B.J.Pol.S. **18**, 513–530
Printed in Great Britain

Review Article: Constitutional Political Economy – Agreement on Rules

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In his 1986 Nobel address, James M. Buchanan characterized his intellectual enterprise as a variant of that spelled out by Knut Wicksell ninety years earlier. Central points in this programme are that 'economists should cease proferring policy advice as if they were employed by a benevolent despot, [that] they should look to the structure within which political decisions are made,' and that they should ground their theories in the assumptions of 'methodological individualism, *Homo economicus*, and politics-as-exchange.'[1] All values, in politics as in the market, are the values of individuals. Any

> differences in the predicted results stemming from market and political interaction stem from differences in the structures of these two institutional settings rather than from any switch in the motives of persons as they move between institutional roles ... The relevant difference between markets and politics does not lie in the kinds of values or interests that persons pursue, but in the conditions under which they pursue their various interests.[2]

This is a remarkably clear and compelling introduction to the foundations of the contemporary public choice school of political economy, of which Buchanan has been a leading exponent.

Buchanan goes on to present principles that are central to his own work and that differentiate his position from those of others in the public choice school. Three are especially important. First, Buchanan says that the 'political analogue to decentralized trading among individuals must be that feature common over all exchanges, which is agreement among the individuals who participate. *The unanimity rule for collective choice is the political analogue to freedom of exchange of partitionable goods in markets.*' Second, he notes that 'Wicksell's own characterization of his proposals in terms of "justice" rather than "efficiency" suggests *the precise correspondence of these two norms* in the context of voluntary exchange.' Finally, he notes that we may find decisions on actual allocations conflictual, hence not likely to yield to unanimity, but that we may be able to reach prior, constitutional agreement on rules for subsequent, less than unanimous decisions on specific allocations.[3] This last principle Buchanan characterizes as his own original contribution to the Wicksellian approach.[4] Indeed, it is

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[1] James M. Buchanan, 'The Constitution of Economic Policy', *Science*, 236 (12 June 1987), 1433–6, p. 1433.

[2] Buchanan, 'The Constitution of Economic Policy', p. 1434.

[3] Buchanan, 'The Constitution of Economic Policy', p. 1435, emphases added.

[4] Buchanan, 'The Constitution of Economic Policy', p. 1436n.

central to his earlier work with Gordon Tullock[5] and to his most recent work with Geoffrey Brennan.[6] It is an important factual claim. The first two of these principles are clearly normative. It is the first two principles that most dramatically distinguish Buchanan's programme from that of other contributors to the public choice school, most of whom see their programme as primarily positive, not normative.

The central normative notion in Buchanan's work is agreement.[7] Agreement on an exchange implies efficiency and justice. The central device for resolving the problem of disagreement is the device of John Harsanyi and John Rawls: Buchanan supposes we reach agreements *ex ante* before we face actual decisions over such conflictual issues as how to divide the social surplus or how to levy tax burdens. For Harsanyi this leads to maximizing expected utility.[8] For Rawls it leads to the Difference Principle that maximizes the position of the worst-off class.[9] For Buchanan it leads to the selection of general or constitutional rules according to which later allocational decisions may be made. In all three, some degree of ignorance or uncertainty is supposed to make it possible for all to agree in the abstract. It is a clear and, one must suppose, annoying irony that these three theorists so radically disagree on what we, reasonable persons, would agree to.

For Buchanan, this focus on *ex ante* agreement is inherently constitutionalist for the Wicksellian reasons given above. We cannot, as theorists, deduce the best state of affairs and then simply suppose it will come to pass. Rather, we can merely deduce what kinds of results will follow from particular kinds of institutions for public decision. From such understandings, we can recommend the form of our institutions. In *The Reason of Rules*, Brennan and Buchanan say that in their 'program, the constitutionalist perspective is necessarily contractarian' (p. xiii). By this they seem to mean that in their normative recommendations on the form of rules we should adopt for making public decisions we must reach general agreement just as parties to a contract reach agreement before we can judge that the exchange to which they contract is efficient. While agreement on direct policies could not be expected to meet this contractarian unanimity test, agreement on prior, abstract rules for making policy decisions can be (pp. 27–31, 107).

To make sense of their programme, we must understand four major elements of it. These are their normative concern with agreement, or their claim that their

[5] James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (Ann Arbor, Mich.: University of Michigan Press, 1962).

[6] Geoffrey Brennan and James M. Buchanan, *The Reason of Rules: Constitutional Political Economy* (Cambridge: Cambridge University Press, 1985), pp. 27–31, 107. Page references to this book will be given in the text in parentheses.

[7] He and Brennan say, 'It is *consensus* that performs [the] basic normative function' in their account (p. 98).

[8] John C. Harsanyi, 'Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking', *Journal of Political Economy*, 61 (1953), 434–5, and 'Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility', *Journal of Political Economy*, 63 (1955), 309–21.

