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James Buchanan's Normative Theory of the State

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This paper examines James Buchanan's normative theory of the state and in particular his attempt to establish a legitimating linkage between the individual and the state. It begins by outlining Buchanan's consent-based theory of the state and the distinction he draws between the explanatory and justificatory roles of his theory. It proceeds to examine the role of his conceptual contract as a justificatory argument for existing and proposed political institutions. It finds that while the conceptual contract may provide an account of the contingent rationality of the state, it fails to have normative significance in terms of Buchanan's value individualism and subjectivism. Buchanan has also failed to address some of the problems associated with securing and enforcing contractual agreement. These conclusions point to wider problems with rational choice theories of the emergence of the state.

The individual's relation to the state is, of course, the central subject matter of political philosophy. Any effort by economists to shed light on this relationship must be placed within this more comprehensive realm of discourse (Buchanan 1988 [1986], 104).

James Buchanan's Nobel Prize in economics was awarded not only for his contributions to economics, but also for his role in bridging the gap between the disciplines of economics and politics through the development of public choice theory. Buchanan was not the first to apply economic methodology to the study of politics. Duncan Black and Kenneth Arrow made important contributions some 20 years prior to Buchanan's publication with Gordon Tullock of *The Calculus of Consent* in 1962. Buchanan was, however, one of the first to step beyond positive public choice theory and bring economic methodology to bear on questions of normative political philosophy. Normative public choice theory, or 'constitutional political economy', has since become a major field of academic inquiry on the part of both economists and political scientists. According to at least one (sympathetic) critic of Buchanan's work, constitutional political economy 'is one of the most important enterprises in contemporary political philosophy' (Hardin 1988, 528).

A major part of Buchanan's constitutional political economy has been his effort to provide a normative theory that can account for an individual's relation to the state. Buchanan's efforts are a contribution to the general contractarian project of answering questions about 'the moral obligations we owe to one another, about the legitimate functions of government and the nature of our obligations to it, and about

justice in the distribution of income and wealth' (Sugden 1993, 1). Buchanan's principal normative concern is to find 'a basis for constructing a society within which persons can remain free' (1977, 4). Buchanan understands the legitimacy of the state in terms of its role in securing the autonomy of the individual and providing a framework for the realisation of individual values in collective choice.

These concerns are in accord with democratic theory more generally, a major normative assumption of which is that 'the state has no legitimate interests of its own; it must serve the interests of its citizens' (Green 1988, 164). Given their presumption in favour of the individual as the foundation for political life, theorists of the liberal-democratic state have often been concerned with the question of how and why free and equal individuals may legitimately be governed by anyone else (Pateman 1985, 13). According to Buchanan, the state is legitimate to the extent that it can be grounded in consent. Individual consent is the basis for the state's ability to realise the autonomy and values of the individuals who are its subjects. A state's legitimacy and the individual's obligations to the state are grounded in this consent.

Consent is seen by many as a possible foundation for political obligation. But while individual consent may be thought to generate strong obligations, such consent is rarely observed as the foundation for political life in any given state. As Pateman notes, '[c]onsent theory has long been embarrassed by the fact that it always runs into difficulties when confronted by the demand to show who has, and when, and how, actually and explicitly consented in the liberal democratic state' (1985, 15). Simmons notes that '[s]ince the earliest consent theories it has of course been recognised that "express consent" is not a suitably general ground for political obligation. The paucity of express consenters is painfully apparent' (1979, 79). It is possible to hold to a consent theory of political obligation, while at the same time recognising that such obligations are rarely incurred in this way. As Green suggests, 'consent theory may offer a correct conception of what it would be for the authority of states to be justified while at the same time offering an explanation of why it is not' (1988, 166).¹

Buchanan seeks to overcome these difficulties by focusing on the justificatory role of his argument from consent, rather than its explanatory usefulness in accounting for individuals' existing obligations to existing states. But this still leaves us with the question of the extent to which his justificatory argument is successful, in view of the difficulties liberal theorists have had in providing any basis for a generalised obligation of obedience to any given state.² The answer to this question will have considerable bearing on the explanatory role of Buchanan's theory, given that he is ultimately concerned with questions of political theory and with providing an account of the legitimacy of real world political institutions. This paper assesses the extent to which Buchanan's justificatory argument succeeds in establishing the legitimating linkage between the individual and the state that his

1 Although Green is concerned with finding justifications for the authority of the state, the question of justified authority can be seen as prior to that of whether we have political obligations. As Simmons (1979, 4) notes, 'political obligation is closely linked with the obligation to obey some legitimate authority, and insofar as that authority operates through laws, with the obligation to obey the law.'

