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**The Ethical Foundations of Limited Government in James
Buchanan's Political Philosophy: A Critical Examination**

Master's Thesis

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Year of the defence: 2024

Declaration

1. I hereby declare that I have compiled this thesis using the listed literature and resources only.
2. I hereby declare that my thesis has not been used to gain any other academic title.
3. I fully agree to my work being used for study and scientific purposes.

In Prague on 31 July 2024

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References

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Abstract

In this thesis, I critically examine James Buchanan's social contract theory as outlined in "*The Limits of Liberty: Between Anarchy and Leviathan*." I argue that his Hobbesian contractarianism is notable for its consistency and precision, especially in distinguishing between the protective and productive states as separate objects of unanimous agreement. His strict individualism, which also forms the basis of his public choice theory, provides a strong ethical foundation for justifying limited government. A constitutionally limited government is essential to maximizing individual liberty, understood as negative liberty, and preventing the rise of Leviathan, a vast bureaucracy that restricts freedom. However, Buchanan's contractarianism presents several issues. I argue that his central concept of natural distribution is too vague, leading to significant difficulties. Moreover, I demonstrate how his framework reveals the limitations of contractarianism when it is virtually unconstrained by moral considerations. I show that the desired outcomes may not be achieved and critique flaws in both the concepts of agreement and individual sovereignty. Additionally, I highlight the strained relationship between contractarianism and liberalism, arguing that contractarianism is not an effective tool for defending individual liberty. Ultimately, Buchanan's approach appears to be fraught with ambiguities and contradictions regarding his understanding of individual sovereignty.

Abstrakt

V této diplomové práci kriticky zkoumám teorii společenské smlouvy James Buchanan, jak je představena v díle "*The Limits of Liberty: Between Anarchy and Leviathan*." Argumentuji, že jeho hobbesovský kontraktualismus je pozoruhodný svou konzistencí a přesností, zejména v rozlišování mezi ochranným a produktivním státem jako oddělenými objekty jednomyslné dohody. Jeho přísný individualismus, který také tvoří základ jeho teorie veřejné volby, poskytuje silný etický základ pro ospravedlnění omezené vlády. Ústavně omezená vláda je nezbytná pro maximalizaci individuální svobody, chápané jako negativní svoboda, a pro zabránění vzniku Leviathan, rozsáhlé byrokracie, která omezující svobodu. Nicméně, kontraktualismus Buchanan vykazuje několik problémů. Argumentuji, že jeho centrální pojem přirozené distribuce je příliš vágní, což vede k

významným obtížím. Dále ukazují, jak jeho rámec odhaluje limity kontraktualismu, když je prakticky neomezen morálními úvahami. Ukazují, že zamýšlené výsledky nemusí být dosaženy a kritizují nedostatky v pojmech dohody a individuální suverenity. Dále zdůrazňují napjatý vztah mezi kontraktualismem a liberalismem, a argumentují, že kontraktualismus není účinným nástrojem na obranu individuální svobody. Nakonec se ukazuje, že Buchananův přístup je zatížen nejednoznačnostmi a kontradikcemi ohledně jeho chápání individuální suverenity.

Keywords

James Buchanan, Contractarianism, Individual Liberty, Liberalism, Limited Government, Individualism, Constitutional Order.

Klíčová slova

James Buchanan, Kontraktualismus, Individuální svoboda, Liberalismus, Omezená vláda, Individualismus, Ústavní pořádek.

Název práce

Etické základy omezené vlády v politické filozofii James Buchanan: Kritické zkoumání.

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List of Abbreviations

CoC	The Calculus of Consent. Logical Foundations of Constitutional Democracy.
EI	Ethical Individualism
LoL	The Limits of Liberty. Between Anarchy and Leviathan.
MI	Methodological Individualism

1 Introduction

James McGill Buchanan was not only an accomplished economist, known for his work in public choice theory, for which he received the 1986 Nobel Memorial Prize in Economic Sciences. Less known is that he was also a political philosopher. Following the revival of social contract theory by John Rawls, Buchanan has been denoted one of the “new contractarians.”¹ However, his social contract theory has been unduly neglected by philosophers. This thesis aims to do him justice by highlighting his position as an independent thinker in the social contract tradition. As I hope will become clear, his version of *contractarianism* can stimulate debates in political philosophy, albeit partly through resolute objection.

Buchanan’s academic career spanned nearly six decades, as evidenced by the nineteen-volume series of his collected works.² Due to the sheer volume of his publications, this thesis must be selective. The focus is therefore on his most significant philosophical work, the 1975 “*The Limits of Liberty: Between Anarchy and Leviathan*” (*LoL*), where he most concisely develops his social contract theory.³ This theory addresses the legitimacy of political institutions, with Buchanan generally seen as an advocate of *limited government*. It is therefore concerned with normative justification, not explanation. While this thesis centres on Buchanan’s *contractarianism*, it will become evident that his frequent references to the sociopolitical transformations of U.S. society at the time are integral to understanding *LoL*.

Buchanan is often considered a neoliberal, but upon closer scrutiny, it becomes evident that neoliberalism is essentially a 20th century revival of classical liberalism.⁴ In general, neoliberals advocate for strongly liberal and capitalist institutions to ensure functional markets, protect individual liberty, and promote economic prosperity. They support liberal rights and a free-market economy, while also endorsing a constitutionally limited democracy and a modest welfare state to ensure social stability and address basic needs. Although they value democracy, neoliberals also acknowledge its limitations. Additionally, they advocate for a government role in social insurance and public goods, while remaining cautious about excessive regulation and government spending.

¹ Cf. Gordon 1976, 573–590. The new contractarians are Rawls (1971/1999), Nozick (1974) and Buchanan (1975).

² See *The Collected Works of James M. Buchanan* edited by Liberty Fund (Indianapolis).

³ Cf. Meadowcroft 2011, 30. Occasionally, other publications such as “The Calculus of Consent: Logical Foundations of Constitutional Democracy” (*CoC*), co-authored with Gordon Tullock, will also be referenced.

⁴ Cf. Vallier 2021. One notable aspect is that those associated with neoliberalism – Hayek, Friedman, and Buchanan – were trained as economists.

Neoliberals advocate for restrained governmental intervention to preserve market efficiency and safeguard individual liberty. Unlike libertarians, they generally exhibit greater support for the state.

This classical liberal perspective is reflected in the central question of *LoL* and its subtitle: “How can we escape Hobbesian anarchy while simultaneously preserving individual liberty from an overreaching state?” In addressing this central question, he also explores the foundational issue of how it can be conceived that individual rights were initially assigned. In this thesis, I will critically examine Buchanan’s social contract theory in detail, focusing on how it addresses these questions. Thus, my research question can be framed as follows: What are the key characteristics of his *contractarianism*, and what does it demonstrate or justify? Some emphasis will be placed on the role of his public choice theory in understanding the ethical considerations of collective decision-making, examining whether Buchanan’s *contractarianism* offers a robust ethical framework for justifying limitations on governmental power, and exploring the relationship between limited government and individual liberty. I will argue that while his approach demonstrates considerable consistency in many aspects, it also reveals significant flaws, exposing the limitations of *contractarianism*. To underscore what distinguishes Buchanan’s *contractarianism*, it will be useful to occasionally compare it with the best-known contemporary social contract theory, that of Rawls’s.⁵ Methodologically, this thesis employs conceptual analysis as elaborated in the tradition of ordinary language philosophy.

One might wonder why it is worth examining a theory published nearly 50 years ago. To address this, let me highlight several reasons why Buchanan’s political philosophy remains relevant today and why it is still worth exploring. First, there has been renewed interest in Buchanan’s work, as evidenced by the publication of three recent anthologies.⁶ These collections partly respond to historian Nancy MacLean’s claims that Buchanan was the ideological instigator of the radical right movement in the USA.⁷ MacLean’s work, being the product of a historian and criticized as flawed and polemical,⁸ will not be discussed in this thesis. The anthologies were also published to mark

⁵ Cf. Rawls 1999.

⁶ Cf. the anthologies *Buchanan’s Tensions: Reexamining the Political Economy and Philosophy of James M. Buchanan* edited by Boettke and Stein, *Exploring the Political Economy and Social Philosophy of James M. Buchanan* edited by Aligica, Coyne and Haefele, and finally the voluminous *James M. Buchanan: A Theorist of Political Economy and Social Philosophy* edited by Wagner, all published in 2018 and 2019.

⁷ Cf. MacLean 2017.

⁸ See, for example, Fleury/Marciano 2018, 1492–1537; Rakove 2018, 243–245; Trasher 2019, 25–6.

the 100th anniversary of Buchanan's birth. Despite this growing recognition of Buchanan as a significant social contract thinker,⁹ the number of philosophical works on Buchanan remains relatively low. Most publications on his philosophical contributions come from libertarian economists and adherents of the Austrian school of economics, presenting an opportunity to advance the philosophical discussion. Second, Buchanan's approach to the legitimacy of political institutions in *LoL* is informed by his work as an economist. Examining *LoL* thus contributes to the growing interdisciplinary field of "*philosophy and economics*." In fact, Buchanan can be considered one of the pioneers in the 20th-century revival of this research area. Third, debates about the tasks and scope of the state are likely to continue indefinitely, often intensifying during perceived crises. For example, while calls for an expanded welfare state were prominent at the beginning of the COVID-19 pandemic, accusations of state overreach became more common later on. Although this thesis does not apply Buchanan's ideas to specific contemporary examples, examining his work can nevertheless enhance the general understanding of the primary role and responsibilities of the state.

In Section 2, I provide an overview of contemporary social contract theory, focusing on how this model of normative justification works and what it aims to accomplish. Buchanan's social contract theory will be examined using the model specification outlined here. In Section 3, I offer a detailed discussion of Buchanan's individualism, his *contractarianism*, and the relationship between these two elements. I then outline his ideal basis for social order, which he terms "*ordered anarchy*," and explain why it inevitably fails in the real world. This failure serves as the starting point for Buchanan's exploration of how rational individuals can agree to a mutually beneficial social contract. The key elements of this contract are examined in detail in Section 4, with a critical interpretation that highlights aspects of Buchanan's theory that seem inconsistent or problematic. In section 5, I present Buchanan's diagnosis of the sociopolitical transformations of his time, along with their causes and sketched solutions. In Section 6, I provide a broader critical discussion of selected aspects of Buchanan's theory, beginning with a short introduction to the issues discussed. Section 7 concludes the thesis.

⁹ Cf. Brennan/Kliemt 2019, 1–5.

2 Contemporary Social Contract Theory

Like other approaches in moral and political philosophy, social contract theories deal with the rational justification of moral rules, principles of justice, or political institutions (“rules”).¹⁰ Ultimately, the goal is to show which set of rules and principles are worthy of endorsement and compliance. What distinguishes social contract theories from other approaches of justification “[...] is that justification does not rely, for its foundation, on some exogenous reason or truth. Justification is generated endogenously by rational agreement [...]”¹¹ If it can be shown that every member of a society for their *own reasons* could agree to a set of rules, then these rules are justified. For solving the justificatory problem, the social contract aims to explicate these reasons.

The social contract can best be described as a *model* that understands the problem of justification as a problem of deliberation and aims to track the reasons individuals have for agreement through exploring what rules they will agree to.¹² In its general form, it consists of four parameters, which can be specified differently.¹³ Importantly, there are two sets of individuals in the model: In the deliberative setting M the *representative individuals* N choose a set of rules R . The reasons that N have for choosing R must be shared by the *real individuals* N^* such that N^* have reason to endorse and comply with R . The general form is therefore (N, M, R, N^*) . However, since the model is supposed to explicate the reasons RS , they should be listed as well. The general form is then (N, M, R, RS, N^*) . Aside from the object of agreement, social contract theories differ with respect to how the parties and agreement is modelled, or what the social contract actually shows.

According to a common distinction, *contractarian* and *contractualist* social contract theories differ in the definition of the justificatory problem.¹⁴ While the former starts from the premise of a foundational crisis of R , the latter are concerned with aligning R with certain basic moral demands. This difference is reflected in the way these theories model the parties. *Contractarians* are *reductionist* in that they try “to derive the reasonable out of the rational.”¹⁵ By deriving moral reasons from nonmoral reasons, they transform the question of why one should be moral into the

¹⁰ Unless otherwise noted, the entire overview of contemporary social contract theory provided in this chapter is based on the comprehensive article by D’Agostino/Gaus/Thrasher 2021.

¹¹ Ibid.

¹² Cf. Rawls 1999, 16.

¹³ The form of the general model is taken from D’Agostino/Gaus/Thrasher 2021 (The Social Contract as a Model).

¹⁴ Buchanan is a political *contractarian*, while Gauthier (1986) is a moral *contractarian*. Similarly, Rawls is a political *contractualist*, and Scanlon (1998) is a moral *contractualist*. Cudd and Eftekhari (2021) argue that *contractarianism* in either the moral or political sphere does not necessarily imply *contractarianism* in the other.

¹⁵ Cf. Rawls 2005, 53.

question of why one should be rational, making compliance a matter of prudence. In their quest to identify the requirements of morality, *contractualists* adopt a non-reductionist approach. Unlike *contractarians*, they attribute certain moral values to the N.

A related issue concerns the idealization of *N*. There is a tension between the necessity to idealise *N* in order to solve the justificatory problem and the need to model *N* in such a way that the identified *RS* for accepting *R* are relevant to *N**. Furthermore, there is a tension between the need to model *N* as homogeneous in order to reach determinate results and discarding the heterogeneity of *N** which may have caused the justificatory problem in the first place. Lastly, both the knowledge or beliefs of *N* and the evaluative criteria for the different *R* need to be specified.

The four possible ways of modelling agreement are *consent*, *bargaining*, *aggregation* and *equilibrium*. Concerned with the justification of state authority and political obligation, the traditional approaches of Hobbes, Locke and Rousseau relied on the idea of *consent*. They maintained that if it could be demonstrated that everyone gave their consent, then state authority would be justified.¹⁶ Moreover, individuals exercise some presupposed basic normative powers over themselves when entering binding contracts, and binding oneself would generate political obligation.

Following Kant's reinterpretation of the social contract,¹⁷ contemporary social contract theory is concerned with the problem of justification, i.e., determining which rules can be justified to all reasonable persons. This has brought a focus on questions of social morality, i.e., which social rules are both mutually beneficial and stable as opposed to questions of individual morality, i.e., the duty to abide by laws.¹⁸ Central to these theories is now the idea of agreement. In contrast to consent, agreement to *R* does not generate political obligation, but rather allows to reveal the reasons people have in accepting certain social rules. These reasons are identified through a model of hypothetical agreement where counterfactual *N* counterfactually agree to *R* for *RS*. For the *RS* to be relevant for *N**, the premises of the model need to be accepted by *N**.

In *bargaining*, unless the parties with individual utility functions reach an agreement on the division of a specified surplus, they will receive the disagreement outcome. *Equilibrium* solutions often represent themselves as solutions to *M* describes in the terms of the prisoner's dilemma. As *aggregation* is not relevant in this thesis, I will skip them here.

¹⁶ See Hobbes [1651] 1991, Locke [1690] 1980 and Rousseau [1762] 1987, respectively.

¹⁷ See Kant [1797] 1999.

¹⁸ Cf. Buchanan 1962, 303–325.

Finally, social contract theories vary in their interpretation of what the outcome of the model actually signifies. In one interpretation, the outcome constitutes both the correct resolution to the justificatory problem and the conclusion that *R* possesses the normative property *L* such as legitimacy. This is commonly known as “*pure proceduralism*”. In the alternative interpretation, the model merely suggests the correct answer to the justificatory problem, which in turn indicates that *R* possesses *L*.

3 Buchanan’s Foundations

3.1 Individualism, Contractarianism and Unanimity

Buchanan characterizes his approach to the justification of political institutions in *LoL* as follows: First, it is “[...] *individualistic*, in an ontological-methodological sense [...]”¹⁹, by which he means that “[...] the individualist is forced to acknowledge the mutual existence of fellow men, who also have values, and he violates his precepts at the outset when and if he begins to assign men differential weights.”²⁰ Second, it is *democratic* in the sense that every individual counts for one which suggests a criterion for evaluating social conditions: They are “good”, if they allow individuals to pursue their interests within the limits of what has mutually agreed upon.²¹ Buchanan concludes:

“Individual freedom becomes the overriding objective for social policy, not as an instrumental element in attaining economic or cultural bliss, and not as some metaphysically superior value, but much more simply as a necessary consequence of an individualist-democratic methodology.” (Buchanan [1975] 2000, 4–5)

If one accepts the Humean *is-ought dichotomy*, Buchanan’s argument requires some clarification because it is not clear how he can infer the supposed objective of social policy, individual freedom, from a methodology for analyzing social interaction, or an ontology of social phenomena. Elaborating on his argument moreover helps shed that some light on his social contract theory.