[9] John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

theory is contractarian; the individualist value theory that underlies their views; their constitutionalism; and the possibility that government by *Homo economicus* agents can produce collectively good results. These are the four most important elements in their constitutional political economy. They are, in the view of Brennan and Buchanan, intimately connected. In keeping with their Wicksellian public choice principles, they implicitly hold that no theory is of any interest if it cannot be implemented by *Homo economicus* agents and they hold that the only values of interest in political theory are the subjective values of individuals. With this much virtually all public choice theorists will agree. In keeping with their Wicksellian normative principles, they think the only good results are the results of agreement or, less demandingly, are results that could have come from agreement. The final important element in their programme is their constitutionalism, their claim that what we must agree to is an institutional structure for making further decisions. In one sense, I think that there is not likely to be any difficulty with this last element in the programme, although it is the element that Buchanan adds to Wicksell. This sense is that we will all want constitutional, institutional arrangements and not just policy recommendations. The only sense in which there might be difficulties with this element of the Brennan and Buchanan programme is in how they work out the constitutional arrangements. I will discuss their contractarianism, their value theory, and the possibility of implementation of a constitutional regime by *Homo economicus* agents in separate sections below. I will take up their constitutionalism only in passing and in a brief conclusion. This is in keeping with the presentation of Brennan and Buchanan themselves, who do not bring the implications of their other positions persistently to bear on their constitutionalist claims.

CONTRACTARIANISM

There are many strands of so-called contractarian political and moral theory, some of which bear too little relationship to the notion of legal contract for the purposes of regulating exchange to use this label without substantial confusion. Brennan and Buchanan clearly wish to relate their own political theory to the usual notion of contract in economics and law. Contractarian theories such as theirs are generally based on the presumption that our agreement to a particular arrangement is an important justifying ground for claiming that the arrangement is legitimate, that we are obligated under it, or even simply that it is right. It is very important that we have agreed to the arrangement before one can go on to claim that we have obligations or that there are patterns of behaviour that are wrong for us. We should keep clear with Brennan and Buchanan what kind of agreement is at issue here. When a jury reaches agreement in a trial, what they should have done is reach agreement on what is in fact the case. When you and I reach agreement in a contract, what we have presumably done is reach agreement on what we want to do that benefits us both.

What then is the function of agreement in securing a political order? Brennan and Buchanan think it is, of course, analogous to that of reaching agreement in a

contract. They cite a distinction drawn by Jules Coleman in a critique of their earlier work, a distinction between what they say Coleman 'calls epistemic and criterial usage of agreement in the definition of efficiency, or maximum value' (p. 24).[10] In actual contracts entered under the protection of the law of contracts, one of the things we – standing off to the side and judging the morality or efficiency of what happens – can generally infer is that both parties expect to be benefited by their mutual fulfilment of the contract. Hence, their entry into the contract tells us something we might not otherwise be in a position to know: it tells us what their preferences are in at least the narrow realm covered by the contract. If our moral or political theory is based on some notion of enhancing welfare, then contracts, like exchanges pure and simple, have a role in our theory because they provide evidence that welfare is enhanced. This is the epistemic function of contracts. We – again standing off to the side and judging what happens – might alternatively simply conclude that the agreement *per se* of the parties to the agreement makes its fulfilment efficient or, more pertinently for the present discussion, right or good. In this conclusion we would be invoking the criterial or semantic usage of agreement: agreement is the determinant of what is efficient, right or good in at least this narrow realm.

Brennan and Buchanan think that neither of these usages of 'agreement' is involved in their defence of contract and of the contract metaphor in political theory. 'No scale of values exists external to the trading process,' they say against the epistemic usage. 'But in the expression of individual values through which agreement is ultimately reached, the traders are not deriving values from the end state of agreement as such. Their values do not reflect feedback from the agreement itself' (p. 24).

There is a misunderstanding here, which may partly be due to Coleman's focus on the apparent equation of 'agreement' with 'efficiency' in the work of Buchanan more generally. Brennan and Buchanan assume that the epistemic function requires that there 'exist some scale of value or valuation external to the traders', in which case 'the trading process might be evaluated in terms of its success or failure in moving toward the maximum on such a value scale' (p. 24). This is asking too much. The epistemic function is fulfilled if agreement tells us *anything that is true that we did not know before and that matters.*

Contracting generally tells us a great deal that we may not otherwise know. It tells us that the signatories are likely, on their view, to be better off once the contract is fulfilled. The notion 'better' does not require a stronger notion 'best' to give it meaning. I can often be quite confident that I am better off than I was before or than I would be under certain other possible circumstances. I do not know what it would even mean to say I was 'best off' *tout court*, that is to say, in any sense that was not merely an application of the notion of 'better off' to a

[10] In the published version of the paper that Brennan and Buchanan cite, Coleman speaks of epistemic and 'semantic' usages. (Jules L. Coleman, 'The Foundations of Constitutional Economics', pp. 141–55 in Richard B. McKenzie, ed., *Constitutional Economics* (Lexington, Mass.: Lexington Books, 1984), especially pp. 146–8.)

finite set of possible states of affairs. Of five possible states, one might be best, but it need not be best in any stronger sense. In particular, there is no maximum on some value scale that I could achieve. Anyone who invokes such a maximum is confused and confusing. But if all that is demanded for agreement to serve an epistemic function in our evaluations is that it tell us relevant facts of the preferences of the parties to the agreement, then agreement *does* serve an epistemic function in the theory of Brennan and Buchanan, contrary to their reading of Coleman's criticism of their work.[11]

The contractarianism of Brennan and Buchanan is bound up with their seeming concern with rules above all. Their focus on rules is itself problematic. It is a remarkable fact that many of the new nations and of the revolutionary regimes of the twentieth century share with the United States many elements of the US Constitution and of Madison's Bill of Rights. That is to say that they share with the United States an initial body of rules on how individuals are to be treated. What many of these nations do not share with the United States or the United Kingdom or many other nations is a set of practices that government officials cannot easily override and that honour certain individual liberties, including those that are supposed to be constitutionally provided.

