all persons be treated as moral equivalents, as individuals equally capable of expressing evaluations among relevant options” (Buchanan and Brennan 2000 [1985]: 26). The way forward is the establishment of the basic framework of rules by unanimous consent. Individuals in equal moral standing, in laying down the rules, in effect exchange rights and privileges to arrive at the institutional framework that structures subsequent activity.<sup>2</sup>

These presuppositions are used to ground the normative legitimacy of the state. But already it is obvious that Brennan and Buchanan are using “state” in a slightly idiosyncratic manner (Brennan and Buchanan 2000 [1985]: 26). The

2 Unanimity as the ideal for establishing the rules of collective action need not extend to unanimity as the decision rule within collective action processes itself. In fact, individuals almost certainly will decide unanimously not to require unanimity at the post-constitutional stage, given such a requirement necessitates high decision-making costs (Buchanan and Brennan 2000 [1985]: 32; see also Buchanan and Tullock 1999 [1962]).

normative foundations of their politics-as-exchange paradigm legitimizes institutions and practices of collective action, but their ultimate justification cannot be found anywhere other than the intersubjective agreement of the participating individuals. The state is not sovereign; nor is any of its subsidiary organizations. Individuals retain their sovereignty, and the institutions of the state must be justified by the appeal to (at a minimum) hypothetical consent.<sup>3</sup> This conception of sovereignty is, at the very least, out-of-step with much of the post-Westphalian conceptions of sovereignty, and even the narrower subset of democratic theories of sovereignty that vests sovereignty in “the people” in their collective, rather than individual, capacities.

In particular, the role that unanimity plays in the analysis distances Brennan and Buchanan’s conception of sovereignty and the state away from more familiar formulations (e.g. Brennan and Buchanan 2000 [1985]: 26). The legitimacy of the vehicle for collective action rests on the agreement of *all* parties involved at the constitutional moment. This follows naturally from contractarian priors. A contract, in order to be legitimate, requires the parties to that contract to have entered voluntarily. If the social contract, which justifies the vehicle of collective action, is to be anything other than an inappropriate metaphor, it too must be voluntarily adopted. In line with the refusal to privilege one individual or group of individual over others, the social contract must be voluntarily accepted by all.

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3 As Buchanan (2001 [1977]: 404) said in an earlier paper: “Ultimately, the social contract offers the *only* bridge between the consent of those who are governed and the possible or potential legitimacy of the entity that purports to exercise powers of governance” (emphasis added).

### 3. Enforcing the Social Contract— Federalism and Exit

The established social contract serves two related functions in Buchanan’s framework. The first is the institutionalization of predictability. Individual behavior is extremely difficult to anticipate, absent some shared social norms (formal or informal). The social contract, by specifying the particular rules that will then govern the socioeconomic “game,” enables individuals to anticipate how others will behave, which in turn enables them to reach higher-welfare outcomes. It is important to realize that, in many cases, the content of the rule is much less important than the codification of the rule, *per se*. This is the case in many social interactions characterized by coordination games, as Brennan and Buchanan (2000 [1985]: 10-16) show using the example of traffic rules. The nexus of agreement formed by the exchange of rights at the constitutional moment serves as the establishment of a formal focal point, future reference to which enables mutually beneficial exchange among individuals.<sup>4</sup>

The second function is the normative analog of the first. Since the social contract was reached (or was so conceptually, at least) via the unanimous consent of individual sovereigns, it commands normative assent for the same reason that any other contractual arrangement voluntarily entered into commands normative assent.<sup>5</sup>

Buchanan’s concerns do not end here, however. Even after an “ideal” scenario, there is the very real possibility that the institutions of collective exchange will overstep

4 Leeson (2009) demonstrates that the contractarian basis for governance, rather than being a mere analytic device, has historical relevance.

5 In “The Libertarian Legitimacy of the State,” Buchanan (1977) counters Nozick’s entitlement-distribution justification of the minimal state with his own contractarian perspective.

their bounds. The troubling possibility of an unrestrained Leviathan is a major concern of Buchanan's research agenda (see the second half of *Limits of Liberty*, for example). Buchanan is no naïve constitutional fundamentalist. He understands the social contract will not enforce itself. There are thus positive and normative concerns with ensuring that the contractually-established institutions of collective action do not overstep their intended bounds and begin working for special interests at the expense of the (individually-evaluated) welfare of all.