In fact, Buchanan appears to conflate what should carefully be distinguished: *methodological individualism* (MI) and *ethical individualism* (EI). The former represents a methodological precept for the explanation of social phenomena in the social sciences. Roughly, MI assumes that the entities ultimately involved in social interaction are individuals and that social phenomena must therefore be explained by reference to the actions and intentions of individuals.²² In contrast, the

¹⁹ Buchanan [1975] 2000, 3 (*emphasis* in the original).

²⁰ *Ibid.*, 3–4.

²¹ Cf. *ibid.*, 4.

²² For a sound defense of *methodological individualism*, see Bulle 2018, 161–84. For a paper exploring the possibility of *methodological holism* in the social sciences, see List/Spiekermann 2013, 629–43.

latter represents a metaethical principle which articulates a requirement for the legitimacy of political institutions and social practices. EI maintains that if all persons affected by the political institutions were to adopt a moral point of view and could rationally accept the general and impartial reasons in favor of these institutions, then they would be legitimate.²³ Importantly, MI and EI are logically independent. One can endorse MI and reject EI, or vice versa. MI is concerned with scientific explanation, whereas EI is concerned with normative justification.

In an earlier paper, Buchanan clearly acknowledges the difference between MI and EI when he stresses the need to distinguish between “[...] individualism *as a method of analysis* and individualism *as a norm for organizing society*.”²⁴ His elaboration of MI is consistent with the above sketch of this methodological precept: Collective action can and, indeed, must be viewed as the action of individuals who are, as decision-makers, the basic units of analysis. Central to the analysis of political institutional is examining their choice problem.²⁵ Moreover, Buchanan endorses EI insofar as he regards the exclusive source of value to lie in individuals.²⁶ This is the normative dimension of his public choice theory. Acknowledging the distinction between these two meta-principles, if done carefully, allows Buchanan to respect the *is-ought dichotomy*.²⁷ His individualistic approach in *LoL* should therefore best be understood as a combination of MI and EI into a view which holds “[...] that the normative structure of complex sociopolitical institutions must be explicated and justifiable in terms of the normative powers and competences [...] of the individual persons who participate in the institutional framework.”²⁸

However, Buchanan’s conception of EI requires some clarification. In the political realm, it translates to the legitimacy requirement that constraints on liberty must be rationally justifiable to those affected by the political institutions. In *LoL* and other works, Buchanan specifies EI concerning what he considers justifiable to the affected individuals. His answer is that nothing can legitimately constrain individual liberty unless agreed upon by the individuals themselves. This is because any external ethical standard, such as a set of principles of justice, would impose values on an individual that they may not share. The ultimate source of values lies within individuals.

²³ Cf. Chwaszcza 2021, 35–7.

²⁴ Buchanan 1962, 315 (*emphasis* in the original).

²⁵ Cf. *ibid.*; Buchanan/Tullock [1962] 1999, 13. Buchanan argues here against an organic understanding of collectives, cf. Vanberg 2019, 555–62.

²⁶ Cf. Buchanan [1975] 2000, 3–5.

²⁷ For a defense of Buchanan in this regard, see Vanberg 2019, 539–76.

²⁸ Chwaszcza 2021, 69.

Only if individuals agree to a constraint on their liberty can it be certain that this constraint is not coercively imposed. This position, which prioritizes the right over the good, can be referred to as (radical) *subjectivism*.²⁹

Buchanan's *subjectivism* is not a form of "epistemic individualism," which posits that individuals, due to their "epistemic privilege," are the best judges of their own welfare.³⁰ Instead, he argues that individuals make choices based on their preferences, and these choices alone reveal what they value most.³¹ According to Buchanan, however, the preferences cannot be represented by independent utility functions that could, in principle, be accessed by people other than the individuals themselves. An individual's preferences and choices are intricately linked, and the former are only revealed at the moment of actual choice-making.³² Thus, Buchanan advocates for "epistemic preclusion," asserting that no one can truly know what others value.

This explains why Buchanan resorts to *pure proceduralism* as a sui generis standard of legitimacy based on a *contractarian* social contract theory. If there are no substantive moral standards or values that can legitimately be used to evaluate political institutions, then the outcome of a certain procedure must provide both the correct resolution to the justificatory problem and the conclusion that the political institutions are legitimate.³³ The *contractarian* approach reflects Buchanan's *subjectivism*, as it is reductive and does not attribute moral values to *N* but assumes that they are self-interested rational maximizers. Buchanan explicitly refrains from imposing his own value judgments on *N* because this would be inconsistent with his individualistic approach.³⁴ However, refraining from attributing any moral values to *N* implies endorsing the value of individual sovereignty in relation to *N**, which is itself a value judgment.³⁵ This presupposes that that individuals have basic normative powers over themselves.³⁶

As a *contractarian*, Buchanan's approach is reductive because he assumes that *N* are self-interested rational maximizers. However, in *LoL*, Buchanan's statements about how he models

²⁹ Cf. Buchanan 1989, 80. I will not discuss whether this label is adequate from a meta-ethical point of view.

³⁰ The following remarks are based on Weale 2020, 271–2.

³¹ As far as I can see, Buchanan does not clearly distinguish between preferences and values.

³² This interpretation of mine appears to slightly differ from Weale's. However, see Vanberg 2019, 563, Fn. 36. Weale criticizes Buchanan's conception of the self, arguing that Buchanan fails to explain how individuals can engage in long-term planning, which is necessary for making the social contract plausible. Buchanan's *subjectivism*, which accepts all preferences, results in a conception of individuals as "rational fools," merely defined by a sequence of choices rather than a reflective self, cf. Weale 2020, 280–1.

³³ In other words, the rules *R* are modelled as endogenous, cf. Levy/Peart 2018, 178–9. See also Barry 1984, 587.

³⁴ Cf. Buchanan [1975] 2000, 3–5.

³⁵ See Vanberg 2019, 571–2; Weale 2020, 271–2.

³⁶ Cf. Trasher 2019, 35.

individuals sometimes appear inconsistent. While he occasionally emphasizes that within his framework it is not necessary to assume, like Hobbes, that individuals strictly follow their “narrowly defined self-interest,”³⁷ he still seeks to illustrate how property rights and political institutions can emerge from self-interested behavior.³⁸ His goal is to demonstrate how it is in individuals’ self-interest to mutually constrain their behavior. Therefore, it seems plausible to interpret him as aligning with the orthodox interpretation of Hobbes, modeling individuals as psychological egoists driven by self-interest and employing instrumental reasoning.³⁹

However, more can be said about Buchanan’s understanding of the rationality he attributes to *N*. It is common to equate the Hobbesian self-interested individual with the *homo economicus*, the model of economic rationality.⁴⁰ Buchanan, also an economist, explicitly has this kind of rationality in mind, without elaborating it further in *LoL*.⁴¹ Gaus argues that the concept of *homo economicus* in general involves more than mere instrumental rationality and suggests that “self-interest” can be understood more broadly. Accordingly, *homo economicus* has strictly monotone preferences, pursues multiple goals, cares only about marginal values and opportunity costs, and is a constrained maximizer of self-interests. Budgets or capacities form these constraints. However, self-interests need not be understood narrowly or solely in terms of maximizing wealth or income. Instead, they can reflect a “non-tuism” where individuals maximize all interests or utility, even those not directly benefiting themselves, expanding the meaning of “self-interest.”⁴² This formal characterization of *homo economicus* aligns with Buchanan’s modeling of *N*, particularly regarding the breadth of self-interest. While it is best to understand Buchanan as modeling *N* as primarily self-interested, consistent with his justificatory aim in *LoL*, the concept of non-tuism may explain why Buchanan insists that *N* does not necessarily need to be narrowly self-interested.⁴³ Even if they are not, they would still want to agree to the social contract, as I will show later.

Unanimity plays an important role in Buchanan’s social contract theory. Before elaborating on this, it is necessary to briefly discuss his conception of society in *LoL*. Consistent with his EI, he denies that society exists to promote the common good or any particular conception of the good

³⁷ Cf. Buchanan [1975] 2000, 34, 56.

³⁸ Cf. *ibid.*, 54, 71, 96, 103.

³⁹ Cf. Gaus 2019, 741–2; Buchanan [1975] 2000, 9. For the orthodox view of Hobbes see Gaus 2013, 263–78.

⁴⁰ Cf. Kliemt 2009b, 46–8.

⁴¹ Cf. Buchanan [1975] 2000, 9. For the role of *homo economicus* in Buchanan’s other projects as *LoL*, see Kirchgässner 2014, 1–17.

⁴² Cf. Gaus 2008, 19–29.

⁴³ Cf. Vallier 2021.

society. Instead, self-interested individuals view society as a cooperative endeavor for mutual benefit, establishing political institutions for this purpose.⁴⁴ Buchanan sees public choice as an analysis of politics through the lens of exchange. He draws a parallel between market exchange and political exchange: individuals cooperate by exchanging goods and services in organized markets, which inherently leads to mutual benefit. Fundamentally, political or collective action, when viewed from an individualistic perspective of the state, operates similarly. In this view, two or more individuals find it mutually beneficial to unite their efforts to achieve shared objectives.⁴⁵ This necessitates collective choice, which must be made *unanimously*. Unanimity is a necessary condition for the legitimacy of the collective choice. Citing the Swedish economist Wicksell, Buchanan argues “[...] that a rule of unanimity for reaching collective decisions provides the institutional analogue to two-person trade in strictly private or partitionable goods.”⁴⁶ He goes on:

“[...] [T]he rule of unanimity offers the only ultimate test for efficiency in many-party exchanges, efficiency being measured by individualistic criteria. Or, to put this differently, any multiparty exchange that captures potentially realizable surplus can conceptually secure the unanimous approval of all participants. (In positive-sum games, all players can gain.) [...] A rule of unanimity provides each and every participant with a veto over final outcomes; [...]” (Buchanan [1975] 2000, 54–5)

When two parties reach an agreement in a private market transaction, there are good reasons to assume that this transaction is mutually beneficial. Otherwise, the parties would not have agreed to the transaction. In other words, a transaction is efficient as long as it does not produce external effects on others.⁴⁷ Briefly, the concept of *Pareto efficiency* signifies that at least one party is made better off without making the other worse off. Analogously, in the context of collective choice, “[a] rule of unanimity will insure to each individual that he will not be harmed or damaged by collective action.”⁴⁸ As Buchanan continues, “[u]nder a unanimity rule, decisions if made at all are guaranteed to be efficient, at least in the anticipated sense. Individual agreement signals individual expectation that benefits exceed costs, evaluated in personal utility dimensions, which may or may not incorporate narrowly defined self-interest.”⁴⁹

The unanimity rule is intricately connected to Buchanan’s *subjectivism*. Unanimity guarantees that no values or constraints on liberty are imposed on an individual without her approval. She

⁴⁴ Cf. Buchanan [1975] 2000, 1.

⁴⁵ Cf. Buchanan/Tullock [1962] 1999, 18.

⁴⁶ Buchanan [1975] 2000, 50 where he credits Wicksell, one of his major influences, as the first one to have recognized this, see Wicksell 1896. For a critique of this cf. Koller 1987, 233–4.

⁴⁷ Cf. Buchanan [1975] 2000, 50.

⁴⁸ *Ibid.*, 51.

⁴⁹ *Ibid.*, 56.

can always use her veto. Any obligations are therefore self-imposed.⁵⁰ Agreement indicates that she is made better off by the collective action, measured by her own criteria. Thus, if agreement must be unanimous, everyone will be better off.⁵¹ In other words, it secures the Pareto property of the multilateral social contract. The unanimity rule, therefore, takes on an important justificatory function vis-à-vis N^* . In his foreword to *LoL*, Kliemt holds that Buchanan is *Kantian* in that his “[...] deepest ethical and normative political concern is the respect for the autonomy of the individual person.”⁵² This concern is expressed by the unanimity rule.⁵³ Confusion might arise because some authors view Buchanan as a Hobbesian due to his modeling of N and the description of the deliberative setting M , which will be explored later.⁵⁴ This apparent paradox can be resolved easily. Methodologically, Buchanan can be seen as a Hobbesian. However, on the level of normative justification he is guided by a respect for the autonomy of the individual, which is a Kantian concern.

3.2 Ordered Anarchy

Based on his individualistic approach, Buchanan sketches an *ideal world* in which the universal basis for social order is what he calls *ordered anarchy*. It is characterized by the absence of formalized rules of conduct. People rather “[...] respect the minimal set of behavioral norms dictated by mutual tolerance and respect”.⁵⁵ Within these limits, they remain free to pursue their own interests. Put casually, the people accept the informal “live and let live” precept because they realize that in face of competing and sometimes contradicting interests this is the best they can get. They may decide to live together in communes, or in isolation. Cooperative ventures are based on voluntary contracts entered by individuals because they promise mutual gain.⁵⁶ As people in *ordered anarchy* accept the minimal set of informal behavioral norms, there is no need for a state as an institutionalized enforcer of rules. It would only manifest itself as a constraint to the pursuit of individual interests, e.g., through bureaucracy. There is an *equilibrium* in that no one has the desire to change the social order because everyone can pursue her interests best. Essentially, *ordered anarchy* realizes the greatest amount of individual freedom compatible with the freedom of others:

⁵⁰ Cf. Weale 2020, 272.

⁵¹ Cf. Buchanan [1975] 2000, 148.

⁵² Kliemt in his foreword to *LoL*, see Buchanan [1975] 2000, xiv. See also Meadowcroft 2011, 40–1.

⁵³ See Kliemt 2009a, 161.

⁵⁴ See, for example, Koller 1987, 17–9 and Mourão/Angeli 2022, 413–32.

⁵⁵ Buchanan [1975] 2000, 5. Thus, *ordered anarchy* is a moral order, cf. Buchanan 2001b, 191; Gaus 2018, 124.

⁵⁶ Cf. *ibid.*, 5.

“The contractarian seeks “ordered anarchy”; that is, a situation described as one which offers maximal freedom for individuals within a minimal set of formalized rules [...]” (Buchanan 2001a, 26)

However, Buchanan acknowledges that such a world is *utopian* and unlikely to succeed in reality.⁵⁷ As he puts it, the idea of ordered utopia is a “conceptual mirage”.⁵⁸ The equilibrium in ordered anarchy is fragile for it takes only one person who does not accept the minimal behavioral norms to threaten it. Buchanan illustrates this as follows: Imagine there is one person in ordered anarchy whose preferences are such that she dislikes long hairs. Suppose this person decides to openly threaten the appearance of people with long hair. This obviously constitutes a constraint to their freedom. To maintain *ordered anarchy*, the people then need to come up with a norm which prohibits such interference. However, this norm must be enforced by some kind of institution, since the precise reason for its formal implementation is that there was no unanimous agreement on this issue in the first place. One might respond that one formalized rule of conduct is certainly acceptable and occurs in a world still close enough to *ordered anarchy*. However, it does not take much imagination to see that it will not stop with just one formalized rule, but many will follow when it comes to topics far more controversial than long hair, such as religious belief.⁵⁹ Buchanan describes this process, though in a slightly different context, as follows:

“To the extent that more and more human interactions exhibit conflicts at the boundaries, institutional means for resolving these will emerge, and the set of formalized rules will expand. If men abide by rules implicitly, formalization is not required. If they do not do so, formalization, implementation, and enforcement become necessary.” (Buchanan [1975] 2000, 8)

Based on the everyday experience of the *real world*, people interfere with the freedom others for various reasons and to varying degrees.⁶⁰ Essentially, *ordered anarchy* cannot be maintained due to the lack of clearly defined and mutually respected limits to individual freedom.⁶¹

⁵⁷ Cf. Boettke/Lemke 2018, 63.

⁵⁸ Cf. *ibid.*, 5.

⁵⁹ Cf. *ibid.*, 6, 9.

⁶⁰ However, Buchanan notes that ordered anarchy can be observed in various spheres of social interaction. For example, in conversations the rule that only one person speaks at a time is commonly respected, cf. *ibid.*, 7–8.

⁶¹ Cf. *ibid.*, 5–6. It might be tempting to understand the interference with the freedom of others as an *externality* and approach it with the help of *Coase’s theorem*. Typically, an externality arises when one agent’s activity has an uncompensated effect on another agent’s utility or production function that has not been taken into account. According to Coase’s theorem, under certain conditions, bargaining between the invader and the invader leads to an *efficient* outcome that does not require government intervention to internalize the externality, see Coase 1960, 1–44. However, the interference does not qualify as an externality because it is *intended*. Moreover, there are no well-defined and enforced property rights which is the precise reason for the failure of ordered anarchy. Therefore, Coase’s theorem is not helpful.