2 For a survey and critique of some of the more prominent accounts of political obligation, see Simmons 1979. See also, Green 1988, 220-47.

theory seeks. It begins by outlining Buchanan's consent-based theory of the state. It then turns to an examination of some of the difficulties that arise with this account. It concludes that these difficulties count strongly against his attempt to ground political legitimacy in consent.

Buchanan's Normative Individualism

Buchanan has not provided a single, definitive account of his normative theory of the state. Instead, his theory must be distilled from a number of different sources. It begins with 'the basic Kantian notion that individual human beings are the ultimate ethical units, that persons are to be treated strictly as ends and never as means, and that there are no transcendental, suprapersonal norms' (Buchanan 1977, 244). The foundation for his justificatory argument lies in the view that individuals should be 'the ultimate sovereigns in matters of social organisation' and are therefore entitled to choose the institutions under which they live. Legitimacy is therefore to be judged in terms of voluntary agreement (Buchanan 1991, 227). Buchanan argues for a subjectivist as against an epistemic foundation for his normative individualism (Buchanan 1991, 227), a distinction that will be elaborated on shortly. According to Gray, 'the foundational value [in Buchanan's thought] is not that of preference-satisfaction (in which the good is what is desired), but individual autonomy, conceived as an intrinsic good' (Gray 1990, 158-9), something Gray terms 'value individualism'. The value of preference-satisfaction in this account is derivative rather than ultimate.

Preference-satisfaction is nonetheless an important element of Buchanan's theory. Buchanan's value subjectivism maintains that 'the individual is the unique unit of consciousness from which all evaluation begins' (Brennan and Buchanan 1985, 21). He argues that if individuals are the only sources of value, then the satisfaction of individual values must carry positive normative weight (Buchanan 1986, 252). According to Buchanan, 'that which is sought for in politics is not and cannot be that which exists independently of the values of the individuals who make up the political community' (250). These values are revealed only in the observed acts of choice of individuals, they cannot be imputed by some supra-individual authority. It follows from this conception of value that 'legitimacy can only be derived, at one level or another, from the voluntary consent of individuals' (273). It will be later argued that Buchanan's value individualism and value subjectivism do not necessarily supply a secure normative basis for his theory.

Brennan and Buchanan's *Reason of Rules* provides the most detailed exposition of Buchanan's view of the role of consent in legitimising a 'rule-governed order'. According to Brennan and Buchanan, 'a rule is legitimate, and violations of it constitute unjust behaviour, when the rule is the object of voluntary consent among participants in the rule-governed order'. This is because 'the provision of consent on a voluntary basis amounts to offering a *promise* to abide by the rules' (Brennan and Buchanan 1985, 100). Along with many other consent theorists, Brennan and Buchanan are quick to recognise that 'clearly, in most social contexts, players do not explicitly agree to the rules that apply to their interactions' (103). They also note that hypothetical consent, which assumes consent where it is thought to be clearly in the interests of the would-be consenter, is a less than satisfactory substitute for

express consent. But they are open to the possibility of tacit or implied consent which arises when participants voluntarily participate in the rules of the game, 'provided that the participants have a genuine option not to participate if they so chose' (Brennan and Buchanan 1985, 103). Whether we can legitimately extrapolate these considerations to all social settings depends on 'whether individual participants in a given social order can be construed to be *voluntary* participants' (104). While we can readily generate such consent for the administrators of the rules or for those who voluntarily join the social order, such as immigrants, 'for general citizens, voluntariness of participation is not so clear' if there are no effective alternatives (104). The only other means by which tacit consent might be established is through a 'history of regular observance' of given rules that give rise to legitimate expectations of certain conduct. 'Voluntary participation amounts to agreement to the rules. It constitutes a tacit promise to abide by prevailing rules, and the breaking of such a promise is equivalent to unjust conduct because it involves treating others in ways in which they do not deserve to be treated' (104-5).