It is not merely rules that protect individuals in modern states, it is institutions and persons who protect them. It is conventions in the sense of Hume, conventions whose violation does not serve the interest of an occasional violator, whose profitable violation requires massive, co-ordinated opposition from many people acting together. Without support from relevant people, perhaps often in the grudging form of those unable to co-ordinate in refusing support, such rules would not be worth the paper on which they are recorded. Alexander Hamilton sensibly noted of the US Constitution that it was a 'frail and worthless fabric' in the hands of the wrong people.[12]

This problem with rules suggests a crucial problem with contractarianism in political theory. Hume argued against theories of an original contract by which government was supposedly established that they were simply false to the facts.[13] We could argue even more crucially against such theories that they are theoretically incoherent, that we cannot simply contract to abide by government. Why not? Because we cannot be forced to abide by our contract. The very

[11] Brennan and Buchanan may be making the same point when they say that 'Individuals make their evaluations ... only as the trading process takes place, and, without trade, there could be no means of determining what value is at all' (p. 24). The difficulty in concluding that this is their meaning is in knowing who it is who could have 'no means of determining what value is at all'. They may be saying that I have no means of determining even my own values without trade.

[12] Quoted in John C. Miller, *The Federalist Era, 1789–1801* (New York: Harper, 1960), p. 82. Many of his contemporaries must have ranked Hamilton's as among the least trustworthy hands around. Rossiter calls the Constitution 'only a spider's web of words' that, upon ratification, still had to be converted 'into the solid reality of a political system both operational and legitimate' (Clinton Rossiter, *1787: The Grand Convention* (New York: Macmillan, 1966), p. 299).

[13] David Hume, 'Of the Original Contract', pp. 465–88 in Hume, *Essays Moral, Political, and Literary*, ed. Eugene F. Miller (Indianapolis, Ind.: Liberty Classics, 1985; essay first published in 1748).

analogy to contract is wrong insofar as contracts require sanctions to back them. This is not to say that no contract can work without the specific application of sanctions but that the institution of contracting can work only in the shadow of a successful regime of potential sanctions. Such sanctions can come from ourselves acting spontaneously to coerce one another if necessary, as in small communal groups, or from the established organs of the state. But creating a state by agreement in order to enforce our agreement is a bootstrapping move that seems unlikely to succeed. If we believed government was actually established by such a move, we would have to wonder why it succeeded. In general, we would expect the answer to be sociological and psychological and not specifically normative, although normative considerations might motivate people and might therefore have a role in securing an agreement.

Despite their asserted contractarianism, Brennan and Buchanan share this view in part because they say that political order is antecedent to the economic order of exchange (p. 26). Of course, contracting is merely a device for extending exchanges over time when necessary to make them worth entering. As contractarians in any strong sense, Brennan and Buchanan would have to think contract antecedent to the political order that makes contract possible. Their way out here is to stipulate that it is prior agreement on *rules* that constitutes the political order and that makes subsequent agreement on partitions of goods meaningful. The prior agreement on rules must start from unanimous agreement on rules of how to establish further, more detailed rules. The possibility of such unanimous agreement, then, is a fundamentally important issue for their programme.

On this point, Brennan and Buchanan continue a theme of Buchanan and Gordon Tullock, that we must have unanimous agreement on our set of decision rules for future allocative decisions.[14] The set we might unanimously adopt might have decision rules that allow for less than unanimity (p. 27). Brennan and Buchanan grant that unanimity over actual allocative decisions is not a plausible goal. But they suppose that, because of uncertainty over their eventual applications, unanimity over these decision rules is less problematic (pp. 29, 150). On this claim they may be right. Unfortunately, however, even with all the uncertainties implicit in overarching decision rules, Brennan and Buchanan give us little reason to suppose we can reach unanimous agreement over them. If we cannot, then on their own account their 'contractarian metaphor' becomes incoherent (p. 27). Perhaps the greatest actual example of a nearly contractarian creation of government is that of the US Constitution in 1787. Of course, it was adopted with far less than unanimity and over a great deal of deep-seated opposition.

Brennan and Buchanan sensibly do not suppose that government was founded on an actual contract or unanimous agreement in this sense. But they suppose that the only way to make intellectual sense of our commitments to government is to suppose it is supported *as if* we had contracted to create it

[14] Buchanan and Tullock, *The Calculus of Consent*.

(p. 22). This is a position that requires some unpacking, which, in an unfortunate omission, Brennan and Buchanan largely neglect. They do eventually give an account of how we can be assumed to have consented tacitly to the rules of our government (pp. 103–5), even though the government may well have originated in 'illegitimate' violation of unanimous agreement (p. 22). They suppose, with Locke, that my going along with things to a reasonable extent is equivalent to my consenting to relevant arrangements.[15] Moreover, mere survival of a rule in practice gives it legitimacy: 'prevailing rules, simply by virtue of their existence, project an aura of justice' (p. 104).

I think this view is correct to some extent – essentially to the extent that the rule accomplishes a successful co-ordination on a generally beneficial way of doing things when recoordination on a supposedly superior rule would be too costly to be justified.[16] To take a clear example, consider the English rules of the road, under which the English, unlike almost everyone else in the West, drive on the left rather than on the right. One could sensibly suppose that it would be better if the English rule were consistent with that of most of Europe but also that it would be too costly to change to the continental rule. Hence, the fact that the English rule has so long been what it is makes it right to keep it that way. Most defensible laws and constitutional arrangements do accomplish beneficial co-ordination to some extent and may be justified on such apparently conservative grounds. But this is very far from the issue of whether the original constitutional arrangements are at all justifiable on contractarian terms. Moreover, the way in which this claim is compelling is that the expectations founded on extant rules and the co-ordination they permit are beneficial, which is to say that the justification for the rules is essentially utilitarian. Without genuine agreement and some deontological theory of promise keeping, it cannot be made out as a serious deontological or contractarian justification for general constitutional obligation under tacit consent.