One could object to this by invoking the “notion of interpersonal reciprocity”.⁶² Accordingly, in an *ordered anarchy*, individuals might voluntarily refrain from interfering with the freedom of others because they fear that doing so might provoke others to in turn interfere with their freedom. In this case the people do not take an internal stance towards the minimal norms, i.e., endorse them because they think it is right to do so. Rather, they take an external stance because they fear negative consequences for themselves. Buchanan responds that some individuals may still interfere with the freedom of certain people either because others may simply have no desire to interfere with this intrusion, or because interference can amount to enormous costs.⁶³

Moreover, *ordered anarchy* cannot be guaranteed by introducing a *numeraire*, either. The free exchange of goods and services among people requires “[...] agreement on some commonly valued commodity as a numeraire. Such a commodity, a “money”, facilitates a comparison of values, and allows others, acting as a unit, to buy off or to bribe a single recalcitrant.”⁶⁴ While some “intruders” may be convinced not to interfere with the freedom of others through numeraire payments, others will be motivated to make a business out of this: Some will start to threaten with intrusion just to get paid by those they threaten.⁶⁵ Though I consider Buchanan’s prediction to be correct, I maintain that *ordered anarchy*, already breaks down with the first bribe of a single intruder. The payment constitutes a constraint on the individual’s freedom as it reduces the resources available to achieve their ends. The payment may simply be the lesser evil.

There is much to be learned from this discussion about Buchanan’s project in *LoL*. Insofar as *ordered anarchy* would indeed guarantee the greatest degree of freedom for everyone within the limits of social compatibility, it can be said that it follows from his *subjectivism*. No one imposes values on others; there is no coercive state. Although Buchanan is too much of a realist to believe that widespread *ordered anarchy* can actually be achieved in the non-ideal world we live in, the concept of *ordered anarchy* remains meaningful. For when the first-best option is not available, we must aim for the second-best option.⁶⁶ Therefore, ordered anarchy represents a desirable limiting case, an ideal to strive for. This explains why the subtitle of *LoL* suggests a social order situated between anarchy and Leviathan. One of Buchanan’s intriguing insights is that, paradoxically, it is

⁶² Buchanan [1975] 2000, 5.

⁶³ Cf. *ibid.*, 6.

⁶⁴ *Ibid.*, 6.

⁶⁵ Cf. *ibid.*, 6–7.

⁶⁶ Cf. *ibid.*, 45, 149.

the state that creates the circumstances in which individuals can enjoy the greatest possible degree of freedom by establishing a private sphere separate from the political sphere.⁶⁷ For in a world without a state, everything becomes political.⁶⁸

Buchanan expects that real anarchy would correspond to the Hobbesian state of nature, marking the starting point of his considerations.⁶⁹ In *Hobbesian anarchy*, characterized by the absence of political authority, there is a “war of each against all,” leading to a perpetually insecure existence.⁷⁰ Individuals, being roughly equal in their mental and physical capabilities, live in constant fear and must devote significant effort to both defence and predation, treating each other merely strategically.⁷¹ This condition has fatal consequences, as life becomes “solitary, poor, nasty, brutish, and short.”

4 Buchanan’s Social Contract

In this chapter, I critically examine Buchanan’s social contract theory in detail. Across various sections, I will reconstruct Buchanan’s argument regarding the political institutions that rational individuals would agree to in their efforts to escape Hobbesian anarchy. Throughout this analysis, I will highlight aspects of Buchanan’s theory that appear inconsistent or problematic. Additionally, I will address certain aspects in greater depth in Chapter 6, where I hope to explore some of the major questions that may arise from this discussion.

4.1 Property Rights, Free Market and Social Justice

In the previous chapter it has been elaborated that *ordered anarchy* is inevitably unattainable because there are no well-defined and mutually respected lines separating individual spheres of interest. In such a world, not universal cooperation but interpersonal conflict will be the norm, going far beyond the conflicts about lifestyle discussed.⁷² Buchanan illustrates the many conflicts encountered in society as follows. Suppose Robin Hood and Little John meet in the middle of a one-man footbridge. Who should step back in favour of the other? Without mutually accepted dividing lines among spheres of interest, such conflicts will be difficult to resolve. While in anarchy questions of lifestyle may not pose much potential for conflict, conflicts analogous to the situation on the one-man footbridge, and the most conflicts appear to be of that kind, certainly do. What is

⁶⁷ Cf. *ibid.*, 12. This aspect forms a major difference between Buchanan and anarcho-capitalists.

⁶⁸ Cf. Kliemt 2014, 391–400.

⁶⁹ Cf. Buchanan [1975] 2000, for example, 9, 13, 32, 42.

⁷⁰ For Hobbes’ description of the state of nature, cf. Hobbes [1651] 1991, 86–90.

⁷¹ This makes Hobbesian anarchy a true moral anarchy, cf. Buchanan 2001b, 189; Gaus 2018, 124.

⁷² Cf. Buchanan [1975] 2000, 12.

characteristic about them is that very often the pursuit of individual interests by two or more persons at the same time is mutually exclusive.⁷³ If such conflicts are not resolved otherwise, they will be resolved by force, transforming any anarchy into Hobbesian anarchy.

The central question for Buchanan is: How do we escape Hobbesian anarchy, and at the same time preserve individual freedom from an overreaching state? The obvious, but not easy way out seems to come up with well-defined and mutually respected lines that separate individual spheres of interest. Buchanan describes the problem as follows:

“The issue is one of defining limits, and anarchy works only to the extent that limits among persons are either implicitly accepted by all or imposed and enforced by some authority. In the absence of “natural” boundaries among individuals in the activities that they may undertake, there arises the need for definitional structure, an imputation among persons, even if this structure, in and of itself, is arbitrary. The logical foundation of property lies precisely in this universal need for boundaries between “mine and thine”. Escape from the world of perpetual Hobbesian conflict requires an explicit definition of the rights of persons to do things.” (Buchanan [1975] 2000, 12–3)

In terms of a social order, Buchanan argues that *economic exchange within a free market economy* is the best approximation to *ordered anarchy*.⁷⁴ As he puts it, voluntary economic exchange between individuals “[...] becomes almost the archetype of ordered anarchy[.]”⁷⁵ because of the absence of coercion. Economic exchange, in turn, requires *property rights* and it is precisely these rights as rights of the individual that constitute the defining limits of everyone’s spheres of interest according to Buchanan. Moreover, they constitute “[...] the initial leap from anarchy [...]”⁷⁶ But where do they come from? In fact, Buchanan states that the major concern of *LoL* is to offer a solution to the question of how rights can initially be defined.⁷⁷

In the cited passage above, he rejects the concept of *natural law*.⁷⁸ There are no dividing lines, or “natural boundaries” established in the form of natural property rights. This is evidence that if *libertarianism* articulates an extremely liberal position that is based on natural law, then Buchanan is not a libertarian. Instead, the individuals have to agree to a defined set of individual

⁷³ The conflicts Buchanan has in mind involve somewhat less “private” issues such as the access to scarce goods. While it is true that hair length poses less potential for conflict, other issues that are viewed in the liberal tradition as lifestyle issues, such as religious belief, certainly harbor great potential for conflict, insofar as people do not see such questions as purely “private”.

⁷⁴ Cf. Buchanan [1975] 2000, 23.

⁷⁵ *Ibid.*, 23.

⁷⁶ *Ibid.*, 34.

⁷⁷ Cf. *ibid.*, 11–2 & 9 Fn. 2 where he criticizes anarcho-capitalist Murray Rothbard for not adequately addressing this problem. Such an undertaking also represents a foundation for economics as a science since economics always starts from the assumption of well-defined and respected property rights, cf. *ibid.*, 24–5.

⁷⁸ See also Buchanan [1975] 2000, 18–9 where he refers to natural law as an instance of the “[...] mystique of some “higher law”, [...]” See also Vallier 2021.

property rights that they themselves have come up with. For reasons explored in Chapter 3.2, these property rights will not be implicitly accepted by all, however, which is why there is a need for an enforcing agent such as the state. Insofar this state protects these rights, Buchanan calls it the *protective state* which I will deal with later on.

Despite its theoretical importance, Buchanan discusses rights only shortly.⁷⁹ His conception of property rights is broad: Property rights are not only concerned with physical objects (or intangible assets) but cover all related spheres of human action including behavioral limits.⁸⁰ To return to the previous example, people have the right to grow their hair long so that others cannot cut it without permission. Thus, Buchanan conceives of property rights as *liberty rights*. However, Buchanan remarks that only few rights are absolute. For example, the right to grow the hair long might be restricted such that the person is not allowed to have his hair lice-infected.⁸¹

In *Hohfeldian* terms a liberty right is a “privilege” of the right’s holder that is directed against *n* persons and institutions and has an exclusively negative content. It corresponds with a “no right” of these persons to interfere with the affairs of the right’s holder.⁸² In other words, the right’s holder is immune from interference. Since Hobbesian anarchy is characterized by the absence of such immunity no person is respected for being a person as holders of certain rights, Buchanan concludes that “[t]he delineation of property rights is, in effect, the instrument or means through which a “person” is initially defined.”⁸³

The broad conception of property rights can be understood in light of the function that Buchanan attributes to them. He argues that “[b]y allocating or parcelling out “rights” among individuals in a community, the fundamental organizing principle of anarchy can be extended over wide reaches of human behavior.”⁸⁴ This function can be illustrated by the example of the one-man footbridge, which, however, is about a physical object again.⁸⁵ If either Robin Hood or Little John possess the right of ownership or right of use concerning the bridge, and this right is being enforced by the state, then the conflict of interests is resolved. Suppose John is the owner of the bridge and Hood wants to cross it. John can either grant Hood a right to use the bridge within a trade, or he

⁷⁹ Cf. Buchanan [1975] 2000, 13–4.

⁸⁰ Cf. *ibid.*, 25–6.

⁸¹ Those who find this example unconvincing may be more persuaded by Buchanan’s example that utilities can demand access to someone else’s land for easement.

⁸² Cf. Hohfeld 1913, 16–59 & 1917, 710–770.

⁸³ Buchanan [1975] 2000, 14.

⁸⁴ *Ibid.*, 13.

⁸⁵ Cf. *ibid.*, 13–4.

can exclude him from using it. Of course, Buchanan does not think that property rights are absolute, but suppose here that Hood has no compelling reason to cross the bridge. In both cases the conflict of interests is resolved *peacefully*. In the former case, Hood may be allowed to cross the bridge after John did. In the latter case, Hood's interests, whatever the reasons, are trumped by John's.

Therefore, property rights have a *coordinating function* that allow individuals to go about their normal business minimizing the number of conflicts of interest, and hence the need of the state to intervene.⁸⁶ It is because of this function that according to Buchanan there is no categorical difference between property and human rights such as the freedom of speech.⁸⁷ Both protect the right's holder from interference. As liberty rights they allow the right holder to do or exclude others from doing certain things within defined limits. The property rights of others therefore mark the limits of one's own liberty. While in Hobbesian anarchy everyone is merely a potential means to another's ends, the property rights of others constitute a constraint on the pursuit of individual interests, or, more technically, a constraint on the maximization of individual utility. It is in this sense that individuals come into existence as persons, as Buchanan states repeatedly. These property rights then enable the individuals, or at least facilitate to enter economic agreements. They are therefore essential to the creation and protection of individual freedom. Buchanan notes:

“Under regimes where individual rights to do things are well defined and recognized, the free market offers maximal scope for [...] individual freedom in its most elementary meaning.” (Buchanan [1975] 2000, 16)

Further, Buchanan argues that the notion of a free market provides a criterion for *social justice*. To the extent that parties, under mutual recognition of each other's property, voluntarily agree to private trade, they regard the exchange as just.⁸⁸ This argument can also be understood as a critique of Rawls. In line with the libertarian Nozick⁸⁹, Buchanan argues that Rawls's approach to justice is unjustifiably focused on end-state-related principles, and fails to provide a procedural principle.⁹⁰ The criticism is that in Rawls's original position *N* evaluate forms of socio-political arrangements exclusively from the perspective of the expected distribution of goods, and thereby disregard distribution processes. In this view, Rawls considers only certain distributional states as

⁸⁶ Therefore, they contribute to pacification, see Vallier 2021. Of course, there may occasionally be disagreements about who actually owns a particular good. Therefore, a judicial system is necessary to resolve such disputes.

⁸⁷ Cf. Buchanan [1975] 2000, 13–4.

⁸⁸ Cf. *ibid.*, 22.

⁸⁹ See Nozick 1974.

⁹⁰ Cf. Homann 1984, 139–40.

just, but not the processes by which distributions occur. For Rawls, the free market does not hold intrinsic moral value.

4.2 The Natural Distribution

In the last section, I have explored Buchanan's conception of property rights. In this section I will present his answer to the question, which, as noted, is central to *LoL*, about how one should imagine that these rights are initially defined.

Since Buchanan rejects the idea of natural rights, people in anarchy must agree to a set of individual property rights that they have instead created for themselves. But how is this possible given the absence of a state which could provide an appropriate framework for negotiations? Returning to the example discussed in connection with the failure of *ordered anarchy*, how can a person who dislikes long hair and even more, impedes the freedom of people with long hair be persuaded to accept certain limits on behavior in the form of liberty rights that prevent her from doing exactly that?

To explain what he considers to be the appropriate basis for the emergence of individual rights, Buchanan introduces a broad definition of *externality*, which he first applies to a static two-person model without production.⁹¹ Suppose that in this model all goods are available to persons A and B in superabundance except for the scarce good x which is simply provided to A and B in the beginning of each period.⁹² Assuming strictly monotone preferences, the consumption of x by either A or B imposes an "*external diseconomy*" on the other. Since there is no surplus possible in this setting, A and B have no incentive to trade x . Rather, they strive to internalize the externality imposed on them by the other and consume as much of x as possible. Conflict about x arises that leads to Hobbesian anarchy due to the lack of individual rights. Both A and B live in constant fear that the other party will deprive them of their amount of x , and therefore invest in defensive efforts to protect the amount of x available to them, and perhaps in predatory actions to take x away from the other person.

The ability to protect or gain a given quantity x depends on the skills, talents and abilities of A and B, or in short, on their capacities, which can be described by a *production function*.⁹³

⁹¹ In Fn. 61 I have explained, why Coase's theorem, which is based on a narrower understanding of an economic externality, is not helpful in preventing the failure of ordered anarchy.

⁹² Cf. Buchanan [1975] 2000, 31–3.

⁹³ Cf. *ibid.*, 71–2. Note that in a model that allows production the production function describes not only the ability to produce by transforming some input, but also the ability to secure certain quantities of x .

According to Buchanan, these capacities as well as the preferences of the individuals which can be described by a *utility function*, may be quite similar, but it is more likely that it is rather unequal.⁹⁴

He refers to some not further indicated empirical evidence when he writes:

“Individuals differ, one from another, in important and meaningful respects. They differ in physical strength, in courage, in imagination, in artistic skills and appreciation, in basic intelligence, in preferences, in attitudes toward others, in personal life-styles, in ability to deal socially with others, in *Weltanschauung*, in power to control others, and in command over nonhuman resources. [...] We live in a society of *individuals*, not a society of *equals*.” (Buchanan [1975] 2000, 15–6)

At first glance, this description of the differences between people seems plausible. Remember that Hobbes crucially assumes that individuals are more or less equal physically and mentally. Therefore, Buchanan rejects one of the main premises that Hobbes uses to describe the state of nature. He believes that this makes his theory less “[...] vulnerable to positivist refutation.”⁹⁵ Note that while Buchanan apparently assumes that individuals differ significantly in descriptive terms, he merely wants to keep his framework general enough to be able to account for these differences if they turn out to be the case.⁹⁶ As I will demonstrate below, this has far-reaching implications.

For the social contract to be relevant for real people, N^* needs to be able to identify with N . Excessive idealization could be problematic. However, Buchanan does not idealize N at all. If N^* is descriptively unequal and, moreover, heterogeneous, as he seems to assume, then so are N . If N is modeled in accordance with N^* , the agreed-upon R may be more stable, as the RS for N to agree to them should also be shared by N^* .

As the result of conflict over good x what Buchanan calls a “*natural distribution*” will emerge.⁹⁷ Without being bound by formalized rules, A and B will “naturally” secure a certain share of x in proportion to their preferences, capacities and the environment setting.⁹⁸ Consequently, this distribution may be significantly different from the initial distribution of x and may be characterized by a large asymmetry in consumption shares. Crucially, it represents an *equilibrium* in that neither party has an incentive to invest further in defensive measures or predatory efforts to gain an additional unit of x . In other words, for both parties the *marginal benefit* of consuming an addi-

⁹⁴ Cf. *ibid.*, especially 15–7, 34, 71.

⁹⁵ *Ibid.*, 71.

⁹⁶ Cf. *ibid.*, 71.

⁹⁷ Cf. *ibid.*, 32.

⁹⁸ See *ibid.*, 72–6, where Buchanan illustrates how this process might work. Note that he assumes a natural distribution will always emerge, even if individuals are not as unequal as assumed or do not behave in narrowly self-interested. In such cases, the distribution might simply appear different, cf. *ibid.*, 34–5.

tional unit of x is equal to the *marginal cost* of defending or winning an additional unit of x . Nevertheless, the consumption of x by one party continues to impose an external diseconomy on the other party. In the absence of a formal agreement, the *natural distribution* does not constitute a structure of rights, but rather a form of *mutual recognition* of the status quo which unlike the initial distribution now allows internalization.