A distinction is drawn between these agreed-on rules and 'just rules'. Just rules are those that emerge from agreed-on meta-rules. This distinction allows that we may be bound by rules to which we have not explicitly or directly consented, since we have implicitly agreed on the meta-rules under which these rules came into being (Brennan and Buchanan 1985, 106). When we accept rules, we are also accepting their meta-rules. Brennan and Buchanan argue that agreement at this abstract level is more readily attainable: 'However exactly one might wish to express the requirements for voluntariness 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 exercise' (107). Brennan and Buchanan ultimately define justice 'in terms of conduct that does not violate agreed-on rules' (110).

These normative considerations provide a basis for assessing the legitimacy of political institutions. According to Buchanan and Tullock, the desirability of moving an activity from the realm of private to public choice can only be assessed through the observation of agreement on the part of all the individuals in a political group to such a move (Buchanan and Tullock 1962, 6-7). Politics is modelled as a complex, many-person exchange process, with the possibility of gains from trade providing individuals with an incentive to agree to the terms of binding collective arrangements to secure those gains. According to Buchanan, 'if politics in the large, defined to encompass the whole structure of governance, is modelled as the cooperative effort of *individuals* to further or advance *their own* interests and values, which only they, as individuals, know, it is evident that *all* persons must be brought into agreement' (Buchanan 1986, 244-5). The only test for the legitimacy of political arrangements is that of observed agreement or unanimity among the participants in these arrangements.

Unanimous agreement is attainable for those changes in the rules that are Pareto superior. A Pareto superior change is one that results in the members of the relevant decision-making group being made better-off, without any members being made worse off. 'Unanimous agreement on some proposed change in the rules must be at least conceptually possible' (Brennan and Buchanan 1985, 136) if the change results

in a Pareto improvement. The Pareto criterion applied to politics in this way is referred to as Wicksellian unanimity, after Wicksell's theory of just taxation.

The value of this contractarian model of politics lies in its purported ability to identify those political arrangements that are most beneficial in the absence of reliable information about the values, interests and preferences of political actors that does not come from individuals themselves. The acts of choice and agreement are recognised as the sole criteria for the efficiency of these collective arrangements in satisfying individual values. As Coleman (1988, 282) notes, '[f]or Buchanan, unanimity constitutes efficiency: that is, unanimity is both necessary and sufficient for efficiency'. As noted earlier, Buchanan upholds a subjectivist, as against an epistemic understanding of unanimity as efficiency. An epistemic understanding of efficiency would hold that unanimity is evidence of efficiency, but that efficiency itself must be judged with reference to some other criterion (281-2). Buchanan thus establishes a strict criterion for the recognition of consent as the normative foundation for the legitimacy of political arrangements, to which we are bound by virtue of that consent.

Consent and the Status Quo

As an explanatory theory of politics, this account would appear to suffer from many of the same problems that afflict other consent theories of political obligation, namely, that individuals are rarely observed to have consented to the political arrangements to which they are subject and usually have few opportunities to proffer or withhold their consent when new arrangements are proposed. As noted earlier, Brennan and Buchanan readily accept that the voluntariness of participation in the social order is often in doubt. Buchanan would therefore appear to face many of the same difficulties confronting other consent theorists in accounting for any political obligations we might have to any given state. As one commentator has suggested, Buchanan's theory would entail, for example, that 'virtually all institutional frameworks we presently have in the United States are unjustified' (Summers 1984, 159).

Despite these implications of Buchanan's theory for the legitimacy of pre-existing political arrangements, he insists on upholding the political status quo as the necessarily legitimate starting point for contractual change. According to Buchanan:

The uniqueness of the status quo lies in the simple fact of its existence ... The necessary recognition of this does not amount to a defence of the status quo in any evaluative sense, as is sometimes charged (Buchanan 1975, 78).

However, he goes on to argue that the 'status quo defines that which exists. Hence regardless of its history, it must be evaluated as if it were contractually legitimate' (Buchanan 1975, 85). While we may reject the status quo on contractarian principles, we still need agreement to justify any change from the institutions defining the status quo (Buchanan 1977, 139). Buchanan argues that whatever the origins of our existing institutions, for the purposes of argument about further contractual change from the status quo, we are necessarily bound to the existing political order. Buchanan notes that this leads to criticisms that contractarianism either justifies too much or it justifies too little (142). Either all existing political

arrangements can be legitimated in this way, or they might all fail the unanimity test, thereby rendering all such arrangements illegitimate.