On their own account of how difficult it is for us to know the values of anyone in actual contracting before they actually contract, that is, without their direct testimony what their values are, the need of Brennan and Buchanan for a serious discussion of tacit consent is particularly stark. They say 'there is no way the economist can define an "efficient" allocation independently of trade itself' (p. 24). This is to say that the economist has knowledge only of *revealed* efficiencies. Then how can these economists define what it is we have *tacitly* consented or contracted to?

There is so large and disputatious a literature on the question of so-called

[15] Madison's frail device is to suppose that 'assent may be inferred, where no positive dissent appears'. (James Madison, 'Letter to Thomas Jefferson, 4 February 1790', pp. 70–1 in Philip B. Kurland and Ralph Lerner, *The Founders' Constitution* (Chicago: University of Chicago Press, 1987), 5 vols, 'Volume I: Major Themes', p. 71.) The frailty of the device in his case is that it was invoked less than two years after he had struggled, in the *Federalist Papers* and in extensive politicking, against strong opposition to get the Constitution ratified.

[16] Russell Hardin, 'Does Might Make Right?' pp. 201–17 in J. Roland Pennock and John W. Chapman, eds, *NOMOS 29: Authority Revisited* (New York: New York University Press, 1987).

tacit consent that it is odd for anyone now to assert without further comment that 'the state can be legitimized "as if" it emerged contractually' (p. 22). Without serious elaboration the claim cannot be convincing. Brennan and Buchanan are bothered by the failure of others to understand and accept their views (p. 32; also see pp. xi, xiii, 33). They suppose that the problem is one of a difference in vision (p. 32). If so, their 'vision' seems rather like that of certain intuitionist philosophers who simply see the moral truth and who do not think it relevant to give supporting arguments. Of all theories, one that turns on *agreement* especially needs more than this. While the theory cannot be refuted simply by the fact that so many of us disagree *with* it, that fact does suggest some difficulty with the presumption that we would agree *to* any constitutional arrangements it supposedly commends.

VALUE THEORY

For Brennan and Buchanan the point of departure in value theory is one shared by most theorists interested in rational choice. They suppose that the only values of interest are the values of individuals and that, as a first approximation, these are the values of *Homo economicus*, the self-seeking automaton of classical and neo-classical economics (pp. 46–66). Brennan and Buchanan are not narrow-minded on this issue, however, because they do not suppose that people have no other concerns than their own interests and pleasures. Indeed, they chastise some of their 'more zealous colleagues' (p. 66) in economics for thinking that self-interest is in fact all that drives people.[17]

This is their subjectivism in value theory. Values are the values subjects have, they are not somehow objectively out there independent of valuing subjects. Brennan and Buchanan wish to take 'no resort to any source of value external to the expressed preferences of individuals who join together in political community' (p. 22). I should stipulate here that, with a caveat on 'expressed', I am in agreement with them on this point but that I cannot follow them much further, especially when they discuss the contrast between their concern with subjective values and what they think is the concern of 'noncontractarian' social theorists with objective values (pp. 34–7). The noncontractarian theorist supposedly thinks the individual seeks an objective good, 'public good' (the term is always used in scare quotes), that is not '*internally conceived*' or '*subjective* to the peson who acts' (p. 37, emphasis in original).

Here's the rub. I am a noncontractarian theorist who is concerned exclusively with values of individuals, with subjective values. I do not think it useful to suppose that what individuals seek in politics is primarily some notion of the public good, although they may do this to some extent, as various patriotic indulgences sometimes suggest they might be doing. Moreover, I think it likely that most

[17] See also remarks on pp. 101, 146. For a nearly opposite complaint that even economists object to the use of explanation from self-interest in realms other than market economics, see p. 46.

public choice theorists are noncontractarian believers in subjective value. The railing of Brennan and Buchanan against noncontractarian theorists is therefore entirely off the mark.[18]

The crucial issue between us – noncontractarian public choice theorists and Brennan and Buchanan – is how the theorist reaches a judgement of what should happen rather than of what kind of values motivate the actors. Brennan and Buchanan write, 'As such, there is no means of evaluating any end state, because there is no external standard or scale through which end states can be "valued"' (p. 45). Granting there is no standard external to the actors, we may still think there is a standard that is in large part external to me. In particular, I can meaningfully say of one state of affairs that it is better than some other if it is true that all are better off by their own standards in the former than in the latter state of affairs. This is what Brennan and Buchanan do implicitly when they invoke Pareto and Wicksell (pp. 135–7).

Typically, if I know you, I know something about your values. That is not to say that I am somehow certain of your values, merely that I am confident and that I am likely to be right in many of my assessments. Moreover, I am relatively confident about certain values of virtually everyone. At the very least I know that everyone who cares to live needs food and that having food is therefore in their interest, that not breathing dioxin is in their interest, and so on through what anyone could extend into a ridiculously long list. This bit of knowledge is so fundamentally a part of my larger understanding of the world that, if someone convinced me that this view was false in general, I would be at a loss to make any claim about much of anything. There is therefore a meaningful and philosophically respectable sense in which one can claim that one has objective knowledge of values that are subjective. Against this seemingly self-evident fact, Brennan and Buchanan repeatedly say, for example, 'that the individual has no way of knowing' (p. 78; also see p. 76) such things about others, or that, even if A wished to be altruistic to B, 'B's evaluation of B's well-being ... could not possibly influence the choice behaviour of A' (p. 36). Of this latter claim, Brennan and Buchanan say that 'The point here is a subtle one, and it is a source of much confusion' (p. 35). At least as stated, the point is surely a false one.