4.3 Contractual Agreement

Regarding the *natural distribution*, Buchanan states::

“The “natural distribution” [...] serves to establish an identification, a definition, of the individual persons *from which* contractual agreement become possible. Absent such a starting point, there is simply no way of initiating meaningful contracts, actually or conceptually.” (Buchanan [1975] 2000, 32)

Since the *natural distribution* constitutes an *equilibrium* that brings some form *mutual recognition*, it enables a *contractual agreement*. This agreement represents the internalization of the external diseconomy. In terms of the general form of the social contract model, the *natural distribution* describes the deliberative setting M in which the descriptively unequal N choose a set of rules or principles R for the mutual benefit. In the framework of the two-person model, A and B as rational agents facing the *natural distribution*, recognize that they both would be better off if they were not forced to make significant investments in defence and predatory measures.⁹⁹ For in an economic sense, these efforts are not used productively, but are wasted.

Importantly, Buchanan notes that, regardless of potential inequalities in the natural distribution, both A and B would benefit from reaching an agreement that includes the following elements: first, multilateral disarmament; second, the assignment of property rights, possibly accompanied by the prior transfer of goods or resources to ensure everyone’s agreement; third, the establishment of a *protective state* to enforce these rights; and fourth, the establishment of a *productive state*.¹⁰⁰ All individuals agree to limit their behaviour in this context. Thus, the social contract can be described as a form of trade or behavioural exchange.¹⁰¹ It is important to highlight that the obligations arising from the contract are fundamentally self-imposed. As rational maximisers, individuals evaluate the social contract based on whether it increases their net utility. The prospect of being better off provides a compelling reason for everyone to agree to the contract. When the contract establishes a constitution, it can be termed a “*constitutional contract*,” as it outlines the

⁹⁹ Cf. *ibid.*, 32–3, 76–7.

¹⁰⁰ Cf. *ibid.*, 92–5. Property rights therefore emerge through an individualistic economic calculus.

¹⁰¹ Cf. *ibid.*, 136.

rules governing the subsequent “game,” i.e. social interaction and the workings of political institutions. However, Buchanan does not specify the details of the constitution, only its broad elements. The efficiency of such a constitution depends on factors like the number of people with membership rights, the environmental setting, and the *natural distribution* as well as precedent trades between N relative to their bargaining skills¹⁰² and other factors and cannot be known a priori.

In discussing why ordered anarchy fails, it was noted that first individuals can also be the object of preferences. For instance, one person might strongly dislike long hair and prefer that others wear short hair. Second, the social contract assigns individual rights. Buchanan, due to their coordinating function, does not make a categorical distinction between rights concerning property and those concerning human behavior. Consequently, from these two points, it follows that the agreed-upon rights could, in principle, include individual rights that allow individuals to demand that others cut their hair. Thus, the social contract might not only assign *liberty rights* but also, under certain circumstances, *claim rights* concerning human behavior.

Buchanan introduces production into the model and discusses what happens when the so-called direct-production position, i.e. the situation in which both A and B could produce goods without being forced to invest in defence or predation seems Pareto-superior to the *natural distribution*.¹⁰³ This question arises because one might ask why A and B do not agree to transfer property rights in this case to avoid conflict in the first place. However, Buchanan objects that the position in direct production will usually not be Pareto-superior due to the expected inequality between the people involved in their capacities or due to environmental setting. At least one person will be better off investing in predation. If the direct-production position is not Pareto-superior, reaching agreement on the assignment of property rights while avoiding conflict must be accompanied by redistribution, i.e. the unilateral transfer of goods or resource endowments from the less assertive person to the more assertive person, either just once or permanently. As can be seen, Buchanan’s assumption of descriptive inequality of individuals, albeit not necessarily true, is an important premise in his social contract theory. If the individuals turned out to be rather equal, there seems to be no reason to deny the possibility that they will agree to an assignment of property rights reflecting the direct-production situation. Such a theory might resemble *Locke’s* social contract theory rooted in natural law.

¹⁰² Cf. *ibid.*, 33.

¹⁰³ Cf. *ibid.*, 32–3, 72, 78–83.

It is central to Buchanan's social contract theory that the *contractual agreement* of the individuals must be unanimous. For as discussed earlier, only the unanimity rule grants each participant of the contractual situation a veto to secure the Pareto property of the social contract. Assuming that the individuals are rational maximisers and do not let themselves be tricked, no participant can therefore be better off at the expense of another. The *natural distribution* cannot be undercut. Note that, due to his respect for individual sovereignty, Buchanan must accept the constitutional contract unanimously agreed upon by N . Additionally, he can be understood as asserting that mutual respect for individual sovereignty emerges endogenously in his model through the interactions among N , once they reach agreement on the social contract.

The two-person model presented above is of course a very simplified model. It is limited in both the number of scarce goods and the number of people involved. In addition, the time factor is also neglected. Buchanan gradually eases these restrictions to see if there are any changes to the process described previously.¹⁰⁴ First, he allows for more than one scarce good in a two-person model. Not only is x now scarce, but also good y , etc. As before, the scarce goods are provided to individuals at the beginning of each period. Buchanan concludes that, just as in the two-person model with one scarce good, a *natural distribution* will emerge which is now many-dimensional which again allows for *contractual agreement*. Everything that was said before about the simplified model also applies to the many-goods model. However, the model changes in one important aspect. While in the one-good model the Pareto-frontier is achieved with the initial agreement on property rights since with only one scarce good there is no incentive to trade, in the many-good model trade becomes possible. Goods can now be traded on markets that emerge for this purpose according to individual preferences, which individuals could not secure to the desired extent in the preceding conflict. Buchanan plausibly assumes here that the preferences of individuals differ from each other because otherwise trades would not be possible.¹⁰⁵

Second, Buchanan allows for an n -person model, where $n > 2$.¹⁰⁶ While a so-called purely *natural distribution* among individuals could arise in such a model, it can also happen that individuals form coalitions against other individuals or coalitions of individuals. These coalitions will be characterized by an internal structure of assigned property rights which emerged from an internal

¹⁰⁴ Cf. *ibid.*, 36–41. The factor time will be accounted for I, section 4.7.

¹⁰⁵ Cf. *ibid.* Pareto improvement through trade requires that, for given bundles of goods, the *marginal rate of substitution* of each party with respect to these bundles differs.

¹⁰⁶ Cf. *ibid.*, 41–5.

natural distribution. The conflict between coalitions and individuals will eventually lead from a *natural distribution* between some coalitions at lower levels to an aggregated *natural distribution* at the top level that includes all coalitions and individuals. This *natural distribution* can then serve as the basis for a comprehensive *contractual agreement*, i.e. a constitutional contract that defines the property rights of each individual and is beneficial to all.

As elaborated above, the individuals trade with each other for additional gains once the property rights have been assigned. The possibility of such trades presupposes not only different preferences regarding rival goods, but also that “[...] the agreed-on assignments do not correspond precisely to the preferred final-goods packages.”¹⁰⁷ However, while Buchanan recognizes that the individuals in both anarchy as well as in the bargaining process prior to the initial assignment of property rights will try to secure the goods that give them greater utility, he argues that this correspondence is unlikely to occur. For there is simply no necessary connection between the individual’s ability to secure and bargain on the one hand and the goods preferred on the other.

According to Buchanan the fourth element of *contractual agreement* is the establishment of the *productive state* which provides *public goods*. The nature of these goods makes it either impossible or very inefficient for individuals to produce them. Understanding the multilateral disarmament, the assignment of property rights together with the establishment of the *protective state* as the first stage of the agreement, the establishment of the *productive state* would be the second. Therefore, Buchanan provides a two-stage or multi-level social contract theory. The novel distinction between the *protective* and the *productive state* as two different objects of agreement corresponds to the distinction between commutative and distributive justice.¹⁰⁸ Since the tasks of these two state agencies differ significantly, their justifications must also be distinct.

Buchanan describes both the trade in private goods succeeding the constitutional contract and the provision of non-rival public goods as happening on the post-constitutional stage. This “*post-constitutional contract*” represents the traditional domain of economics.¹⁰⁹ The *productive state* will be discussed in more detail later on. For now it suffices to have a look at the graphical illustration of the individuals’ utility associated with the two objects of agreement.¹¹⁰

¹⁰⁷ Ibid., 38.

¹⁰⁸ Cf. D’Agostino/Gaus/Thrasher 2021.

¹⁰⁹ Cf. Buchanan [1975] 2000, 38–40.

¹¹⁰ This figure is taken from *ibid.*, 39.

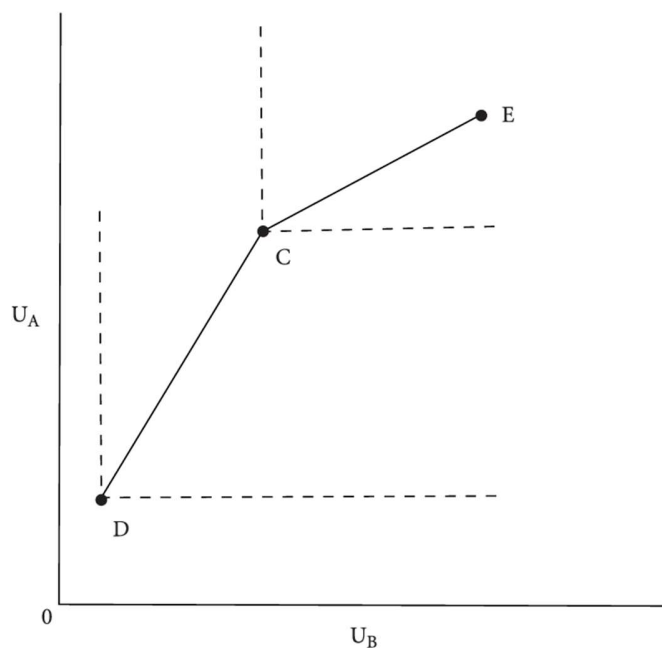


Figure 1. Two-stage contractual sequence.

Figure 1 shows the situation in the two-person model with persons A and B. The x-axis shows the level of utility of B and the y-axis shows the level of utility of A. D marks the utility gained by both parties in the *natural distribution*. Although A receives a higher utility than B, the utility for both parties is greater than zero, meaning that both parties manage to secure, for example, a certain amount of good x . C denotes the greater utility gained if the parties agree on the assignment of property rights and the establishment of the *protective state*. In other words, it illustrates the benefits that arise from the first stage. Here A and B benefit equally from the contract, as can be seen from the approximately 45 degree angle of the connecting line. E denotes the even higher utility gain if the parties agree on private-goods trades and/or the joint provision of public goods as part of the post-constitutional stage. Here B benefits relatively more than A, which may be due to generally lower production capacities. As noted before, in the two-person model with only one scarce good there is no room for trade in private goods because the Pareto frontier is already reached by the agreement over the initial assignment of the scarce goods.¹¹¹ Therefore, C is the highest point they can reach in this simple model. The situation is different in the many-goods model. Here A and B can reach E as a trading equilibrium.

¹¹¹ Cf. *ibid.*, 38.

4.4 A Game-theoretical Analysis

Following the orthodox interpretation of Hobbes, Buchanan models M in the form of the game-theoretical prisoner's dilemma.¹¹² He illustrates the *strategic interaction* between the individuals involved by applying the prisoner's dilemma to the aforementioned two-person model. Note regarding *Figure 2* that, as elaborated above, there are actually no rights in the natural distribution, only mutual recognition. Therefore, *Figure 2* represents the strategic reasoning of individuals in the natural distribution.¹¹³

		B	
		Respects Rights	Respects No Rights
A	Respects Rights	Cell I 19, 7	Cell II 3, 11
	Respects No Rights	Cell III 22, 1	Cell IV 9, 2

Figure 2. The prisoner's dilemma.

The left-hand numbers state the utility gained by player A, while the right-hand numbers state the utility gained by player B. Utility is ordinal, with 22 representing the highest utility. Buchanan explicitly ignores the issue of the interpersonal comparability of utility, and so will I.

The arrangement of the potential outcomes resulting from the possible interactions, according to the highest utility, yields the following:¹¹⁴ For both individuals, the best outcome occurs if one does not respect rights oneself, i.e., attacks, while the other respects rights, i.e., does not attack (Cell III for A and Cell II for B respectively) (1). The theoretically even better outcome, ordered anarchy, is not depicted at all since it is practically unattainable. The second best outcome for both individuals occurs, if both A and B respect rights (Cell I) (2), while the third best outcome for both individuals arises, if both A and B do not respect rights (Cell IV) (3). Hence, in Buchanan's theory (3) represents the natural distribution. Finally, conversely to (1), for both individuals, the worst possible situation occurs when they themselves respect the rights of the other, but their own rights are not being respected (4).

It is common to represent the utility in the prisoner's dilemma symmetrically on the left and right along a diagonal from Cell I at the top left to Cell IV at the bottom right. In *Figure 2*, however, Buchanan chooses unequal levels of utility because he assumes, contrary to Hobbes, that

¹¹² Cf. Gaus 2013, 263–278. Another option that Buchanan does not pursue is modelling it as an assurance game.

¹¹³ This figure is taken from Buchanan [1975] 2000, 36.

¹¹⁴ Cf. Gaus 2013, 263–278.

the individuals are descriptively unequal. Still, the players' strategic thinking is adequately represented by the prisoner's dilemma. Suppose that in a two-person-model A is very assertive and B is not. To the extent that A is more assertive than B one could say that even when B defends himself, the interaction somewhat resembles the situation where A attacks and B does not. As Buchanan maintains, however, this situation is still adequately represented by (3) since both players can reach the *Pareto-superior* (2) by forgoing their predatory and defensive efforts. The difference that arises from Buchanan's rejection of equality is that some individuals are likely to be more assertive to the detriment of others than is the case in Hobbes' own social contract theory.

In the *natural distribution* (Cell IV), the more assertive A gains a utility of 9 and B gains a utility of 2. Obviously, both A and B would find themselves in a position that is *Pareto-superior* to the natural distribution, if they agreed on the assignment of rights and were willing to respect those. As can be seen in Cell I, A would gain a utility of 19 and B would gain utility of 7. The difference in utility can be explained by the fact that in Cell I both A and B would not have to bear the costs of predatory and defensive effort anymore. However, in a *static game* A and B will never reach the positions represented by Cell I because the *natural distribution* represented by Cell IV constitutes the game's sole *Nash-Equilibrium*. For both players the *dominant strategy* is to attack because they are afraid that if one of them respects the rights of the other person, the other person will not do so, so they will end up no worse off than in the *natural distribution*. It follows that they will always play $S_{IV} = \{\text{Respect No Rights, Respect No Rights}\}$. Suppose A respects the rights of B hoping to gain a utility of 19 (Cell I). B will actually be better off if he does not respect the rights of A so that he will gain a utility of 11 (Cell II). This utility is greater by 4 units than what he would gain if he respected the rights of A (Cell I). To illustrate this, A would drop his weapons and stop investing into predatory and defensive effort making himself vulnerable to B who would not do so. Such a situation is *Pareto-inferior* since one player is made better off by making the other player worse off. However, as A and B anticipate that this would happen, neither of them will respect the rights of the other person. In short, the mistrust between the players prevents them to achieve a *Pareto-superior* position. Moreover, the *natural distribution* is the default or *disagreement position*, i.e., if no agreement is reached, the players will remain in Cell IV.

Next, Buchanan discusses the *problem of stability*.¹¹⁵ He argues that any agreed-on assignment of rights will normally not be stable in the sense that any party has an incentive to violate the

¹¹⁵ Cf. Buchanan [1975] 2000, 35–6, 83–8.

terms. This is because, whereas Cell I denotes the Pareto-superior outcome, Cells II and III depict the best individual outcomes. Buchanan holds that in the two-person model, and only in this model, there are in fact elements of stability in the Pareto-superior positions in Cell I. For he suspects that in a repeated game if either A or B will not respect the rights of the other, while the other did, the person who feels betrayed will quickly return to the Pareto-inferior Cell IV. Anticipating this, both players will respect the rights of the other player for this will ensure the greatest permanent utility.

Against Buchanan, I maintain that in his scenario whether Cell I constitutes a stable position depends on the critical discount factors δ^A and δ^B which are usually not identical and differ depending on the utilities in the game.¹¹⁶ If B respects A's rights but A deviates and does not respect B's rights, A will gain additional utility amounting to 3 (= 22 ./ 19) compared to Cell I. If, in the opposite case, A respects B's rights but B deviates and does not respect A's rights, B will gain additional utility amounting to 4 (= 11 ./ 7). Depending on how valuable this additional utility is for each player *in the present* (expressed in the discount factors),¹¹⁷ they will deviate and accept the subsequent return to the *natural distribution*, or not. However, this is only a minor issue since Buchanan rightly acknowledges that in a n -person model with $n > 2$, the suggested elements of stability disappear because here the influence of others' behaviour has less influence on one's own behaviour. Hence, the insight gained from this discussion remains: Achieving and maintaining the Pareto-superior position in Cell I requires an agent that enforces everyone's rights.