The Conceptual Contract

Partly in recognition of these difficulties, Buchanan draws an important distinction between the explanatory and justificatory roles of his theory. He notes that:

We do not, of course, observe the process of reaching agreement on constitutional rules, and the origins of the rules that are in existence at any particular time and in any particular polity cannot satisfactorily be explained by the contractarian model. The purpose of the contractarian exercise is not explanatory in this sense. It is, by contrast, justificatory in that it offers a basis for normative evaluation. Could the observed rules that constrain the activity of ordinary politics have emerged from agreement in constitutional contract? To the extent that this question can be affirmatively answered, we have established a legitimating linkage between the individual and the state (Buchanan 1988 [1986], 112).

Buchanan is thus not so much concerned with the historical record of the emergence of the state, or with a positive account of political processes as with the application of his normative framework as a benchmark for the evaluation of the political process. According to Buchanan, the historical question is irrelevant when analysis is limited to evaluation (1977, 129). We can still evaluate the existing political order to see whether existing institutions could have emerged through a process of unanimous agreement. 'Individuals must ask themselves how their own positions compare with those that they might have expected to secure in a renegotiated contractual settlement' (Buchanan 1975, 75).

Conceptual agreement can also be postulated for proposed changes in existing institutions. As Buchanan observes, 'the political structure of modern societies is such that suggested reforms in institutions can rarely, if ever, be put to the Wicksellian unanimity test' (Buchanan 1986, 270). Buchanan suggests that if a political economist 'cannot actually carry out the Wicksellian test and observe the results, he is left with the notion of conceptual agreement' (270). Political arrangements might be rendered legitimate, and political obligations generated, when it can be shown that the proposed arrangements could conceivably emerge from a process of voluntary choice and exchange. Where such proposals are likely to result in Pareto improvements, conceptual agreement can be assumed to follow from the rationality of the participants in recognising these potential gains and in agreeing to political arrangements that will enable them to secure those gains. Buchanan's theory thus comes to be used in two ways: 'retrospectively in a metaphorically legitimising rather than historical sense. Prospectively, the model is used in both a metaphorically evaluative and an empirically corroborative sense' (Brennan and Buchanan 1985, 19).

The notion of conceptual agreement or hypothetical consent is commonly criticised and is seen as a means of avoiding the requirement to observe actual agreement as a basis for political obligation. Yeager has suggested that, "conceptually" is an adverb stuck into contractarians' sentences to immunise them from challenge on the grounds of their not being true' (Yeager 1985, 271). Buchanan defends his use of the conceptual contract 'in opportunity cost terms. What are the

alternatives to the hypothetical social contract or quasi-contract? (Buchanan 1977, 124–5). He argues that the potential rivals to his approach all rely on illegitimate modes of evaluation. According to Buchanan:

The contractarian perspective or approach finds its value precisely in the deficiencies of its putative substitutes. It is necessarily somewhat more ambiguous in its application, less clearly defined than some of its alternatives. Its potential use is inherently difficult, but not impossible. It is subject to abuse. Almost any conceivable activity of the state, either as observed or imagined may be explained as a conceptually possible outcome of some sort of 'social contract' (Buchanan 1977, 127).

Despite this acknowledgment of some of the difficulties associated with the use of the conceptual contract, Buchanan argues that his approach is superior because:

Only some set of contractarian precepts or principles can resolve the problem of obligation of the individual in political society. A person can abide by the 'laws and institutions' in existence if he can evaluate them as structural features that might have emerged from a social contract in which he might have participated (Buchanan 1977, 127).

Buchanan's defence of his use of the conceptual contract is essentially a negative one, coupled with the reassertion of his individualist value premise. Whatever its strengths relative to its pretenders, we need to ask to what extent Buchanan can bring together the justificatory and explanatory features of his argument to provide a compelling normative theory of the state.