As a theorist I may put knowledge of your evaluation of your well-being plus relevant social scientific knowledge of how institutions and so forth work into some principle of aggregation of individual preferences and judge whether that principle does or does not generally increase or protect individual values. For some principles, the issue will be left undecided because those principles might make some better off and others worse off. This, of course, is much of the subject matter of public choice over the past generation since the time of the work of Duncan Black and Kenneth Arrow.[19] *Ex ante*, however, we may even agree that

[18] In a footnote (p. 37), Buchanan takes most credit for this railing.

[19] Duncan Black, *The Theory of Committees and Elections* (Cambridge: Cambridge University Press, 1958); and Kenneth J. Arrow, *Social Choice and Individual Values*, 2nd edn (New Haven, Conn.: Yale University Press, 1963; first published 1951).

a principle that might make some worse off is sufficiently likely to make any one individual enough better off on average to justify our choosing, on our own behalf, to go with that principle rather than with certain other principles. And, given the difficulty of going this far in making our system the direct product of the choices of all of us, we might even conclude from our general knowledge of others that this is true even though we do not have the direct testimony of all concerned that it is true. This is what social theorists generally do. Not even survey researchers, who go to greater lengths than anyone else in the social sciences and philosophy to try to find out what individuals' interests actually are or what they actually think of various possibilities, go much further than this. Some democratic choice procedures go further in eliciting preferences, but these procedures do not directly govern very many actual policies.

Brennan and Buchanan hold that we should commit ourselves to rules rather than outcomes at the constitutional level. What sense can we make of this? A great deal, if we argue roughly as follows for, say, the rules of private property, rules particularly dear to the hearts of Brennan and Buchanan. I cannot imagine what evidence it would take to convince me that a fairly substantial regime of private property would be inferior to radical socialization of all property in modern societies. As an academic I depend heavily on books and I have invested many thousands of dollars in those I use most. Books are, oddly, one of the things in contemporary society that people seem most readily to assume are essentially in free supply and not subject to ownership. I would not try to recount the number of books I have loaned that people – honourable, decent people – have not returned. If my books are treated as free goods, imagine the hopeless condition of my university's library. From experience I have finally grown past being annoyed, appalled, or whatever at the condition of the books I borrow from that library – that is to say, those that can be found to be loaned when I ask for them. If present conditions are not ideal, however, scholarship would collapse if there were not even such imperfect rights of ownership over books. Perhaps the problem is one of socialization and without property rights we could do a better job of socializing people to take better care of what we all own together. I think that possibility is so implausible in a large society that it is not worth discussing until someone has more to discuss than a wish. It seems likely that socializing children to value what is uniquely theirs does more to socialize them to respect the interests of others than socializing them to respect what is ours together could do.

Brennan and Buchanan would presumably hold these views as well. What is the import of such views for our political philosophy? It is that we value property rights not *per se* – that is a staggeringly empty idea – but for what they do for us. What these rights do is help us prosper as individuals and therefore, taken in the aggregate, collectively. For this compelling reason, having some system of property rights is good. What we directly defend politically may be property rights rather than the good that is supposed to follow from such rights. This is one of the oldest conundrums in political theory, one that Hume and John Rawls both have understood with great clarity but that many still find confus-

ing.[20] We directly defend something that we grant is only a means, but we do so for the purpose of achieving the end to which it is a means. The greatest trick in all of this is not to lose sight of what our greater purpose is and to become blinded to any consideration other than the means. If conditions were otherwise, for example, as Hume imagines they might be,[21] it might not be so good a means to our end. We would then be foolish to adhere rigidly to it none the less as though it were the more basic concern.

Brennan and Buchanan discuss democracy in terms roughly like those of this brief discussion of a regime of property rights. Yet they claim their commitment to democracy is deontological, not consequentialist (and certainly not utilitarian).[22] They say that, 'For the noncontractarian, ... there can be no categorical difference between, say, majoritarian democracy and hereditary monarchy' (p. 44). Partly for epistemic reasons, I think democracy has a privileged status as a means in many societies. But I would not wish to assert independently of any facts that it is always better than monarchy and I can at least imagine that people were better served in many times and places by monarchy than they would have been by anything vaguely like what we count as democratic institutions today. At the very least, this is an empirical issue. Brennan and Buchanan would seem to agree when they say that, 'At base ... empirical issues determine the significance of the whole constitutional enterprise' (p. 53). If, then, they wish to argue that democracy is deontologically right irrespective of its results, and welfare be utterly damned, I am astonished. Indeed, if the only values are the values of individuals, how can one say democracy is right or wrong independently of its role as a device for securing their values *unless it is one of their values*? In most times and places before the past two centuries, democracy was not demonstrably a value of major concern to most perople. Hence, on the deontological, revealed-efficiency account of Brennan and Buchanan it cannot have been right in those times.

Why, in the account of Brennan and Buchanan, do democratic institutions have special status? Their priority is 'based on their ability to facilitate the expression of *individual values*' (p. 43, their emphasis). One is tempted to read this with querulous emphasis on *expression*. What is the value of expression in all of this? Demonstrators in the streets probably do a better job of expressing themselves politically than the rest of us do, unless we also go to the streets. But

[20] David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge and P. H. Nidditch, 2nd edn (Oxford: Clarendon Press, 1978; first published 1739–40), book 3, *passim* especially part 2, section 7, pp. 534–9; John Rawls, 'Two Concepts of Rules', *Philosophical Review*, 64 (1955), 3–32; see also Russell Hardin, *Morality within the Limits of Reason* (Chicago: University of Chicago Press, 1988), §21.