This is where the *protective state* comes into play.¹¹⁸ Its task is to enforce the property rights. It will coerce individuals to respect each other's rights, so that the second best outcome (2), the situation depicted in Cell I can be achieved. Individuals now obtain a higher utility than in the *natural distribution*. It is important to note that the *protective state* fundamentally changes the game by making the best possible outcome (1) unattainable for any player.¹¹⁹

4.5 The Protective State

Let me reiterate and elaborate what set of R the representative individuals N in the *natural distribution* unanimously agree on at the first stage of the social contract: They agree first, on multi-lateral disarmament and second, on the assignment of property rights which involves the mutual

¹¹⁶ See also Weale 2020, 269.

¹¹⁷ A high discount factor means that a person values future benefits much less than immediate ones.

¹¹⁸ Cf. Buchanan [1975] 2000, 9.

¹¹⁹ For the sake of completeness, it should be noted that *ordered anarchy* which is not depicted in the game is even better than (1), since enforcement of rules is not required here.

guarantee not to infringe them.¹²⁰ These property rights will be guaranteed by a constitution which is why they can also be referred to as *constitutional rights*. Since the individuals – who now have become citizens – know that this guarantee alone is not enough to ensure the protection of these rights, they agree third, on the complementary establishment of the *protective state* as an enforcing agent.

The establishment of the *protective state*, which includes a police force and a judiciary, is closely linked to the disarmament of individuals, as the state, drawing on Weber's concept, holds the "monopoly of legitimate physical coercion."¹²¹ One significant issue arises concerning the disarmament agreement. Coming from the stateless *natural distribution* the individuals are still armed. In the transition to the state the questions arises: Who lays down the weapons first, and who is allowed to keep his weapons since the state requires that armed individuals work for it as police force? This problem is particularly significant because the *protective state* is not an external entity that can oversee the process but is instead established by the citizens for the citizens at this stage.¹²² In fact, no citizen will make the first move because there is no guarantee that they will not be immediately attacked by another party. Going back to the prisoner's dilemma, it seems clear that once one player shows that he is vulnerable, others will attack. Obviously, this would change the game to the detriment of the player being attacked. Knowing that this will happen, no one will make the first move. The individuals are stuck in *equilibrium*. Therefore, while the *protective state* can be agreed on, it cannot emerge from the *natural distribution*. Unfortunately, Buchanan does not explicitly elaborate the process of disarmament.¹²³

It is important to distinguish between the agreement on constitutional rights within the constitutional contract and the enforcement of these rights. In the *natural distribution*, it is individuals who unanimously agree on constitutional rights. The *protective state* safeguards these rights but does not have the authority to alter them, as it is not a decision-making body. If this distinction can be upheld, government power is effectively limited. Any changes to the constitution require the unanimous agreement of all citizens.¹²⁴ Although the *protective state* cannot be entirely external, it ideally functions as a referee, overseeing whether the game is played according to the agreed

¹²⁰ Cf. Buchanan [1975] 2000, 16.

¹²¹ Weber 1919, 4 (own translation).

¹²² In Hobbes' theory, the absolute monarch is an external agent because he is not part of the social contract.

¹²³ Cf. Weale 2020, 269–70.

¹²⁴ This will be explored in section 5.7.

rules and administering punishment for violations.¹²⁵ It is solely concerned with determining facts in a “mechanical” manner – either the law has been violated or it has not. Since it is not a legislative body, democratic organization is not necessary. Through this law enforcement, rather than law-making, the state provides a public good: the general security of property rights, which ensures stability and predictability.¹²⁶ The *protective state* thus facilitates the coordinating and pacifying functions of property rights. It should be noted, however, that it also enforces bilateral agreements between individuals and the decisions made by the *productive state* regarding the financing and provision of public goods. As discussed, these aspects belong to the post-constitutional stage.¹²⁷

Buchanan further stresses the “neutrality condition” of the state which “[...] translates into equal treatment for unequals, not equals.”¹²⁸ This means that the state remains neutral in enforcing potentially different property rights and thereby treats descriptively unequal citizens equally. On the one hand, the neutrality condition refers to the ideal of “the Rule of Law”. On the other hand, it underscores Buchanan’s repeated emphasis that the state’s role is not to realize any particular conception of goodness or justice. Let me offer a brief critique. Buchanan overlooks the crucial role of an independent judiciary in democracies. While he acknowledges that the process of determining facts cannot be entirely “mechanic,” thus allowing judges some discretion, he nonetheless argues that judges should avoid engaging in legislative activities. This perspective seems narrow and disconnected from practical legal realities. In democratic systems, constitutional rights require interpretation for practical application, and these interpretations evolve as society changes. Additionally, there are uncertainties regarding the existence or extent of property rights, for example in the context of private transactions occurring after the constitution was enacted. Addressing these uncertainties is a key task of the judiciary. Furthermore, Buchanan neglects to address the differing roles of judges in common-law versus civil-law countries. In common-law systems, where the development of law is heavily influenced by precedents, judges have a more significant role in shaping the law compared to their counterparts in civil-law systems, where legal codes and statutes play a more central role. Bertolini highlights an additional, potentially more severe issue with Buchanan’s approach.¹²⁹ He argues that Buchanan’s stringent form of legal positivism together with

¹²⁵ Cf. Buchanan [1975] 2000, 88–90; 121–3; 125.

¹²⁶ Cf. *ibid.*, 87–8.

¹²⁷ Cf. *ibid.*, 88, 132.

¹²⁸ *Ibid.*, 16, see also 88–9.

¹²⁹ Cf. Bertolini 2019, 41–69.

his *contractarianism* overlooks several critical aspects: the role judges play in shaping legal rules, the inherently moral nature of constitutional principles, and the importance of private legal arrangements. By disregarding the pluralism of lawmaking institutions, Buchanan's constitutional framework allows for an insufficiently constrained political monopoly on lawmaking. This oversight fails to account for effective institutional safeguards that protect liberty against the risks of coercive political power.

Buchanan also extensively discusses punishment, arguing that decisions on penalties and methods of execution should be enshrined in the constitution.¹³⁰ Subsequent empirical observations should not alter these decisions. While efficient penal measures might ideally vary based on different patterns of behavior and character among potential offenders, this could lead to ex-post speculation about group-specific sanctions, potentially undermining respect for the law. During the initial contract negotiations, it is unrealistic to expect a group to agree to differentiated penalties, regardless of their efficiency. Instead, the rule should be that a specific legal violation results in uniform sanctions for everyone.

Let me now explicitly state a premise about the *protective state* that Buchanan takes for granted. As elaborated, individuals will only enter the contract if it is Pareto-superior. However, implementing and maintaining the *protective state* requires imposing taxes on citizens. Therefore, for the social contract to be Pareto-superior, it must ensure that the taxes paid by individuals do not consume the profits generated from additional production. The expected net profits must still be greater than what could be generated in anarchy through predation and defence.¹³¹

Overall, the *protective state* we encounter in Buchanan's framework aligns with the classical liberal concept of the *minimal state*, sometimes referred to as the "night watchman state."¹³² Its primary role is to protect citizens' constitutional rights and enforce contracts. The *protective state* has no other purpose and derives its justification solely from this function. As previously discussed, the constitutional rights in question are liberty rights. When these rights are violated, regardless of the perpetrator, citizens have a claim against the state to take immediate action to address the infringement.¹³³ Additionally, these liberty rights also safeguard citizens from interference by the

¹³⁰ Cf. Buchanan [1975] 2000, 165–185.

¹³¹ See also *ibid.*, 92.

¹³² It is important to note, however, that within Buchanan's framework, the *productive state* retains responsibility for national defense.

¹³³ Cf. Buchanan [1975] 2000, 107. For an analysis of *claim rights* see Hohfeld 1913, 16–59; 1917, 710–770.

protective state itself. It is important to note, however, that Buchanan does not advocate for the *minimal state* alone. He also supports the implementation of a *productive state*. What Buchanan shares with proponents of the *minimal state* is the principle of minimal interference in both personal and economic matters.

4.6 The Productive State

The two categories of the post-constitutional contract belong to the traditional domain of economics. It is useful to highlight the differences between these two categories.¹³⁴ The first category includes trade in private goods that are rival in consumption. The second includes the provision of public goods that are non-rival in consumption. Private goods are traded in markets that spontaneously emerge and are, in the absence of significant external effects, efficient. In bilateral trade, only two people need to explicitly agree, so agreement and transaction costs are typically low. In contrast, public goods markets fail to emerge or produce efficiently. Agreement and transaction costs are usually high due to the large number of people involved. This is where the *productive state* comes into play.¹³⁵ Its task is to facilitate the complex exchange processes necessary for financing and providing public goods among all citizens, with the aim of increasing their level of utility.¹³⁶ Therefore, it has a *cooperative function*.

Central to the productive state are collective decisions. As elaborated above, collective decisions require unanimity to satisfy the efficiency criteria, ensuring that no one imposes external costs on someone else. However, due to the high or even prohibitive internal costs of agreement in large group settings, a departure from unanimity to a less-than-unanimity rule is necessary.¹³⁷ *CoC* demonstrates how one can capture many of the benefits of unanimity without incurring its associated costs.¹³⁸ In the constitutional contract, individuals will unanimously agree to some qualified unanimity rule, which need not be uniform across all decisions, but will not adopt a simple majority rule. However, it is possible that through a less-than-unanimity rule, individuals could be made worse off, for example, by paying taxes for what they perceive to be an excessive amount of a certain public good. This would imply that the *productive state* can interfere with the constitutional

¹³⁴ Cf. Buchanan [1975] 2000, 41, 46–50.

¹³⁵ Moreover, the provision of public goods, unlike private transactions, faces the free-rider problem. Individuals have an incentive not to share the costs related to the provision of public goods while still benefiting from them, cf. *ibid.*, 48–50.

¹³⁶ Cf. *ibid.*, 121, 124. For the problem of free-riding, see *ibid.*, 47–50.

¹³⁷ Cf. *ibid.*, 54–55.

¹³⁸ For further details see Buchanan/Tullock [1962] 1999. For an overview of *CoC*, see Thrasher/Gaus 2017.

rights of citizens, thereby questioning their validity. Hence, Buchanan argues for constitutional constraints:

“It is important to recognize both the purpose and the limits of the constitutional constraints that may be imposed on the operation of nonunanimity rules for collective decision-making at the postconstitutional stage of social interaction. To remain within what we may call broad contractual bounds, individuals must be assured that, in the net, operational politics will produce for them benefits rather than damages.” (Buchanan [1975] 2000, 62)

For example, constraints on the types of public goods and the fiscal process, including tax institutions, can ensure that outcomes under less-than-unanimity rules resemble those that would be achieved under unanimity.¹³⁹ The same principle applies to drawing at least a rough distinction between the private and public sectors of the economy. Limiting the power of the *productive state* is one of the issues that most concerns Buchanan. More on this can be found in the next chapter.

Let me highlight the difference between the *protective* and the *productive state*.¹⁴⁰ Unlike the former, the latter is represented by a legislative body that engages in actual decision-making. It is *democratic*, operating under the qualified unanimity rule agreed upon in the constitution. While the *protective state* is ideally concerned with finding facts “mechanically,” deciding only whether rights have been violated or not, and administering punishment, the *productive state* requires the participation of citizens who express value judgments. Citizens place different values on public goods, their quantity, and cost-sharing. These differences need to be reconciled in the political process. Furthermore, while the *protective state* focuses on the internal enforcement of constitutional rights, the *productive state* is responsible for providing national defense. The extent to which Buchanan’s concept of a productive state includes elements of a welfare state is unclear. It might incorporate social insurance.¹⁴¹

However, there are also inevitable interrelationships between the two state agencies. For example, while delegating the power of enforcement to judicial experts such as seems to be a good idea in the *protective state*, it must be ensured that they act within constitutional limits. For this reason, the contractual participants have an interest that “[d]emocratic procedures, including representation of interests, may be explicitly incorporated into the structure of the enforcer state because these seem to offer the only means of exercising ultimate control over the experts to whom enforcing tasks are delegated.”¹⁴² Conversely, the collective decisions made by the *productive state*

¹³⁹ Cf. Buchanan [1975] 2000, 57–63, 93. Note that constraints do not need to be uniform for different types of goods.

¹⁴⁰ For the following cf. *ibid.*, 88–90, 123–5.

¹⁴¹ Cf. Vallier 2021; Buchanan [1975] 2000, 145–6.

¹⁴² Buchanan [1975] 2000, 126.

under less-than-unanimity rule need to be enforced by the *protective state*.¹⁴³ Precisely because the workings of the *productive state* can make a minority worse off by reducing their net command over goods, it is necessary that the *protective state* assesses whether this is in line with the constitution. Buchanan points out that “[...] the granting of review authority to the enforcing arm of the state carries with it a fundamental contradiction [...],”¹⁴⁴ because ideally, the *protective state* only enforces constitutional rules and does not specify or change them. While the occurrence or severity of such situations can be at least mitigated by introducing well-defined constitutional constraints, Buchanan, in my opinion, needs to more explicitly acknowledge the necessity of a system of checks and balances between the branches of government.

4.7 Renegotiation

The models used so far have been static, with time not playing a role. Buchanan now extends the many-person model by incorporating the factor of time.¹⁴⁵ He focuses on how to ensure the stability of the constitutional contract, specifically the willingness of citizens to abide by the law. This question is particularly pressing for two reasons. First, as time passes, the capabilities of citizens are likely to change. While the property rights assigned in the contractual agreement reflect the individual capabilities at that time, this may no longer hold true as time goes on. Some citizens might come to claim more goods than they could secure under conditions of anarchy, and vice versa. Second, as time progresses, the number of citizens living in the community who did not personally agree to the social contract will increase. Children are born into a constitutional order that they have not agreed to themselves.

Buchanan’s crucial assumption in this discussion is that the “anarchistic equilibrium,” which is the *natural distribution*, “[...] always exists “underneath” the observed social realities.”¹⁴⁶ Although citizens live under the current constitutional order, which Buchanan refers to as the “*status quo*,”¹⁴⁷ the factors that lead to the *natural distribution*, such as individual preferences and capabilities, continue to operate, resulting in the emergence of new equilibria. Consequently, the property rights assigned in the status quo may no longer align with the new equilibrium, and the gap between them can widen over time. As citizens become aware of this discrepancy, discontent

¹⁴³ Cf. *ibid.*, 125, 131–3.

¹⁴⁴ *Ibid.*, 133.

¹⁴⁵ Cf. *ibid.*, 96–111.

¹⁴⁶ *Ibid.*, 35–6.

¹⁴⁷ Cf. *ibid.*, 100. The *status quo* can also be described as the entire set of mutually shared expectations regarding the behavior of the citizens in the community.

among those who feel deprived by the *status quo* is likely to grow. According to Buchanan, increased discontent leads to more frequent violations of the law, thereby raising enforcement costs.

Let me now examine the potential responses to the problem of stability that Buchanan considers. The first option he discusses is increasing enforcement and punishment of violations by the *protective state*.¹⁴⁸ This approach seems natural because it aligns with the primary function of the protective state. Citizen A, whose capabilities have relatively decreased, would not have to accept a reduction in property rights. However, Buchanan rejects this option, arguing that “[t]he agent may become increasingly reluctant to guarantee a set of individual rights as the relative positions of individuals diverge increasingly from what is seen to be the natural equilibrium in anarchy “underneath” the existing order.”¹⁴⁹ Unfortunately, he does not elaborate the exact processes occurring within the *protective state*. The rejection of this option is surprising because Buchanan himself clearly differentiates between the initial assignment of constitutional rights and their subsequent enforcement. It seems as though the *protective state* has developed an independent role, assessing whether the *status quo* is “deserved,” thus interfering with constitutional rights. This appears inconsistent with Buchanan’s earlier statements, first, because of the constitutionally defined role of the *protective state*, and second, because assessing whether the *status quo* is “deserved” implies a value judgement which is incompatible with Buchanan’s *subjectivism*.¹⁵⁰

Secondly, Buchanan considers the option that individuals who have entered the *contractual agreement* are honor-bound because they have given their word.¹⁵¹ This assumption is surprising, as it is clearly inconsistent with his *contractarianism*. His non-reductionist approach prohibits attributing moral values to individuals.¹⁵² While individuals may feel honor-bound, the theorist cannot prescribe or expect this sentiment. Instead, adherence to the law is a matter of rational calculation and depends on the probability of detection, the severity of punishment, and the potential disadvantages of being treated with suspicion by others. However, Buchanan rejects this option anyway, correctly noting that individuals living under the constitutional order who did not agree to the social contract, perhaps because they were not yet born, cannot be honor-bound.

¹⁴⁸ Cf. *ibid.*, 98–9.

¹⁴⁹ *Ibid.*, 103.

¹⁵⁰ A possible explanation for this may be that the civil servants are, of course, citizens as well who constantly form renegotiation expectations.

¹⁵¹ Cf. Buchanan [1975] 2000, 96–9.

¹⁵² For a general discussion of the importance of individual ethical norms in Buchanan’s work, see Congleton 2018, 35–50.