Normative Individualism, Subjectivism and Agreement

The first question that needs to be asked of Buchanan's account is the extent to which his normative individualism and value subjectivism provide a secure foundation for consent as the basis for political legitimacy. Buchanan's normative individualism may be thought to fall victim to its own moral scepticism, born of his value subjectivism. Buchanan holds that we should respect the autonomy of individuals, and by extension, their preferences, but we have no basis for upholding this normative claim without some further specification of objective morality. If objective moral knowledge is unobtainable, we cannot know that it is wrong to impose costs on others through less than unanimous agreements (Coleman 1988, 113). Buchanan's theory may be thought to fail its own test, to the extent that people fail to agree that agreement should be the basis for collective choice. Buchanan's appeal to Kantian ethics needs to be grounded in something more than Buchanan's own intuition that such an ethic is a desirable one. As Barry has argued, 'if agreement is to be serviceable for a liberal theorist it must be subordinate to other moral concepts which validate or legitimise purported instances of consent' (Barry 1986, 83). This is not to say that such a grounding is not possible. In fact, such a grounding would be highly desirable, given its intuitive appeal. Only if it is difficult to see how Buchanan could provide such an account that would satisfy his own value subjectivism and moral scepticism. Gray notes that 'whereas value-individualism may be affirmed in a way that is neutral as to questions of moral epistemology, it is for that reason compatible with a form of value-realism of the sort that Buchanan has rightly rejected in other contexts' (1990, 159). Given the importance of

Buchanan's individualist value premise to the rest of his theory, these must count as important objections.

Granted his individualist conception of value, Buchanan's normative theory of the state hinges on the ability of unanimous agreement to satisfy the subjective values of individuals. But as Coleman points out, there is no necessary connection between Pareto-optimality or Pareto-superiority and the satisfaction of subjective preferences through unanimous agreement. A state of affairs that is efficient in a subjective sense need not be efficient in an objective welfare sense. Only if we assume that individuals are rationally self-interested does Pareto-superiority follow from freedom of exchange. People may well agree to be made worse off in an objective welfare sense, for the sake of some subjective benefit, such as securing the well-being of the less well-off (Coleman 1988, 282).

Buchanan would not be expected to have any difficulty with the failure of agreement to realise some objective welfare measure, given his adherence to value subjectivism. A problem arises, however, if voting (the mechanism for agreement) does not serve as a reliable indicator of individual (subjective) preferences. This will occur if there are opportunities for strategic behaviour in reaching an agreement. The most frequently cited example of strategic behaviour under a unanimity rule is that of one or more individuals holding out for a better deal during the bargaining process as the price of their agreement. Such hold-outs promote inefficiency of the sort that the unanimity rule is meant to overcome. It is impossible to distinguish between genuine and strategic hold-outs, particularly if one grants the subjectivity of individual preferences. Coleman argues that a unanimity rule suffers from the same incentives that create private market failures. A unanimity rule could only work in the absence of strategic behaviour, in which case the market itself could secure an efficient allocation of public goods. Therefore unanimity either 'fails to secure efficiency or it is otiose' (1988, 284).

We thus have reason to question both the foundation for Buchanan's value individualism and whether his conception of unanimity as being criterial of efficiency satisfies the subjective preferences of individuals, as opposed to creating incentives to misrepresent those preferences in a bargaining context. If unanimous agreement cannot be relied upon to satisfy these individual preferences, then agreement loses much of its normative import in legitimising obedience to a rule-governed order. For Buchanan's account to work, we need to grant him both the arbitrary imposition of his individualist value norm and assume that a unanimity rule can be freed from strategic manipulation.

There is a further difficulty, however, that Buchanan violates his own value subjectivism in postulating conceptual or hypothetical agreement in the absence of observed agreement or actual, express consent as the basis for the legitimacy of a given set of political arrangements. As noted earlier, for Buchanan, unanimity constitutes efficiency. What people agree to is efficient by virtue of their agreement. At the conceptual level, however, Buchanan allows this relationship to be reversed. Consent becomes a function of efficiency. That which is efficient is what people will agree to, such that agreement is postulated rather than observed. Individuals are no longer the source of evaluation. It is therefore difficult to see how conceptual agreement has the same normative import or evaluative usefulness given Buchanan's

prior insistence on individuals as the only source of evaluation. Agreement no longer performs the criterial function it does in the original model. Efficiency must be established with reference to some other criterion, presumably some version of welfare. The conceptual contract assumes what in Buchanan's terms only actual contracting should be able to reveal. So while we might grant that unanimous agreement of the actual contract variety provides a basis for consent-based political obligations, such agreement is absent in the case of Buchanan's conceptual or hypothetical contract.