Since by definition there is no organization that can keep the outcomes of collective action within the initially-agreed bounds without itself being subject to capture by special interests, the enforcement of the social contract falls to those who are party to it. Buchanan's contributions to our understanding of political federalism, especially the essays late in his career, provide insight as to how he envisioned this to be achieved. Buchanan (2001 [1995]: 69) explicitly puts forth federalism as a mechanism for reducing the possibility of political exploitation, and argues in favor of a federal governance structure during the constitutional moment. Buchanan has in mind constitutional provisions that severely restrict the central government's "domain of action" (Buchanan 2001 [1995]: 70). The central government would be strong enough to prevent the several local territories from enacting policies preventing the free flow of resources across borders, but other than this would have a very limited sphere of activity.

But this is still begging the question. What exactly prevents the central government from growing beyond its constitutional limits and encroach on the territory of the several sub-polities? Buchanan's answer here is crucially important, since it provides the link between the familiar theories of contractarianism and

defenses of self-governance:

The separate states, individually or in groups, must be constitutionally empowered to secede from the federalized political structure, that is, to form new units of political authority outside of and beyond the reach of existing federal government. Secession, or the threat thereof, represents the *only* means through which the ultimate powers of the central government might be held in check. Absent the secession prospect, the federal government may, by overstepping its constitutionally assigned limits, extract surplus value from the citizenry almost at will, because there would exist no effective means of escape (Buchanan 2001 [1995]: 70-71, emphasis added).

Buchanan's defense of secession in the context of federalism is so important because he openly admits it is the only real check the sub-polities have against the central government. In the remainder of the article, Buchanan discusses the impacts of federalism in positive terms based off of the analytics of Tiebout (1956), but he is never far from the normative consideration he spells out early in the paper, i.e. the prevention of the exploitation of the citizenry.<sup>6,7</sup>

Buchanan's discussion of secession is important because it highlights the extraordinary differences arising from alternate conceptions of democratic sovereignty.<sup>8</sup> Traditional conceptions of

6 See also Buchanan (1995/1996) and Buchanan (1996) for similar arguments. The earlier piece is interesting due to the discussion in the Postscript. Here Buchanan engages in a brief dismissal of anarchy, instead arguing for the maximization of individual sovereignty. As I will argue later, this distinction is largely superficial.

7 One could think of the resulting group of decentralized polities as a network of governance "clubs." Leeson (2011) considers questions of constitutional effectiveness in clubs vs. governments. Leeson and Coyne (2012) employ a framework for comparing the efficacy of social rules with and without government.

8 I am using "democracy" in its Tocquevillian sense, meaning "self-governance" rather than the far

democratic sovereignty vest sovereignty with the undifferentiated mass of the coalition-carrying collective, typically a majority. Secession under this theory of sovereignty is either outright forbidden, or requires the explicit consent of the ruling powers-that-be. In contrast, Buchanan's conception, which vests sovereignty always and everywhere in the separate individuals party to collective action, affirms the viability and permissibility of genuine exit as a mechanism that is normatively reflective of (and positively effective in the realization of) individual sovereignty. The only consent required is the consent of those who wish to secede, achieved through whatever method the social contract stipulates.

But conceptually, how large must the subset that wishes to secede be? Given Buchanan's dedication to individual sovereignty, it seems there is only one answer consistent with his normative framework. Rothbard (2004 [1962]: 1051), in asking the question, provides the answer:

If Canada and the United States can be separate nations without being denounced as being in a state of impermissible "anarchy," why may not the South secede from the United States? New York State from the Union? New York City from the state? Why may not Manhattan secede? Each neighborhood? Each block? Each house? Each person? But, of course, if each person may secede from government, we have virtually arrived at the purely free society, where defense is supplied along with all other services by the free market and where the invasive State has ceased to exist.

The questionable viability of Rothbard's dichotomy in the final sentence aside, he has arrived at a critical insight. If it is the case that the only normative legitimacy for what we call "politics" lies within a framework of more common (and more narrow) "one man, one vote."

established rules that must, at minimum, command conceptual unanimity, and if the "right of secession down to the level of the individual" is upheld, it seems in a very meaningful sense we have arrived at contractarian conception of anarchy. Instead of being opposed to radical self-governance, the social contract—at least normatively—properly constructed becomes a mechanism by which it may be achieved.<sup>9</sup>

#### 4. Possible Objections

Several objections can be raised to the line of argument I have drawn. I will address those I perceive as the most damning here. First, and most obvious, individuals in an actual or hypothetical constitutional moment may unanimously choose to vest sovereignty in "the people," conceived collectively. In short, individual sovereigns might renounce their sovereignty. As mentioned before, this would severely curtail, if not outright eliminate, the normative justification for secession. Secession is the final plank on the bridge to contractarian anarchy; without it, contractarian anarchy falls apart.