Buchanan endorses the third option, which revolves around the concept of renegotiation.¹⁵³ It is crucial to recall that Buchanan assumes an anarchistic equilibrium always exists beneath the *status quo*. The idea of renegotiation is thus straightforward: the *status quo* is to be considered “as if” it were the legitimate outcome of a current social contract.¹⁵⁴ Citizens compare their present position with what they believe they could secure under the *natural distribution*. Based on this comparison, they form “renegotiation expectations,” which will vary across time and individuals due to descriptive inequalities. These expectations can swing in either direction: individuals might anticipate being better off, worse off, or remaining in the same position. If their expectations fall below a certain threshold, they are likely to comply more with the law.

According to Buchanan, the process of renegotiation can be envisioned as follows:¹⁵⁵ Citizens with negative negotiation expectations have vulnerable claims to certain goods or resources. Recognising both their vulnerability and anticipating that it will be more difficult to sustain the support of the *protective state* in the enforcement of their rights, these citizens will accept reductions in the goods in question in order to secure others. This way they can avoid the leap back into anarchy where they may potentially be even more vulnerable. In addition, a renegotiated constitutional order will reduce the costs of law enforcement. Thus, these citizens will start to negotiate accordingly although they appear to end up in a Pareto-inferior position. In this context, it is important to note that any adjustment to the *contractual agreement* requires unanimity. Buchanan highlights the importance of renegotiations as follows:

“Agreed-on and quasi-contractual readjustment offers the only effective alternative to progressive deterioration in legal order, to continued violations of the implied contract by governments and individuals alike, to accelerated decline in the legitimacy of the whole constitutional structure, to general reduction in the stability and predictability inherent in the ordinary operation of the legal-political environment.” (Buchanan [1975] 2000, 110)

At first glance, Buchanan’s response to the problem of stability appears appealing. Note also that the issue of stability is part of a broader context. It arises because citizens feel that rules are being externally imposed on them, rather than being self-imposed. Weale describes this as the problem of *alienation*, characterizing Buchanan’s social contract theory as “[...] an attempt to secure moral and political obligation free from the taint of alienation, the sense that individuals and groups in

¹⁵³ Cf. Buchanan [1975] 2000, 96–100.

¹⁵⁴ Cf. *ibid.*, 109.

¹⁵⁵ Cf. *ibid.*, 100–5.

society are having rules externally imposed on them.”¹⁵⁶ Buchanan’s idea of renegotiation can thus be seen as aligning with his aim of ensuring that nothing is imposed on individuals unless it is agreed upon. Nevertheless, upon closer examination, several issues with the concept of renegotiation emerge, which I will discuss in Chapter 6.4.

5 Leviathan

As discussed, one of Buchanan’s central insights is that the individual can enjoy the greatest degree of liberty when there is a state. *Ordered anarchy* inevitably fails and turns into Hobbesian anarchy, which is a grave threat to liberty. This is why citizens in the *status quo* fear the lapse back. Property rights coordinate behaviour and create protected spheres of individual liberty. However, as the subtitle of *LoL* suggests, there is another grave threat to liberty which Buchanan denotes as “Leviathan.” This term describes the other extreme basis for social order: the ever-expanding impersonal bureaucracy of the productive state *within* democratic procedures. This expansion means taking control over various spheres of life and imposing more constraints on individual liberty, ultimately resembling the Hobbesian sovereign. Buchanan offers a diagnosis of the, in his view, dreadful state of American society at his time: increasing frustration with government processes, which is paradoxically answered with government expansion in an infinite regress.¹⁵⁷ As he puts it, “[m]an finds himself locked into an impersonal bureaucratic network that he acknowledges to be of his own making.”¹⁵⁸ The solution is limiting government power and more appreciation of the laissez-faire principle. “Controlling Leviathan” means “controlling self-government.”¹⁵⁹ This way, one ends up with a social order “Between Anarchy and Leviathan.”

Let me sketch what Buchanan identifies as some of the core issues leading to government expansion. For example, he demonstrates that in a majority voting system under benefit-cost constraints, public-goods proposals that are each efficient can, in aggregation, be inefficient if interdependence between the projects exists.¹⁶⁰ The same is true for a majority voting system without benefit-cost constraints. Costs can be imposed on minorities against their will. Buchanan concludes that majority voting tends to overexpand budgets. For example, this issue clarifies why neoliberals

¹⁵⁶ Weale 2020, 280.

¹⁵⁷ Cf. *ibid.*, 188, 205–6.

¹⁵⁸ *Ibid.*, 188. He describes the situation as “constitutional anarchy”, cf. *ibid.*, 19.

¹⁵⁹ Cf. *ibid.*, 116–8, 188.

¹⁶⁰ However, this can also apply to private transactions, cf. Koller 1987, 234–9.

see limitations in democracy. For prevention, Buchanan proposes implementing procedural constraints in the fiscal constitution, such as size limits on revenues or outlays, or requirements that public-goods proposals are to be reviewed for interdependences and assessed in bundles.¹⁶¹

Another aspect that Buchanan discusses is the role of politicians in collective decisions. Voters are usually represented by politicians who make decisions on the provision of public goods and budget size. Buchanan provides a typology of politicians.¹⁶² First, there are ideological politicians who seek to implement their own conception of a good society. Second, there are politicians who seek office for power and influence. Third, there are corrupt politicians who seek pecuniary gains. The upshot of his examination is that they all tend to expand the budget size.¹⁶³ This result reinforces the importance of procedural constraints in the fiscal constitution.

Although Buchanan acknowledges that a complete discussion of Leviathan requires examining the excesses associated with the *protective state*, he does not elaborate on this topic further, except for reiterating his criticism of judges who alter rules rather than merely assessing compliance.¹⁶⁴ To address this gap, Coyne identifies five channels in the U.S. context through which the protective state can undermine individual liberty.¹⁶⁵ The basic idea is that government actions carried out by fallible individuals can have unintended consequences. First, constitutions are open-ended systems requiring changing interpretations over time, giving the Supreme Court considerable power, which it has used to side with the government in times of crisis, undermining citizens' rights. Second, the so-called "deep state," mainly consisting of the national security apparatus, has considerable autonomy and can expand state power over citizens in an unchecked manner. Third, through federalism, the protective state can accumulate more power to the detriment of subunits. Fourth, when former employees with coercion-enabling human capital transition to the private sector, they bring their attitudes and skills, potentially altering the perceived relationship between citizens and the state. Fifth, technological advances in coercion-enabling physical capital enable governments to more easily conceal their activities, making it difficult for citizens to recognize expansions in the scope of state power. Overall, limiting the power of the *protective state* appears to be

¹⁶¹ Cf. Buchanan [1975] 2000, 190–6. In fact, he believes that individuals would insist on this. For more on the fiscal constitution he envisages, see Meadowcroft 2011, 110–9.

¹⁶² Cf. Buchanan [1975] 2000, 197–201.

¹⁶³ Buchanan holds that the same is true for the bureaucracy and its employees, cf. *ibid.*, 201–4. I will not explore the arguments supporting these hypotheses further because they are *empirical* in nature.

¹⁶⁴ Cf. *ibid.*, 206–208.

¹⁶⁵ Cf. Coyne 2018, 147–170.

as crucial as limiting that of the *productive state*. Buchanan argues, for instance, that this may involve a clear recollection of the judges' actual tasks. However, it must be conceded that his recommendations on this matter are not thoroughly elaborated and, therefore, are difficult to implement practically.

6 Critical Comments

In this chapter, I present critical comments on Buchanan's *contractarianism*, most of which, as far as I can tell, are not found in the existing literature. First, I address a "technical" issue concerning the modelling of agreement in social contract theory. Second, I argue that his *contractarian* framework may be too broad to achieve the desired contractual agreement. Third, I examine the strained relationship between *contractarianism*, as an instance of *pure proceduralism*, and liberalism, using the example of slavery. Fourth, after establishing that Buchanan has been accused of conservatism for arguing that the status quo is to be treated as if legitimate, I analyse why arguments in favour of this claim fail. I then propose an interpretation that attempts to reconcile his claim with his theoretical framework, in which the idea of a *natural distribution* is central. Based on this, I develop a severe criticism of his theory, followed by a brief structural comparison of his approach with Locke's. Fifth, I object to one of Buchanan's premises regarding renegotiations within the *status quo*, arguing that if my criticism is valid, citizens would prefer principles of *fairness* and *equality*. This, however, would render his idea of a *natural distribution* irrelevant. Finally, I explore the fundamental question of what Buchanan's social contract theory actually demonstrates or justifies. I discuss several issues that arise in this context and argue that Buchanan's peculiar understanding of individual sovereignty leads him into ambiguities and contradictions that he cannot resolve. Furthermore, it becomes evident that *LoL* is not merely a philosophical work but also a philosophical intervention in public debate during a period of sociopolitical transformation.

6.1 Equilibrium and Bargaining

In social contract theory, agreement can be modelled as *consent*, *bargaining*, *aggregation* or *equilibrium*.¹⁶⁶ Buchanan models agreement as being based on the *natural distribution* which represents an *equilibrium*. Nevertheless, he notes that the final assignment of rights not only depends on the *natural distribution* but also on *bargaining skills*:

¹⁶⁶ See Chapter 2.

“Mutual gains are possible [...] over a wide range of assignments of final consumption, with the particular assignment finally negotiated dependent on bargaining skills and other factors.” (Buchanan [1975] 2000, 33)

Therefore, one might question whether Buchanan’s models of agreement are at least partially based on *bargaining*. Specifically, what role does *bargaining* play in his *contractarianism*? In brief, I believe Buchanan can consistently model agreement both as an *equilibrium* and, to some extent, as a *bargaining* solution.

The *natural distribution* arises from conflict among individuals. This conflict is not necessarily characterized by brute force alone. While Buchanan seems to anticipate a Hobbesian state of anarchy, it is possible that such conflict could be resolved peacefully, which is why he refers to actual *or* potential conflict in anarchy.¹⁶⁷ The emergence of the *natural distribution* depends on individuals’ capacities, including their *bargaining skills*.¹⁶⁸ Thus, the *natural distribution* can be understood as resulting from *bargaining*, among other factors. This perspective becomes especially evident when considering that the *natural distribution* might necessitate prior redistribution.

Moreover, it cannot be ruled out a priori that, despite an *equilibrium*, individuals might still prefer to exchange some goods for others. For instance, suppose A secures a large amount of good *x* at low cost or by chance, which provides A with only a small marginal utility, while good *y* offers A much higher marginal utility. Conversely, if B secures a large amount of good *y* at low cost or by chance, resulting in only a small marginal utility for B, but good *x* offers B much higher marginal utility, there are potential gains from trade. In this scenario, A and B might exchange goods *x* and *y* based on a “provisional” *natural distribution* achieved through either force or *bargaining*.¹⁶⁹ This provisional *natural distribution* could be adjusted until they reach a “final” *natural distribution* that facilitates contractual agreement. In this new *equilibrium*, the additional marginal cost of *bargaining* must equal the additional marginal benefit, ensuring that individuals have no incentive to deviate from their positions. Thus, in this interpretation, *bargaining* presupposes an *equilibrium* and can contribute to reaching a *contractual agreement* by modifying the *equilibrium*.

Overall, there appears to be a systematic possibility for *bargaining* at various stages. However, it is crucial to emphasize that it is not the *natural distribution* itself that promises a surplus, but rather the *contractual agreement* it facilitates. The surplus anticipated from the social contract

¹⁶⁷ Cf. Buchanan [1975] 2000, 31.

¹⁶⁸ Cf. *ibid.*, 32.

¹⁶⁹ Of course, *bargaining* between coalitions is also possible, see *ibid.*, 140.

can be divided among individuals through *bargaining*. If they cannot reach an agreement on how to divide the surplus, anarchy persists. It is important to note, however, that Buchanan does not systematically elaborate on the role of *bargaining* within his *contractarian* framework.

6.2 Profiting from War

Buchanan's argument rests crucially on the assumption that under *natural distribution* everyone can benefit from the *contractual agreement*. The enforcement of property rights by the *protective state* makes it possible to productively use the effort that would otherwise be invested in defense and predation. Such a situation is Pareto-superior to the *natural distribution*. He therefore considers it appropriate to model *M* as a prisoner's dilemma type of strategic interaction between individuals.

However, the assumption that Pareto gains are always possible may be unjustifiably optimistic, given that Buchanan allows for great heterogeneity in both preferences and capacities across individuals. Additionally, his *subjectivism* prevents him from distinguishing between acceptable and unacceptable preferences. As rational maximizers, individuals maximize their own utility regardless of their preferences, subject only to their own capabilities and the defense capabilities of others. This can lead to a war of all against all.

The problem here is that it seems possible that some individuals are very skilled at waging war, or have a strong preference for violence, or both. At the same time, these individuals may have few skills that could, in Buchanan's words, be put to productive use. Thus, if some individuals gain large profits from waging war and would gain significantly less in a peaceful environment, *contractual agreement* may not necessarily be Pareto-superior to *natural distribution*. As a result, these people have no incentive to enter into the agreement.

To show that such a scenario is not purely theoretical, it helps to take a look at political war theory. Under the term "new wars" authors summarize phenomena such as warlords, mercenaries and terrorism, which have in common that their violence is, firstly, directed primarily against civilians and, secondly, is often associated with far-reaching business interests. Precisely because "war entrepreneurs" can make enormous profits from never-ending violence, it is not intended to stop, but it rather sustains itself and becomes a kind of "way of life." In societies affected by these phenomena, the boundaries between peace and war become blurred, and the societies are often unable to endogenously pacify the situation. The respective states can be "failed states".¹⁷⁰

¹⁷⁰ For more details on the "new wars" see Münkler 2005.

Such a scenario can be represented by slightly modifying the game theory representation of the prisoner’s dilemma. *Ceteris paribus*, one can either reduce the utility gain of the war-prone individual (here: A) in Cell I so that it is less than the utility gain in Cell IV, or one can increase the utility gain in Cell IV so that it is higher than the utility gained in Cell I. In *Figure 3*, I chose the former for no particular reason.

		B	
		Respects Rights	Respects No Rights
A	Respects Rights	Cell I 5, 7	Cell II 3, 11
	Respects No Rights	Cell III 22, 1	Cell IV 9, 2

Figure 3. War profiteering.

The dominant strategy is still to attack, and the *natural distribution* represented by Cell IV is still the game’s only Nash equilibrium. However, the situation no longer illustrates the prisoner’s dilemma, since it is not mutually beneficial for the players to lay down their arms and enter into the contractual agreement presented in Cell I. While B would benefit, A would not. Here the political philosopher will lose interest because in such a scenario Pareto gains are impossible.

The purpose of this exercise is to show that the *contractual agreement* does not necessarily materialize under Buchanan’s assumptions. Although he deliberately keeps the framework as general as possible to demonstrate that individuals will enter into the *contractual agreement* under all circumstances, it turns out that it may be too broad to produce these results. This highlights the limitations of any approach that refrains from assessing preferences for social compatibility.

6.3 Slavery and Liberalism

To say the least, it is puzzling to discover that a liberal theory on the legitimacy of political institutions considers slavery, under certain conditions, to be legitimate.¹⁷¹ Buchanan’s allowance for slavery follows from the descriptive inequality between individuals in their capacities and his *subjectivism*. While he suggests that “[t]hose who have referred to the strong enslaving the weak may well have exaggerated the differences[.]”¹⁷² Buchanan nonetheless allows for slavery to maintain the framework’s generality.¹⁷³ The reasoning is as follows: in Hobbesian anarchy, some individuals may, due to their superior capacities, be able to kill others. However, they might prefer to enslave

¹⁷¹ Note that Nozick also considers slavery legitimate if entered into “voluntarily”, see Nozick 1974.

¹⁷² Buchanan [1975] 2000, 34.

¹⁷³ Cf. *ibid.*, 77–8.

them instead, having them produce goods for their benefit. The *contractual agreement* may then involve a slavery contract where both parties mutually benefit from reduced defence and predation efforts. The slaveholder owns the slave's production capacities, while the slave is assigned individual rights that allow him to live and keep a portion of goods beyond mere subsistence. Therefore, the condition for the legitimacy of slavery is that it arises from the *natural distribution* of capacities. Buchanan's *subjectivism* prevents him from systematically excluding the possibility of slavery, as doing so would mean imposing his or someone else's preferences onto others.

This is surprising not only because Buchanan is seen as an ardent defender of individual liberty, but also because his normative justification is guided by a Kantian concern for respecting individual autonomy, expressed in the unanimity rule.¹⁷⁴ This raises the question: how can one be guided by a Kantian concern and still allow for slavery, since forcing others into slavery is clearly inconsistent with treating them as ends in themselves, as "free and equal" persons?

Buchanan's social contract theory is guided by respect for individual autonomy vis-à-vis N^* and, consequently, their representatives, N , in the deliberative setting, M . However, his *contractarian* reductionism prevents him from attributing this concern directly to either group. Therefore, the Kantian concern applies only to the relationship between the theorist, Buchanan himself, and both N^* and N . Buchanan's *subjectivism* cannot rule out that N and N^* respect the autonomy of others, since it could be motivated intrinsically. Nevertheless, he cannot prescribe this respect but must accept both N 's preferences and choices in anarchy, no matter what they are. This includes treating others merely as means. The only thing they may respect in equilibrium is the other's sword. This demonstrates that Buchanan is not a Kantian in the strict sense but follows Kant in his general reinterpretation of the social contract, where the problem of justification becomes the central question.