Consent theories generate obligations by virtue of agreement alone. Consenters are bound *because* they have agreed, not because of the content of the agreement (assuming that they have not 'agreed' under duress). Contractarian theories of the conceptual type, by contrast, generate agreement by virtue of the rationality of what is (or would be) agreed to. The fact of agreement is incidental to the content of the agreement (Green 1988, 161-2). Green puts forward 'a normative thesis', that 'given purely individualist goals and an instrumental conception of rationality, it follows that to treat the state's requirements as binding is to be overcommitted to them, to be bound to them in a way that their point cannot justify' (154). Contractarianism may supply an indirect consequentialist explanation of the existence and utility of social rules, but it does not give us the content-independent reasons for acting that Green argues are necessary for the justification of political authority (155-7). Express consent gives us content-independent reasons for obedience. But consent is at best a product of, and not the basis for, Buchanan's conceptual contract.

Schmidtz makes a similar argument against the use of hypothetical consent theories in justifying the state. Schmidtz analyses two possible justifications for the state, which he terms 'emergent' and 'teleological', although he recognises that these accounts are neither exhaustive nor mutually exclusive. Buchanan's normative theory of the state is an emergent one, although at the conceptual level it takes on teleological elements. Schmidtz (1991, 8) maintains that 'hypothetical consent arguments have no bearing on emergent justification, for a state can only be emergently justified in terms of the process by which it actually arose'.³ Hypothetical consent is also irrelevant to teleological justifications for the state, since the ends for which the state is instituted do not depend on agreement for their legitimacy (8-9). 'Hypothetical consent proceeds from teleological justification rather than to it' (9-10). Schmidtz suggests that because consent is rarely observed in the way needed to justify the state, we should look to non-consensual processes by which the state might be emergently justified (13-14).

Buchanan's conceptual or hypothetical contract may be able to provide an account of the contingent rationality of a state. It cannot, however, provide an account of the way in which a state emerged (or might have emerged) that has the normative significance that would provide an account of an individual's consent-based obligations to the state that satisfies Buchanan's own value individualism and subjectivism. These problems are exacerbated by some of the difficulties involved in securing contractual compliance and agreement examined in the next section. In attempting to expand the evaluative scope of his theory, and overcome its

limitations as an explanatory account of politics, Buchanan has arguably compromised its normative foundation. Only agreement of the actual contract variety could be expected to meet his normative benchmark of individual agreement, but such agreement would be vulnerable to the reservations expressed earlier about the lack of a satisfactory foundation for his individualist value norm and whether unanimity can in fact satisfy individual values.

Securing Contractual Compliance and Agreement

There are also some fundamental problems in securing the agreement that is necessary for a contractual account of the legitimacy of the state. In Buchanan's account of the emergence of the state, individuals agree on binding collective arrangements to secure a cooperative surplus which would not otherwise be obtainable. Such agreement entails the existence of an enforcement mechanism as well as agreement on the way in which the cooperative surplus is to be distributed.

Enforcement presupposes a legal order with a system of property rights. Buchanan follows many other theorists in considering the protection and enforcement of basic rights to be a public good (Buchanan and Tullock 1962, 46). But a system of property rights is itself a bargained solution to a public goods problem (Coleman 1988, 263). Coleman calls this an instance of 'pre-market market failure'. In the standard market failure case, the state enforces agreements to cooperate to overcome market failures. This raises the question as to whether 'agreement to have a legal order is self-enforcing, or whether, instead, enforcing the agreement to have an enforcement mechanism itself presupposes such a mechanism' (266). If the legal order is not self-enforcing, then it may be impossible for individuals to agree on a legal order with property rights, despite the fact that such an agreement would be in their rational self-interest. If such an agreement is not self-enforcing then 'it may be impossible to give a rational choice or market account of the emergence of rational political institutions' (276).