[21] David Hume, *An Enquiry Concerning the Principles of Morals*, pp. 167–323 in Hume, *Enquiries*, ed. L. A. Selby-Bigge and P. H. Nidditch, 3rd edn (Oxford: Clarendon Press, 1975; *Enquiry* first published in 1751), pp. 183–92.

[22] They say, 'The contractarian–constitutionalist position is almost necessarily nonconsequentialist and deontological. Evaluative criteria must be applied to rules or processes rather than to end states or results, at least in any direct sense' (p. 45). See also p. 100.

expression is only a means, if that. It is one among many means to getting results that match what people want. If our system of governance is not backed by draconian suppression, then the more expression there is, the more we may wonder whether our institutions are doing a good job of serving the interests of people.

Presumably their invocation of 'expression' is just an odd use of terminology. Surely somehow Brennan and Buchanan value democratic institutions because these enable individuals to *satisfy* their preferences, not to express them. Or perhaps they do not. Recall that they are concerned to avoid 'resort to any source of value external to the *expressed* preferences' of relevant individuals (p. 22, emphasis added). Moreover, as noted, they reject the epistemic role for expression of preferences, for example, as by entering a contract. Perhaps in fact it is expressions of preference rather than preferences *per se* that are ontological in their view. The role of governmental institutions is not to satisfy preferences but to satisfy expressed preferences. At first thought this might seem reasonable to some degree. After all, how is government to know of preferences that are not expressed? But in fact we all know of many preferences and interests that are not expressed. For example, we often reasonably generalize from the expressed preferences of one person to those of similarly situated other persons, although there are kinds of preferences that we would not confidently generalize. And, again, we know as well as we know much of anything that, even though they may never have expressed themselves at all on such subjects, virtually everyone 'prefers' not to breathe dioxin, not to be jailed and tortured, not to be desperately poor, and so forth. If we are going to speak freely of 'as if' contracts, we should speak even more freely of 'as if' preference expressions.

GOVERNMENT BY THE SELF-INTERESTED

How do we achieve collectively good results if we are individually self-seeking? This question has been convincingly answered for certain contexts by modern economics. The answer is Mandeville's law, that private vices beget public virtues, or, in Adam Smith's version, that it is not to the public spiritedness of the butcher, the baker and the candlestick maker that we look for the satisfaction of our needs and desires, but to their own self-interest. Madison aptly politicizes Mandeville's law into 'private rights and public happiness'.[23] Mandeville, of course, was arguing that it is not true that public spiritedness is required to make society work well, that self-seeking entrepreneurship can do the job better. Still there are allocations and actions that cannot be handled strictly through market exchange, that are often handled by government. Can we turn economic analysis back on the actions of government or must these be understood as somehow the product of other than self-interest? Brennan and Buchanan say that public choice emerged to fill a 'truly awesome gap in normative analysis' (p. 83) to answer this question of whether institutions would do what such analysis recommends. To some extent they think that public choice arguments give

[23] Madison, *Federalist*, no. 14, p. 131 in Kurland and Lerner, *The Founders' Constitution*, vol. 1.

an understanding of how government by the self-interested can work well but to some extent they also think, *contra* Mandeville, that we need norms and 'a civic religion' (pp. 146–50). I am loath to touch civic religion, whatever it might entail, but I will briefly address how government by the self-interested can work and even how the relevant norms for making government work can themselves be based in self-interest.

Essentially the question to be addressed is that posed by James Wilson, one of the Philadelphia conventioneers. Wilson asked, 'are men capable of governing *themselves*? In other words; are they qualified – and are they disposed to be their *own* masters? ... In still other words; are they qualified – and are they disposed to *obey themselves*?'[24] The answer has the form of the project of Brennan and Buchanan: first, we must answer whether we may successfully adopt rules or constitutional devices; then, we must answer whether we can subject ourselves to these rules. Brennan and Buchanan deal far more extensively with the first part of this answer than with the second.

On the first part of our answer, we often decide collectively how all are to behave. Then there need be no conflict of self against collective interest. If we must choose whether we will all pay a fraction of our incomes to pay for collective benefits or we will all keep our incomes to pay only for private benefits, we may easily agree – by voting – to pay for certain collective benefits. At this level our choices are to co-ordinate in one way or another. No one readily faces a choice of free-riding on the contributions of others. Brennan and Buchanan suppose that this logic overcomes the usual problem of collective action in public choice contexts.[25] It does so regularly for many substantive issues, as when we tax ourselves to pay for specific collective purposes, such as public education, fire and police protection, parks, roads and so forth. It does not so readily overcome the free-rider problem for determining the form of our institutions and the rules under which they operate except when these somehow get on the agenda and come to a vote, as when the Philadelphia conventioneers exceeded their mandate and proposed a new constitution in 1787. Similarly, if someone can force an amendment to the US Constitution on to the agenda, we may all vote as though we were selecting one co-ordination point over another. This is not a problem of the usual logic of collective action, which is to get each individual to act voluntaristically to contribute an individual share towards some collective provision. In the spontaneous voluntaristic problem, my interest weighs against the collective benefit and the collective benefit may get severely discounted if it gets counted at all. In voting yes or no to a particular proposal, to vote for my benefit may be to vote for the collective benefit; at the very least it is to vote for the collective benefit of all those who share my interest on the relevant issue.