Common-sense morality holds that slavery can never be legitimate under any conditions. The same applies to killing, unless in self-defence. One of our deepest convictions is that no one can own another person, subdue them to their will, let alone take their life. Instead, every person has certain liberty rights that protect them from coercion and violence by others. Let me illustrate the absurdity of Buchanan's arguments, which raises serious doubts about whether his *contractarian* approach is an appropriate method for reasoning about the legitimacy of political institutions.

¹⁷⁴ Cf. Kliemt 2009a, 161.

Buchanan's attempt to downplay the possibility of slavery is unconvincing. One could argue further that Buchanan may be overly optimistic. It is possible that some individuals have a strong preference for enslaving others, or even prefer killing to enslaving. The idea that the legitimacy of political institutions might include killing and slavery is absurd. Furthermore, the *natural distribution* appears to systematically disadvantage groups such as children, women, the elderly, and disabled individuals who tend to be physically weaker than others. Rights assigned based on *natural distribution* effectively become rights of the strongest. Certainly, in anarchy, competition may not always involve individuals but rather families or coalitions, and outcomes depend on various capacities, not just physical strength. However, physical strength remains a significant factor, systematically disadvantaging the aforementioned groups.

Of course, one could defend Buchanan by arguing that we currently live in relatively peaceful societies without slavery. Why should we concern ourselves with what might occur in anarchy? Buchanan points out that the constant pressure to revert to anarchy persists, particularly the longer the established order has been in place.¹⁷⁵ If anarchy is always a potential concern, and individuals could potentially become slaves in such a scenario, this should factor into renegotiations. But can we realistically imagine that free citizens would agree to enter into slavery contracts?

Slavery is, of course, an extreme example, but it illustrates the limits of Buchanan's *contractarianism* by highlighting the strained relationship between agreement and liberty. First, contractual agreement is made based on the *natural distribution*, which may be characterized by widespread violence. In the face of violence and death, it seems grossly mistaken to talk about "voluntary" agreement.¹⁷⁶ From the standpoint of classical liberalism, the conditions framing contractual negotiations should matter. A truly voluntary agreement presupposes that individuals are free from coercion. Clearly, this condition is not met for an enslaved person. If Buchanan believes that respect for individual sovereignty emerges endogenously in his model once individuals unanimously agree on a social contract, this would reflect a fundamentally flawed understanding of individual sovereignty. Respect for individual sovereignty in his framework only arises in response to the violent *natural distribution* and the prospect of gain, making it inherently conditional. Second, in the social contract, individuals agree to limit their liberty by accepting behavioural constraints for mutual benefit, ultimately expanding their liberty. However, it seems absurd to argue that an individual

¹⁷⁵ Cf. Buchanan [1975] 2000, 96–115.

¹⁷⁶ See also Gordon 1976, 584–5; Barry 1984, 591; Koller 1987, 221–2.

benefits from a slavery contract or expands their liberty simply because they are allowed to continue living.

While Buchanan acknowledges the value of individual sovereignty, he does not assign intrinsic value to individual liberty.¹⁷⁷ His *contractarian* approach, which is by construction unconstrained by moral precepts, can therefore limit individual liberty if the individual agrees. Due to his *subjectivism*, Buchanan cannot define any moral constraints on contractual agreements.¹⁷⁸ As a result, individuals could prefer and agree to a deeply illiberal state. As Barry rightly notes, “[...] unanimity as a procedural rule is indeterminate in its prescriptions [...]”¹⁷⁹ Buchanan’s *contractarianism*, and perhaps *contractarianism* in general, does not seem to be an appropriate model for justifying individual liberty, which, according to classical liberalism, has intrinsic value.¹⁸⁰ Instead, it appears essential to integrate moral constraints into proceduralist accounts, which themselves demand justification independent of proceduralism. *Contractualism*, in contrast, may be better suited because it is non-reductionist and allows moral values to be attributed to *N*.¹⁸¹ For example, Rawls’s veil of ignorance ensures that *N* respect each other as “free and equal” persons.¹⁸²

6.4 Issues related to the Status Quo

Buchanan has been called a conservative.¹⁸³ His insistence that changes to the constitutional order require unanimous agreement among citizens, along with his defense of the *status quo* as the legitimate default if such agreement cannot be reached, effectively results in conservatism. The *status quo* continues unless citizens unanimously agree to change it.¹⁸⁴ It does not matter that it may largely be the result of evolutionary processes.¹⁸⁵ Buchanan’s defense of the *status quo* as the le-

¹⁷⁷ See Vanberg 2019, 570–2.

¹⁷⁸ See also Barry 1984, 581.

¹⁷⁹ *Ibid.*, 593.

¹⁸⁰ Cf. *ibid.*, 591; Holcombe 2018, 75–97 also critiques an aspect I have not covered here: namely, that classical liberalism, which demands actual agreement, conflicts with contractarianism, which usually depends on hypothetical agreement. This aspect is also relevant for Buchanan’s renegotiations.

¹⁸¹ See also Barry who says that “[o]therwise “agreement” allows slavery to masquerade as freedom and theft to constitute [sic] a title of property.” (Barry 1984, 595)

¹⁸² Buchanan criticizes Rawls’s *contractualism* for not being purely procedural and specifying the outcome of the agreement, cf. Buchanan 1972, 123–28; see also Buchanan [1975] 2000, 221–22. For an approach that combines elements of Rawls’s and Buchanan’s social contract into a supposedly improved version, see Kogelmann 2018, 17–37.

¹⁸³ See Barry 1984, 579–96; Kliemt 2004, 171–85; Melenovsky 2019, 87–109; Weale 2020, 273.

¹⁸⁴ Barry rightly points out that not all changes that are not unanimous are illegitimate, since unanimity is not required at the post-constitutional stage, cf. Barry 1984, 592. However, unlike him, I do not consider this an ambiguity, because it was unanimously decided not to require unanimity for certain collective decisions, cf. Buchanan [1975] 2000, 57.

¹⁸⁵ Cf. Buchanan [1975] 2000, 37–8, Fn. 13.

gitimate default has considerable implications. Different defaults lead to different agreements because citizens will only unanimously agree to changes if they are expected to be Pareto superior to the *status quo*.¹⁸⁶ As a result, the choice of the *status quo* as the default influences the range and nature of possible agreements. One reason for defending the *status quo* “as if” it were the legitimate default is that Buchanan’s *subjectivism* requires a value-neutral perspective on recommendation of social changes. It is not the case that he believes the *status quo* has intrinsic value.¹⁸⁷ Nonetheless, the label of conservatism is appropriate, even if he himself rejects this label.¹⁸⁸

Let me point out two common criticisms that have been leveled against Buchanan. First, he is unable to condemn a *status quo* that came about through illegitimate change. Suppose that B steals x from A in t_1 and sells it to C in t_2 . The fact that B stole from A implies that A did not agree to B taking x . However, B and C mutually benefit from the voluntary transaction of x in t_2 . Buchanan, in fact, declares the *status quo* in t_2 legitimate. Second, his conservatism favors those citizens who already benefit from the *status quo*.¹⁸⁹ It is not clear whether the powerful and rich should voluntarily give up their privileged positions. Everyone with negative renegotiation expectations will veto changes.

Due to the central role of Buchanan’s claim that the *status quo* must be treated as if it were legitimate, it seems worthwhile to examine what could be advanced to defend this claim. In a concise paper, Melenovsky examines whether *LoL* exhibits an unjustified status quo bias.¹⁹⁰ He discusses three arguments for the priority of the *status quo*, all of which he ultimately rejects: The *argument from existence* posits that the *status quo* is epistemically privileged because it is known by everyone. In the first interpretation, a perspective is needed to assess potential agreements, and the *status quo* is the only available one. However, it is not clear why one should not rather compare and choose among different sets of rules that could be implemented, as Rawls suggests. In the second interpretation, the *status quo* is deemed the only justifiable perspective because it is known. However, Buchanan has already acknowledged that participants in the social contract make agreements under uncertainty, selecting sets of rules based on expected benefits. Therefore, the priority of the *status quo* cannot be justified by presumed privileged knowledge. Consequently, the first

¹⁸⁶ Cf. Melenovsky 2019, 88–9.

¹⁸⁷ Cf. Buchanan [1975] 2000, 109.

¹⁸⁸ Cf. Buchanan 2005.

¹⁸⁹ Cf. Koller 1987, 231–3; Weale 2020, 273.

¹⁹⁰ Cf. Melenovsky 2019, 87–109.

argument fails.¹⁹¹ According to the *argument for progress without coercion*, social changes must be consensual or non-coercive.¹⁹² However, coercion cannot be avoided because citizens have not consented to the *status quo*. Moreover, suggesting that we should regard the *status quo* as legitimate to prevent coercion actually entails making a specific moral judgment about when coercion is unjustifiable, contradicting Buchanan's *subjectivism*. Consequently, the second argument fails.¹⁹³ The *argument from realistic change* suggests that the *status quo* represents the practical constraints on social changes, acknowledging the positions of certain powerful individuals or groups.¹⁹⁴ This argument can be understood in two ways: as a predictive-positivist or as a prescriptive stance. The prescriptive interpretation advises that one should respect the *status quo* and the limitations it imposes on social change. However, it fails to explain why any constitutional change must have unanimous agreement starting from the *status quo*, does not specify the direction reforms should take, and neglects to balance realism with optimism. The third argument fails as well.¹⁹⁵

I agree with Melenovsky's objections to these arguments and do not want to discuss them further. Instead, I want to suggest another interpretation for which Buchanan needs to hold that the *status quo* should be treated as if it were legitimate. Although this interpretation may not fully align with some of his earlier remarks in this section, I find it to be the most plausible because it focuses on a crucial aspect that the other arguments have surprisingly overlooked: the *natural distribution*. It is as follows: The *status quo* must be treated as if it were the result of (hypothetical) rational agreement because, *as long as* "[...] there is no pressure for a fundamental renegotiation of the constitutional contract, we can assume that the rules it enforces are in some fundamental sense self-imposed."¹⁹⁶ If citizens do not demand social change, it can be assumed that they agree with the *status quo*.¹⁹⁷ Given the rationality assumptions, they will only agree to what maximizes their self-interest. This maximization is a function of the individual's capabilities reflected in the *natural distribution*, which "[...] always exists 'underneath' the observed social realities."¹⁹⁸ The pressure referred to above is, in fact, the *natural distribution*. It is dynamic because individual capabilities

¹⁹¹ Cf. *ibid.*, 93–5.

¹⁹² This argument is partly based on Vanberg 2004, 153–170.

¹⁹³ Cf. Melenovsky 2019, 95–8.

¹⁹⁴ This argument is based on Munger 2019, 39–64.

¹⁹⁵ Cf. Melenovsky 2019, 98–9.

¹⁹⁶ Weale 2020, 274.

¹⁹⁷ See also Buchanan 1962, 321: "[...] [W]e may say that the definition of an existing set of political rules (the constitution) as reflecting consensus implies only that there exist no particular changes on which all citizens can agree."

¹⁹⁸ Buchanan [1975] 2000, 35–6.

change, and as new individuals enter society, others exit. If it drifts sufficiently far away from the *status quo*, people will demand social change. While some may have negative renegotiation expectations, others have positive ones. Thus, the constitutional assignment of rights becomes just a temporary mutual recognition of the current distribution of goods and positions.¹⁹⁹ Once the pressure is too great, redistribution will take place.

Recall that in anarchy, the *natural distribution* forms the basis for mutually beneficial agreements. For reasons of consistency, Buchanan must explain how it can be rational for everyone in the *status quo* – where the *natural distribution* is always present – to agree to social change. Recall also that Buchanan’s models agreement as based on an *equilibrium* defined by the *natural distribution*. If successful, his argument would be internally robust against criticisms about certain minorities refusing to give up their privileged positions. According to Buchanan, these individuals would agree to changes because, as the distance from the *natural distribution* increases, the costs of defection and punishment rise, and they want to avoid reverting to anarchy.²⁰⁰ Thus, even if agreeing to change initially seems Pareto-inferior to some, they benefit from reduced enforcement costs, increased stability, and potentially greater predictability. Accepting this interpretation, renegotiation necessarily involves fear, and possibly threats from those advocating for social change.²⁰¹ If peaceful reform fails, violent revolution may follow. This aligns with the anarchic *natural distribution*, which likely describes a very violent and fearful environment. Of course, the question remains whether “voluntary agreement” can be meaningfully applied in either context.²⁰² Nevertheless, in my interpretation, Buchanan can indeed anticipate that social change will occur.

Consequently, the claim to the legitimacy of the *status quo* centers around the idea of a *natural distribution*. This idea does not refer to a metaphysical idea but rather to the social forces capable of bringing about change. These forces are, in principle, empirically observable. For instance, workers’ movements, through strikes and political mobilization, have historically improved their working and living conditions, illustrating such social forces that initiate renegotiations.²⁰³

¹⁹⁹ Cf. Colombatto 2019, 616–7 who also points out some difficulties in this regard.

²⁰⁰ Also, recall that, according to Buchanan, the *protective state* becomes increasingly unwilling to enforce rules it does not deem “deserved.” However, this aspect seems not only inconsistent with his framework but also somewhat contrived in attempting to explain why individuals with negative expectations would agree to renegotiation in the first place. I will bypass this point in the current discussion.

²⁰¹ Against this background, it is hard to see how Buchanan’s critique of the student protests of the 1960s and 1970s is compatible with his own conception of renegotiations, see also Holcombe 2018, 85–6. These protests could be understood as a movement to renegotiate the social contract.

²⁰² Colombatto 2019, 615–6 denies this.

²⁰³ This example is taken from Weale 2020, 274.

The renegotiation of the order may occur through actual agreement by those directly involved, such as workers and employers, as well as through implicit agreement by those who do not object. Ultimately, the individuals behind these social forces *believe* that due to their capabilities (and numbers), they could be better off under a renegotiated constitutional order.²⁰⁴ In conclusion, given the theoretical importance of the *natural distribution* for Buchanan, it is internally consistent to consider the *status quo* as if it were legitimate. It must be treated as if it were the result of rational agreement, provided that it is not currently being challenged by a sufficient number of citizens.

Although this argument appears somewhat consistent with Buchanan's framework, it allows me to develop a significant criticism of his version of the social contract. It begins with the observation that the *status quo* will periodically realign with the *natural distribution*. Consequently, the constitutional order effectively reflects a principle akin to "To each according to his capabilities." While Buchanan would likely reject this principle, as it implies a value judgment, his social contract effectively results in a similar outcome. Combined with his questionable use of "voluntary agreement," Buchanan's theory could be criticized for being vulnerable to a Social Darwinist interpretation, which, could justify constitutional orders marked by substantial inequality due to allegedly natural superiority. Note that while Buchanan's theory may be interpreted as internally robust against criticisms related to allowing certain minorities to maintain their privileged positions, it can still be employed and misused as an "apology of what is."²⁰⁵ This issue stems from the vague and indeterminate concept of a *natural distribution*, which offers no clear criteria for deriving the design of the (renegotiated) constitutional contract.²⁰⁶ Consequently, it can accommodate both social change and a rigid *status quo* equally well.

6.5 Epistemic Issues and Fairness

In *CoC*, Buchanan and Tullock assume that individuals choose constitutional rules under a *veil of uncertainty*.²⁰⁷ For each individual, there is considerable uncertainty about their own position under the operation of those rules once implemented:

"He cannot predict with any degree of certainty whether he is more likely to be in a winning or a losing coalition on any specific issue. Therefore, he will assume that occasionally he will be in one group and occasionally in the other. His own self-interest will lead him to choose rules that will maximize the utility

²⁰⁴ Interesting practical issues arise, such as how to manage (large) inheritances. Citizens might, for example, implement a high inheritance tax in the constitution. Buchanan argues that the inheritance of nonhuman resources could be highly vulnerable in anarchy, cf. Buchanan [1975] 2000, 104–5.

²⁰⁵ Cf. Koller 1987, 229.

²⁰⁶ *Ibid.*, 224–5.

²⁰⁷ Cf. Buchanan/Tullock [1962] 1999, 36–9, 78.

of an individual in a series of collective decisions with his own preferences on the separate issues being more or less randomly distributed.” (Buchanan/Tullock [1962] 1999, 78)

In this way, individuals enter the negotiation as equals, although the authors did not assume descriptive equality.²⁰⁸ They choose rules that are to the advantage of everyone; they are fair.²⁰⁹

In *LoL*, in contrast, the contractual agreement is not made under a *veil of uncertainty*.²¹⁰ Descriptive inequality among individuals replaces uncertainty.²¹¹ The *natural distribution* is the result of conflict in anarchy and depends on both the individuals’ preferences and capabilities, which are known to them. The reason for allowing descriptive inequality is that if N^* are indeed descriptively unequal, something Buchanan seems to assume, then N must be as well for the social contract to be relevant to real people. As elaborated above, the *natural distribution* constantly exists underneath every *status quo* and is crucial for renegotiations. N^* are asked to imagine how they would perform in anarchy. Based on this, they form their *renegotiation expectations* with which they enter the renegotiation arena. The interesting question now is how to picture this process of imagination. To describe it in other words, real people N^* form a belief about how their representative counterpart N would counterfactually perform in a counterfactual scenario.