Buchanan has tended to neglect this enforcement problem, most notably with Tullock in *Calculus of Consent*. In Buchanan and Tullock's model of constitutional choice, the initial collectivisation of the recognition and enforcement of basic property and human rights within the political community is assumed to have already taken place, since 'clearly, it will be to the advantage of each individual in the group to support this minimal degree of collectivisation' (Buchanan and Tullock 1962, 46). Not only do they gloss over the problem of enforcement, but they also appear to violate their own claim that "'public goods" can only be defined in terms of individual evaluations' (35) in postulating that rights recognition and enforcement is necessarily a public good.⁴

Buchanan later noted that the approach taken in *Calculus* reflected the 'extension and application of orthodox economic methodology', which has tended to neglect critical problems of establishing individual rights' (Buchanan 1975, 70). In *The Limits of Liberty*, Buchanan seeks to 'analyse the initial contract that assigns rights and claims among persons' (70). He notes that individuals 'will, at the time of contract, enter into some sort of enforcement arrangement' to secure this assignment

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This distinction between 'emergent' and 'teleological' modes of justification corresponds to the more familiar distinction between deontological and consequentialist argument.

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For arguments as to the private goods characteristics of rights recognition and enforcement, see Barnett 1985/1986.

of rights and claims (66). Buchanan is quick to note the public goods characteristics of such an arrangement and the problem of how 'the enforcing institution or agent can itself be constrained in its own behaviour' (67). He concludes this discussion with the observation that when an individual 'recognises the problems of enforcement, including those which involve constraining the enforcing agent, this individual may be quite reluctant to enter into the basic social contract at all' (71). This would appear to lend weight to Coleman's point and to Kalt's argument that 'the idea of some initial unanimity in the formation of the state ... is both historically (ie, empirically) and theoretically questionable' (Kalt 1981, 576-7). The only way around this enforcement problem would be to conceive the legal order, following Barnett, in terms of a self-enforcing private goods market, which would then obviate the need for Buchanan's 'protective state' as the necessary precursor to his 'productive state' (1975, 71-3).

Even if agreement on a legal order conceived in public goods terms could be enforced, there is the further problem of what the content of subsequent agreements would be. Coleman (1988, 272) notes that, 'embedded in all institutional arrangements that provide the opportunity for mutual gain is a bargaining game over relative shares'. Any potential agreement is vulnerable to strategic manipulation and rent-seeking behaviour directed at securing a greater share of the cooperative surplus. An actual agreement is thus likely to be inherently unstable and inefficient (273). These problems are particularly acute in bargaining games with large numbers of players. It may consequently be irrational for any individual to agree to the outcome of any bargaining process, despite the potential gains to be realised through a particular agreement. While Buchanan provides for continual contractual renegotiation for those dissatisfied with particular bargaining outcomes, Coleman notes that this collapses into a one-shot bargaining effort in anticipation of future rent-seeking induced contractual instability (272-5).

Although it might be possible to demonstrate that a state could be the outcome of rational individuals seeking to overcome pre-market market failure, the content and distributional consequences of such an agreement are indeterminate. We therefore have reason to question whether any such agreement would be reached. We cannot legitimise existing political arrangements on the basis that they could have emerged through a process of individual agreement, given that the distribution of the cooperative surplus may be arbitrary, unstable and inefficient. Nor can we say much about the desirable shape of any future such arrangements that would give legitimacy to particular proposals for constitutional reform that are not subject to the actual agreement of individuals. While such uncertainty about the future distribution of the cooperative surplus might be thought to enhance (or thicken) Buchanan's thin veil of uncertainty, it may also be thought to undermine the potential for agreement given the opportunities for strategic bargaining that this uncertainty represents. An increasingly thick veil of uncertainty may undermine rather than facilitate agreement. As Gray (1990, 164) has argued:

the actual risks of real world renegotiation of property titles are what will inform the contractors, and not a hypothetical uncertainty generated by the thought experiment of the veil of ignorance ... [Hypothetical circumstances cannot ... generate reasons for action for persons in their actual circumstances'.

He goes on to suggest that:

a natural development of Buchanan's thought, accordingly, is to eliminate from it its last hypothetical or counterfactual component, the veil of ignorance, and reconstitute his contractarianism as entirely of the actual-contract variety. His public choice theorising would then fuse with his normative philosophy in providing a most powerful tool for those in the real world who are seeking to achieve a new social contract or constitutional settlement (Gray 1990, 164).