By a similar argument, as Brennan and Buchanan note (p. 148), even a modest

[24] James Wilson, 'Lectures on Law', in *The Works of James Wilson*, ed. by Robert Green McCloskey, 2 vols (Cambridge Mass.: Harvard University Press, 1967, essay first published in 1791), excerpted in Kurland and Lerner, *The Founders' Constitution*, vol. 1, p. 73.

[25] They discuss this issue in a section oddly entitled 'The role of norms' (pp. 146–9).

admixture of altruism or fairness may be sufficient to generate votes for modest redistributive policies. People who would not donate even a hundred dollars to charity for redistribution to the disadvantaged might readily vote to require everyone in their own situation to pay several hundred dollars in taxes for such a purpose. Why? Because the latter move would accomplish its purpose far more effectively than the former.

The practical question in reaching a decision then is how to get us to vote. This is a question that clearly we can answer (better in Chicago, where electoral turnouts are very high, than in New York City, where they are very low, proportionately almost as low as a quarter of those in Chicago; and better in most other Western democracies than in the United States). There is, however, a prior question: how to get an issue on the agenda in the first place. Here the logic of collective action may come in with full force (pp. 144–6). We might almost all prefer to have, say, one of Robert's Rules of Order or some constitutional provision changed. To get it changed, someone may have to work long hours to get it to a vote. As long as it has to be someone, why not let it be someone else? It is such questions as this that Brennan and Buchanan think their civic religion can answer in some sense.[26]

The focus of Brennan and Buchanan is on motivations such as these to achieve electoral and legislative outcomes despite our general self-interest.[27] Much of the criticism of government by economists of the so-called Chicago school has been directed rather at the problems of having self-interested officials administer government programmes, which is the second part of the answer to Wilson's question above. The problem of self-interested officials was generally a concern of Adam Smith. Brennan and Buchanan allude to this issue occasionally, for example in their discussion of a despotic government of one person who, given the power to decide on distributional issues, is essentially given ownership over all that is to be distributed (p. 115; also see p. 48). The actual problem we face is how to make many, indeed, millions, of officials act in *our* interest.[28] We seemingly resolve the problem through the force of norms for substantially disinterested behaviour. However, to a large extent, the relevant norms can be established and enforced by convention, so that we can see them as essentially self-interested or at least as congruent with self-interest.

People do not have to be thoroughly public-spirited to be good 'public servants' while in government positions. They can be basically self-interested – interested in income and career. Both bureaucratic and judicial systems generally include many checks on behaviour, checks that make it easy for some to advance their careers or to block the careers of others by calling the others' actions properly to account. One of the most important incentives for sustaining the

[26] It is such questions that Brennan and Buchanan pose (pp. 145–6) to set up their discussions of norms and civic religion.

[27] This is also the chief interest of Buchanan and Tullock in *The Calculus of Consent* and of Anthony Downs in *An Economic Theory of Democracy* (New York: Harper, 1957).

[28] Brennan and Buchanan briefly address this issue in a discussion of who will seek public office (p. 64), although here their central concern seems to be with those who seek elective office.

norm is that others cannot generally see benefits in ignoring or co-operating with dereliction by their colleagues and superiors. Getting such a system established and working well may take several generations of office holders. But once it is in place, it can run reasonably well on the self-interest of its office holders as its primary support. Such a conventional norm system may not work equally well at all levels or in all circumstances. But its force can be seen in recent decades in the forced removal from office of legislators, high-ranking bureaucrats, presidential advisers, a president, and a vice president in the United States, and of ministers and other high-ranking officials in England.

Although its rationale in part is similar, this is not the system of checks and balances envisioned by Montesquieu. It is a finer grained application of Madison's injunction: 'Ambition must be made to counter ambition.'[29] In some ways it has more in common with competition among producers in a market than between departments of a government. To be sure, I block your action because I think it is wrong. But I do so with substantial support that makes my action costless or even beneficial to me. Similarly, I do my job well because others will generally support and reward me for working well. Moreover, it would be difficult to disrupt this system to anyone's benefit, including that of a national president or prime minister.

This is not to say that such a system can never be abused for essentially self-interested purposes. In addition it can be abused in a way that is peculiar evidence of how well the relevant norms can be conventionally created and enforced. It can be subject to what the French call *déformation professionnelle* – the tendency to support one's organization's supposed interests to the detriment of larger public purposes. The organized military is notoriously prone to such deformation. But other bureaucracies, such as regulatory and welfare delivery agencies, are also often accused of such deformation. The oddity of this behaviour is that the enlargement of an agency's mission is essentially a collective benefit to its staff and therefore must suffer from the logic of collective action. We individually have better career and income prospects from the expansion of our agency's mission. But, by the logic of collective action, I cannot be motivated by self-interest to take any risk to contribute to this general expansion in return for my paltry share of the expansion that results from my contribution. My incentive to contribute comes rather from the specific support I personally receive from colleagues in the agency, perhaps especially from superiors, who are all driven by our agency-specific conventional norm.