Buchanan implicitly addresses this argument in a different context. In likening the establishment of an authoritarian social contract to a slave contract, Buchanan (2001 [1987]: 171), rejects the legitimacy of such a contract. Slavery contracts are invalid, according to Buchanan, "because [they] do not allow for a post-contract viable exit option". As such, it does not represent an acceptable exchange of rights. Individual sovereignty simply cannot be renounced.<sup>10</sup> While this

9 Despite their hostility to traditional social contract theories, de Jasay (1997, 2008) and Narvson (2002, 2008) can be read as "fellow travelers" of this line of thought.

10 Those familiar with the natural rights literature will have encountered similar arguments, although Buchanan obviously is not using natural rights as the

point is not ironclad, the implied symmetry to contracts in general (in which parties exchange titles and/or rights, frequently with contingency clauses specifying punishment for parties that do not meet their obligation(s), *but still allow parties the option to break the contract and incur this punishment*) is consistent with Buchanan's "politics as exchange" normative hard core.

Second, relationships between new and old communities post-secession are under identified. Presumably, subgroups that choose to secede have, while they were a member of the larger community, contributed to the provision of goods with some degree of publicness. How are use rights and cash flow rights to be apportioned among those who secede and those who do not? What must individuals do in large communities to accommodate those individuals in smaller, secession-generated communities? These are interesting and complicated questions, and it is likely the social contract will contain some provision for answering them. However, while questions of practicality are obviously important, they in and of themselves do not indict the contractarian-anarchic logic of Buchanan's position. An impractical alternative is, conceptually, still an alternative.

Third, asserting the viability of secession may be question-begging. Individuals declaring their independence from a community they perceive to be practicing discriminatory politics is of little use if that community can compel obedience by force. In addition to the counterargument made in the preceding paragraph, it is important to note the possibility of communities preying on each other is a concern in any realistic world (Leeson 2007). Of those who call for vesting domestic governments with sovereign authority, very few also call for the creation of an international sovereign to enforce "good" foundation for his reasoning.

behavior amongst sub-polities, although this is what the logic of this position implies if taken to its conclusion. As such, it is unclear what damage this objection can do against contractarian anarchy specifically.

## 5. Conclusion

Buchanan would probably be troubled by the conclusions reached here. Despite becoming somewhat more sympathetic to anarchy late in his career<sup>11</sup>, Buchanan never backed away from unanimity as a conceptual ideal, whose applicability to real-world politics and policy was primarily as a normative benchmark rather than an obtainable goal.<sup>12</sup> Despite this career-long antipathy, Buchanan's normative individualism-subjectivism-contractarianism can, when taken to its logical conclusions, serve as the foundation for philosophies of radical self-governance. With its foundations in individual sovereignty, collective action justified only as the result of consenting rights exchanges among several sovereign individuals, and explicitly preserved right of exit, Buchanan's take on social contract theory does much to deserve the title "anarchic." Contractarian political philosophy along Buchananian lines thus has the potential to be a complement to, rather than just a substitute for, scholarship of a free society.

In fact, it is likely that contractarian anarchy has the potential to be among the most fruitful of ideas, in terms of securing real-world change. Peter Boettke (2010: 290),

11 "As I now reflect on...anarchy, I now realize that we were perhaps too influenced by the Bush-Tullock presumption to the effect that the behavioral hypotheses used were necessarily empirically grounded" (Buchanan 2004: 268). Buchanan here is backing away slightly from his earlier, far more pessimistic conclusions on anarchy reached during the 1970's. See also Buchanan (2005).

12 Stringham (2013) provides a concise summary of this partial turnaround.

albeit in another context, has emphasized the importance of doing “rational choice as if the choosers were human, and institutional analysis as if history mattered.” We live in a post-Enlightenment world, and the imperative of subjecting fundamental social institutions to scrutiny by reason pervades the popular, professional, and academic mind. As such, Buchanan’s contractarianism fits some of the most closely-held normative priors of those Buchanan would insist must consent to the kind of society he envisioned. As out-of-favor as the ideas of strict federalism and secession are, convincing enough people that Saga-period Iceland, medieval Ireland, or the

19<sup>th</sup>-century American West represent viable blueprints for social reform is even further beyond the pale.<sup>13</sup> The most likely avenue for advancement towards the free society is through constitutional moments. Buchanan’s ideas, taken to their logical if radical conclusion, have the greatest potential to bridge the gap between radical self-governance in theory and in practice.

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13 Of course, the proper takeaway from these historical case studies is the ability of spontaneous order to resolve social dilemmas. They are not meant to be “do it yourself” kits for reform. Unfortunately, this is how most of those who hear about these cases interpret them.

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