In resorting to hypothetical or contractual agreement, Buchanan adopts an essentially rationalist derivation of consent which is a common feature of modern contractarian theorising. Hardin has noted that where consent plays a role in contemporary political theory, it is 'only at a rationalist level of derivation or justification, not at the level of practice or of actual citizens' (1989, 104). This he attributes to the implausibility of any consensual basis for political obligation (105-6). According to Hardin, Buchanan's normative theory of the state 'abandons actual agreement and replaces concern for it with concern for what is mutually beneficial' (Hardin 1990, 41). But the attempt to ground consent in what is mutually advantageous is flawed, since what is in our interest 'is not uniquely defined' (Hardin 1989, 108). Hardin utilises game theory to discuss theories of mutual advantage and whether they are likely to give rise to compelling reasons to agree to coercive political arrangements for the regulation of social interaction. He shows that while 'certain claims for political obligation may make strategic sense', there are a variety of 'complications that prevent them from being generally compelling' (108). The outcomes of these bargaining models are not only indeterminate within themselves. We also face an essentially arbitrary choice in the specification of the bargaining problem itself. While any given bargaining game may yield a unique solution, this solution depends on the initial characterisation of the bargaining problem (Coleman 1988, 273). Any rationalist derivation of the origins of the state is likely to be heavily dependent on the bargaining model used and therefore lack the normative and explanatory significance that would otherwise attach to a model that could be considered a unique characterisation of a generalised political dilemma, and which had a unique solution. The very different conclusions reached by three leading contractarians—Buchanan, Gauthier and Rawls—on what sort of state (if any) rational and reasonable people would agree to is indicative of these problems. We should accordingly be sceptical of any attempt to ground political obligation in the outcomes of rational choice accounts of the emergence of the state that are divorced from the actual practices of individuals.

Conclusion

Buchanan establishes a strict criterion for the recognition of consent in the form of Wicksellian unanimity as the foundation for his normative theory of the state. As an explanatory account of politics, this consent-based theory of the state suffers from many of the same limitations that afflict other consent-based accounts of political obligation. Partly in recognition of these difficulties, Buchanan relaxes the application of his Wicksellian unanimity criterion in two ways: by upholding the political status quo as the necessarily legitimate starting point for contractual change and in postulating hypothetical agreement or the conceptual contract as the basis for

judgments about the legitimacy of existing or proposed political arrangements. In so doing, Buchanan seeks to expand the evaluative scope of his theory of the legitimacy of political institutions, while recognising its limitations as an explanatory account of political processes.

Buchanan's account of contractual agreement suffers from a number of difficulties, at the levels of both explanation and justification. His normative individualism lacks an adequate foundation in moral theory, and it is not clear that his moral epistemology would allow for a more satisfactory account to be developed. Even taking the individualist value postulate as given, however, it is not clear that Wicksellian unanimity is successful in satisfying the subjective preferences of individuals as opposed to their interests in strategic bargaining.

Buchanan's use of the conceptual contract violates his own individualist value norm in important respects. The conceptual contract can at best provide an account of the contingent rationality of the state, but not one that has normative significance in terms of Buchanan's value individualism and subjectivism. There are also some fundamental problems in enforcing and securing contractual agreement which Buchanan has not satisfactorily addressed. It is not clear that agreement could be reached given the vulnerability of a unanimity rule to strategic manipulation, while the content and distributional consequences of any such agreement are indeterminate. It is therefore unlikely that rational individuals would agree to be bound by such an agreement, either hypothetically or in an actual contract situation. This points to the fact that rational choice theories of the emergence of the state are heavily dependent on the initial specification of the bargaining problems they seek to solve, to which there may not be unique solutions. The sharp disagreement among contractarian theorists as to the character of the state which would emerge from a process of individual agreement is indicative of these problems.

Buchanan would therefore appear to be restricted to actual consent as the basis for Wicksellian unanimity, with all the limitations this entails in accounting for the individual's relationship to the state. Any actual contract version of his normative theory of the state would need to seek more secure foundations for his normative individualism. It would also need to seek solutions to the instability and inefficiency problems inherent in the vulnerability of a unanimity rule to strategic manipulation. Only then will Buchanan have a normatively compelling account of the individual's relation to the state.

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