TOWARDS CONSTITUTIONAL ANALYSIS

From his earlier work with Tullock to his present work with Brennan, Buchanan is arguably the outstanding figure in the social choice analysis of constitutionalism. I think the Brennan–Buchanan programme of such analysis of

[29] Madison, *Federalist*, no. 51, pp. 330–1 in Kurland and Lerner, *The Founders' Constitution*, vol. 1, p. 330.

constitutionalism, of its value and its underpinnings, is one of the most important enterprises in contemporary political philosophy. Apart from the analysis of elections, it is an enterprise that has been dwarfed over the past decades by the purely normative analysis of distributive justice. As Rawls among others realizes with Brennan and Buchanan, such normative analysis requires institutional – hence constitutional – understanding if it is to be complete or compelling. Despite that asserted realization, however, neither Rawls nor Brennan and Buchanan have gone very far towards enunciating actual constitutional principles. Without more such work, we cannot judge the credibility of their programmes. The greatest single effort of Brennan and Buchanan on this score has been their analysis of deficit financing and taxation. Let us briefly consider it in order to assess how far their programme may carry us.

Brennan and Buchanan suppose that we might reach *ex ante* agreement on levels of taxation, of inflation, or of deficit financing.[30] They seem to think it meaningful to say that 'debt retirement now will benefit the whole community in the long run' (p. 94). But on their value theory, how can they know that their balanced budget amendment is desirable if we do not agree that we prefer to have one? Presumably many social security recipients, big defence advocates, and others in the United States would oppose a balanced budget. More generally, very large groups might strongly oppose anything even vaguely approaching 'debt retirement now'. It may also be true that if future generations had to decide along with the current generations, under Brennan–Buchanan contractarian principles, whether to continue debt-financing of current expenditures, such expenditures could not pass their contractarian test (in their view, this would make such expenditures illegitimate (p. 22)). Of course, bringing future generations into the decision does not automatically mean there could be no deficit financing of current projects. Many such projects imply investments for the future, as in expenditures for education, scientific research, infrastructure development, social security and even national defence. Hence, future generations might conclude that they benefit more than their share of the debt-financing. For example, one might imagine that a referendum on deficit financing of the Second World War war efforts in the United Kingdom and the United States would get strong support even from future generations. But many expenditures would surely fail such a test.

How would a general principle to limit deficit financing fare? Alas, on the Brennan–Buchanan test it would almost certainly go down to defeat, as would its opposite, a general principle not to limit deficit financing. Everything and its opposite will go down to defeat if we require genuine unanimity. This seems obviously true for specific policy decisions. But it seems likely also to be true even for the most abstract of constitutional provisions. Brennan and Buchanan say, 'however exactly one might wish to express the requirements for voluntari-

[30] For their views on taxation, see Geoffrey Brennan and James M. Buchanan, *The Power to Tax: Analytical Foundations of a Fiscal Constitution* (Cambridge: Cambridge University Press, 1980). For briefer statements on inflation and deficit financing, see *The Reason of Rules*, pp. 90–3 and 93–4.

ness in agreements reached, all such requirements appear to be met to an increasing extent as one moves to higher and higher levels of abstraction in the rule formation exericse. This fact represents a possible major justification for the whole "constitutionalist" approach' (p. 107).

What Brennan and Buchanan need at this point in their argument is a bracing dip into cold historical facts or common sense guesses about actual views on relatively abstract rules for governance.[31] Recall again the actual facts of the American constitutional experience of 1787–89.[32] Many of the rules being decided then were exceedingly abstract but they were also severely conflicted. After all, many of the Antifederalists were the forerunners of today's communitarians. (The chief difference is that the Antifederalist communitarians might not have been so intellectually agile as to have found themselves comfortably at home in world-class, universalistic universities.) They objected to bigness and they therefore did not want a constitutional order at the level of the burgeoning new nation. They wanted values to be determined at the most local level. Had it been in their power to do so, they might have seceded from the world. Instead, they were rolled under by a national movement that eventually crushed other secessionist strains as well. In one sense, they were only barely rolled under, because they did not lose by a very wide margin.[33] In another sense, all that really mattered historically was that they lost by *some* margin so that they were permanently defeated as the scales were tipped forever in favour of bigness. Few issues sound more abstract than the question of the level at which we will govern ourselves, yet much of the history of political, especially constitutional, conflict turns on this issue.

Perhaps it is a failure of imagination that makes me think that, if we want meaningful constitutional provisions, there is no level of abstraction that will take us to *positive* provisions that would get unanimous support in the face of such divergent abstract views of how we should be governed. We could readily find provisions, essentially negative provisions, that would get unanimous opposition. (Let the first person born in each decade be dictator for a decade four decades later.) But can Brennan and Buchanan commend a serious provision that would get unanimous support? Or even overwhelming support? Yet their program condemns as worthy of opposition and reform any constitutional provisions that could not pass their contractarian test of agreement. The only saving grace for extant constitutional provisions is that, 'simply by virtue of their existence, [they] project an aura of justice' (p. 104). Where ought we to stand

[31] They say that 'the empirical record of the establishment of historical states is essentially irrelevant to the contractarian explanatory argument' (p. 22). It might not be irrelevant to our understanding of the plausibility of their contractarian program and, especially, their commitment to abstract rules.

[32] As Buchanan notes, the Philadelphia 'convention was one of the few historical examples in which political rules were deliberately chosen' (Buchanan, 'The Constitution of Economic Policy', p. 1436).

[33] For further discussion of the fate and role of the constitution, see Russell Hardin, 'Why a Constitution?' forthcoming in Bernard Grofman and Donald Wittman, eds, *The Federalist Papers*.

between these two apparently divergent views of radical revolution or anarchy and hidebound conservatism?

It is to such details of their constitutionalism that Brennan and Buchanan and their critics should direct further discussion. If such details cannot be worked out, the contractarian–constitutionalism of Brennan and Buchanan is stillborn. Moreover, on their own account, such details must be worked out *persuasively*. For now, further judgement must await agreement.