From my formulation, one can probably tell that I am skeptical that this process leads to anything substantial. The issue is not the assumed inequality of N^* and their respective counterparts N , per se. Buchanan does not idealize N in any way, so N essentially equals N^* , whatever the real people are. Rather, I maintain that anarchy is as distant from the everyday life of real people as it can possibly be, at least for those who do not live in failed states, such that there are no grounds at all to judge how one would perform in it. Contra Buchanan, who asserts that “[i]nsofar as human capital takes the generalized form of physical and/or intellectual capacity, the relative ability of a person to survive in anarchy itself or to secure terms in renegotiations is likely to be mirrored somewhat closely in the status quo[.]”²¹², I argue that my capabilities and how I put them to use in the *status quo* do not tell me anything about how I would fare in anarchy.²¹³ Being a clever philosopher will probably not help in anarchy whatever it precisely looks like. However, it would be

²⁰⁸ Cf. Buchanan [1975] 2000, 91.

²⁰⁹ Cf. Buchanan/Tullock [1962] 1999, 78–9.

²¹⁰ Cf. Buchanan [1975] 2000, 71, Fn. 3, 91–2, 222.

²¹¹ This should not be taken too literally. In *CoC*, the uncertainty does not depend on the description of the individuals but rather on the practical workings of the agreed-on constitutional rules. As far as I can see, Buchanan does not argue why this uncertainty should no longer be relevant in *LoL*.

²¹² Buchanan [1975] 2000, 105.

²¹³ As stressed in the previous section, the concept of a *natural distribution* is indeterminate. It does not provide any criteria for deriving the design of the (renegotiated) constitutional contract, cf. Koller 1987, 224–5.

over-hasty to conclude that the philosopher will struggle in anarchy. She may possess undiscovered skills and talents that have not yet been developed and could prove beneficial. Even more, she may just play a minor role in a larger coalition, so it does not matter how she would perform if she were completely on her own. The same applies to the undisputed boxing champion. His superior fighting skills may not help him much in a fight without rules, or when he faces a coalition of individuals.

Talking about “*renegotiation expectations*” implies that there is uncertainty. I argue, in short, that the uncertainty actually becomes ignorance.²¹⁴ If we do not have any justified belief about performance in anarchy, then we cannot form *renegotiation expectations*. Behind a veil of ignorance, we would conclude that every position in anarchy, from slave to king, would be equally likely, and that renegotiation should then be guided by principles of *fairness* or *equality*. If my point is valid, this would effectively bring *LoL* closer to *CoC*, or even to Rawls, thereby rendering the concept of a *natural distribution* irrelevant.

The next point is related to the aforementioned one. Suppose citizen A had good reasons to believe that, in a hypothetical *natural distribution*, she would secure a certain amount of physical good x compared to her neighbors B, C, D, and E. However, in n -person models, n usually represents millions of individuals. The question arises: how is A to know how much of x she would secure compared to yet unknown individuals F to Z? This issue is complicated by the fact that the social contract may, as I have shown, include *claim rights* against individuals as well.²¹⁵ One could argue that individuals could form coalitions with an internal *natural distribution* and that a *natural distribution* between coalitions arises, ensuring all individual rights are well-defined. However, it seems odd to assume that an individual in the *status quo* can have a justifiable belief a priori about whether and how this process would unfold.

It is hard to imagine an incomplete structure of rights where A’s individual rights vis-à-vis F to Z are not constitutionally defined. How will they coordinate their activities when encountering each other?²¹⁶ To avoid these issues, it seems natural to agree on principles of *fairness* or *equality*, where everyone owns at least a certain amount of property, and the rights concerning behavior are

²¹⁴ The recognition in the *CoC* that there may still be uncertainty about the practical operation of the renegotiated constitutional rules makes this point even stronger.

²¹⁵ Buchanan seems to insinuate the opposite in ch. 7 of *LoL*, see Buchanan [1975] 2000, 77–8. It is true that in both the anarchic struggle and the bargaining that precedes contractual agreement, individuals try to secure whatever is most valuable to them. However, I think that Buchanan cannot systematically exclude the possibility that individuals in the *natural distribution* may secure a claim right that entitles them to prescribe which God everyone else should worship.

²¹⁶ Cf. Buchanan [1975] 2000, 28.

the same for everyone. This conclusion is supported by another aspect: if a complete structure of rights were to arise where people not only have differing property rights but also different *claim rights* concerning behavior,²¹⁷ enforcement would become overly complex and prohibitively expensive. Therefore, it seems rational to resort to the principles just mentioned.

6.6 Justification of What?

In this section, I will clarify Buchanan's objectives with his social contract theory. At first glance, it might seem that Buchanan aims to reform existing political institutions to match those derived from his *contractarian* approach discussed in Chapter 4, as he asserts that only these are legitimate. This interpretation is reinforced by his attempt to keep the *contractarian* framework broad and general, relying on a wide notion of rationality without specifying particular values. However, I argue that the issue is more nuanced. I will present what I believe to be the most accurate interpretation of Buchanan's project and then offer a critique.

Buchanan is a classical liberal,²¹⁸ but his *subjectivism* prevents him from imposing his personal values on others.²¹⁹ As discussed, Buchanan must accept that if individuals agree to a constitutional order very different from his own, he cannot challenge this, as he prioritizes individual sovereignty. Even if they unanimously choose a deeply illiberal state, Buchanan has no grounds to oppose it. Ultimately, *ordered anarchy* and a state with *limited government* are his personal ideals, rooted in his own personal value judgments. He acknowledges that he cannot entirely avoid positing some values:

"[...] I make no claim to have escaped all normative influences. But I should argue that the approach taken is less normative [...] [than others]." (Buchanan [1975] 2000, 71)

Elsewhere, he identifies his individualism as the essentially normative foundation" of his framework.²²⁰

"Yet I remain, in basic *values*, an individualist, a constitutionalist, a contractarian, a democrat – terms that mean essentially the same thing to me." (Buchanan [1975] 2000, 11, *my emphasis*)

Because Buchanan prioritizes individual sovereignty as the core of his individualism, he cannot impose his personal ideals on others, even when these ideals are grounded in the value of individual

²¹⁷ See also *ibid.*, 15, 33.

²¹⁸ Cf. Kliemt 2014, 391–400.

²¹⁹ Cf. Buchanan [1975] 2000, 3–5.

²²⁰ Cf. *ibid.*, 3–5, 15; see also Buchanan 1962, 311, 320.

sovereignty itself. Therefore, it is incorrect to view Buchanan's social contract theory as prescriptive or to assume that the political institutions he proposes are binding. He does not claim to offer an absolute "truth judgment."²²¹

Instead, Buchanan's *contractarianism* should be understood as conditional on respecting individual sovereignty as a value. As Vanberg describes it, Buchanan's individualism reflects a "conditional value judgment."²²² This respect for individual sovereignty is external to the social contract model itself. It represents an attitude toward others that cannot be justified but can only be endorsed. This interpretation aligns with Buchanan's declared aim in *LoL*

"The reform that I seek lies first of all in attitudes, in ways of thinking about social interaction, about political institutions, about law and liberty. If men will only commence to think in contractarian terms, if they will think of the state in the roles as defined, and if they will recognize individual rights as existent in the status quo, I should not at all be insistent on particulars." (Buchanan [1975] 2000, 222)

Buchanan aims for an "attitudinal revolution" to persuade others to embrace his individualism and its benefits, though he uses "revolution" metaphorically.²²³ He envisions peaceful yet significant reforms to the existing constitution, advocating for a "constitutional attitude" as the only alternative to Leviathan.²²⁴ Buchanan emphasizes the need to recognize that "[...] political power over and beyond plausible contractarian limits [...] exist[s]."²²⁵ and that individuals are both participants in and subjects of collective decisions. *LoL* is intended not just as an academic work but as a philosophical intervention. Buchanan believes that the "ordinary man" is increasingly receptive to this kind of "public philosophy" and hopes to influence public political debate in response to what he views as negative sociopolitical changes of his time.²²⁶

Let me now discuss the role of Buchanan's *contractarianism*. It provides criteria for evaluating and modifying the *status quo*.²²⁷ This aligns with the core of Hobbesian *contractarianism*: assessing current institutions to determine if they meet the standard of mutual benefit and guiding necessary reforms.²²⁸ The satisfaction test of mutual benefit essentially evaluates whether all individuals or citizens could unanimously agree on the current political institutions. This interpretation

²²¹ Cf. Buchanan [1975] 2000, 20–1.

²²² Cf. Vanberg 2019, 549. Trasher interprets Buchanan in a similar way, cf. Trasher 2019, 35.

²²³ Cf. Buchanan [1975] 2000, 223.

²²⁴ Cf. Boettke/Lemke 2018, 51–74.

²²⁵ Buchanan [1975] 2000, 12.

²²⁶ Cf. *ibid.*, 223.

²²⁷ Cf. *ibid.*, 37–8, Fn. 13; 40 Fn. 14; Buchanan 1962, 319.

²²⁸ Cf. Gaus 2018, 123.

is consistent with Buchanan's emphasis on unanimity and suggests he *advises* on achieving Pareto improvements through such agreement.²²⁹

As the citation above indicates, Buchanan does not insist on specific details when individuals, having endorsed individual sovereignty, start thinking in individualistic terms and viewing politics through the lens of exchange. This is because the specific agreement that will emerge cannot be known a priori and depend on different factors.²³⁰ Trasher correctly points out that Buchanan differs from most social contract theorists in this regard: he avoids prescribing a *unique* set of rules and instead justifies a general set of principles for a constitutional order that meets the satisfaction test.²³¹ Thus, Buchanan's social contract outlines the *broad* structures of a mutually beneficial constitutional order based on his conditional value judgment. It shows that all individuals, despite their differences, can accept his social contract as legitimate on prudential grounds.²³² The individual liberty it aims to enable benefits everyone, creating a strong incentive for endorsing individual sovereignty.

Several issues need addressing in this context. One might argue that Buchanan's constitutional order is justified only in comparison to Hobbesian anarchy which is problematic because: a) Pareto improvements should be made from the *status quo*, not from anarchy; and b) anarchy is not an adequate baseline since, according to Gaus, there is always an informal moral prior to a constitutional order that serves as the default when no agreement is reached.²³³ If this is correct, the constitutional order must be justified against this moral order, not anarchy. In response to point a), Buchanan might be seen as indirectly introducing his two-stage social contract. If the *status quo* is at risk of slipping back into anarchy when renegotiations fail, Buchanan's social contract offers a constitution that is always Pareto-superior to Hobbesian anarchy, thus serving as a default everyone could agree to. However, this does not answer b). Regarding point b), Buchanan assumes Hobbesian anarchy in *LoL* because he believes that an ordered moral anarchy fails, as discussed in Chapter 3.2. However, this does not satisfy Gaus. Alternatively, Buchanan could be viewed as proposing a constitutional order that maximizes mutual benefit, regardless of the *status quo* or default. In this sense, Buchanan's *contractarianism* is predictive, as it outlines the social contract that rational,

²²⁹ Cf. Barry 1984, 584.

²³⁰ Cf. Buchanan's criticism of Rawls in Buchanan [1975] 2000, 221–2.

²³¹ Cf. Trasher 2019, 26–9.

²³² Vanberg seems to interpret Buchanan's overall individualism similarly, but unfortunately, he does not address *LoL* specifically, cf. Vanberg 2019, 569–72.

²³³ Cf. Gaus 2018, 117–145.

self-interested individuals could agree to under any circumstances.²³⁴ From this perspective, deriving the order from Hobbesian anarchy serves as a clear illustration of how individuals would establish a mutually beneficial order from scratch, highlighting the functions of constitutional elements without considering the complexity of existing institutions. Then, one can evaluate whether the *status quo* aligns with this constitutional order and has criteria for improvement.

Next, it is unclear whether interpreting *LoL* as an intervention in public political debate aligns with other aspects of Buchanan's *contractarianism*. Given the central role of the *natural distribution* in renegotiations, one might question if the state expansion Buchanan criticizes merely reflects the current *natural distribution* that benefits its proponents. If my interpretation is correct, that the *status quo* should be seen as if it was the result of rational agreement, then why does Buchanan critique it? The issue arises because the concept of *natural distribution* is indeterminate. Buchanan might argue that his position would improve under a renegotiated constitutional order and seeks to convince others that theirs would too. Thus, society is in a new renegotiation phase, with uncertain outcomes. Various forces, including Buchanan's support for *laissez-faire*, are competing to shape future political institutions. Individuals like Buchanan must act to influence social change.

Finally, I see a persistent issue. Although Buchanan emphasizes respect for individual sovereignty at the level of normative justification, he does not extend this respect to individuals involved in the social contract model, who may end up treating each other merely as means. Despite this, the social contract still emerges. If Buchanan believes that respect for individual sovereignty arises endogenously in his model once individuals unanimously agree on a social contract, this would appear circular. It raises the question of why respect for individual sovereignty should be recommended to those whose attitudes he seeks to change. Regardless, it seems implausible to claim that individuals suddenly come to respect individual sovereignty simply because they unanimously agree to a social contract based on the *natural distribution*. The *natural distribution*, in both anarchy and any *status quo*, drives the social contract and its renegotiations, placing individuals in situations where agreement is reached for mutual benefit rather than out of mutual respect for individual sovereignty. If individuals begin to endorse individual sovereignty in the sense I have outlined, it could lead to renegotiations that diverge significantly from Buchanan's social contract. Ultimately, Buchanan's approach appears to be fraught with ambiguities and contradictions in this respect.

²³⁴ Cf. Buchanan [1975] 2000, 71.

7 Conclusion

Buchanan's Hobbesian *contractarianism* is characterized by notable consistency and argumentative precision. His two-stage social contract aims to establish a mutually beneficial constitutional order that can gain unanimous agreement from all individuals. It facilitates and safeguards ordered anarchy across various social interactions, thereby maximizing individual liberty while minimizing formalized rules. The assignment of property rights and the creation of a *protective state* to enforce these rights address most coordination problems and ensure peace. In the post-constitutional stage, the *productive state* tackles cooperation problems and facilitates the efficient provision of public goods, while individuals engage in bilateral agreements. Buchanan's novel approach is to distinguish between these two state agencies as distinct objects of agreement, each requiring different justifications based on their functional roles. This distinction could significantly enhance social contract theory by highlighting the need for separate justifications for different types of state functions.

To fully grasp Buchanan's social contract, it is essential to consider the normative dimensions of his public choice theory. He emphasizes individualism, encompassing both MI and EI. MI underpins his approach to collective decisions, while EI shapes the normative treatment of individuals within the collective choice process. At the heart of EI is his *subjectivism* and respect for individual sovereignty. Buchanan's integration of MI and EI leads him to view politics through the lens of exchange, analogous to bilateral market transactions. In this context, unanimity in collective decisions serves as the institutional counterpart to bilateral agreement in market transactions. Thus, Buchanan's public choice theory significantly influences his ethical considerations within his *contractarian* framework.

Buchanan's *contractarianism* advocates strongly for *limited government*. He argues that if government is effectively constrained by a constitution – including a fiscal constitution – it allows for the laissez-faire principle, granting individuals the maximum degree of liberty constrained only by self-imposed obligations. Limited government benefits everyone. Conversely, if government is not effectively limited, it will inevitably expand due to inherent budgetary processes within democratic procedures, eventually transforming into a Leviathan – a vast, impersonal bureaucracy that restricts individual liberty. At least the threat posed by Leviathan is Buchanan's diagnosis for the American society of his time.

In this context, *limited government* represents a middle path between the extremes of Hobbesian anarchy and Leviathan, both of which he views as catastrophic. Overall, Buchanan contends that only *limited government*, including both the *protective* and *productive state*, can effectively safeguard individual liberty, understood as *negative liberty*, within a democratic society. Buchanan's framework, particularly his focus on a fiscal constitution, offers a strong ethical justification for *limited government* by ensuring that all deviations from unanimity are constitutionally constrained so that political outcomes could theoretically reflect unanimous agreement. However, his discussions on limiting the power of the *protective state* are underdeveloped.

Buchanan's *contractarianism* faces significant interpretative challenges, particularly concerning the concept of a *natural distribution*. This concept is central to both Hobbesian anarchy and the *status quo*. While it helps explain Buchanan's view that the *status quo* is a legitimate starting point for renegotiations and reform, it is too vague to offer clear guidance for these renegotiations. As such, it falls short as an adequate deliberative setting for individuals to consider how to improve institutions for the mutual benefit. Individuals, despite knowing their capabilities, cannot form a justified belief about their position in anarchy. This vagueness might lead individuals to agree on principles of *fairness* or *equality* instead. In my view, the concept of a *natural distribution* is vulnerable to manipulation by individuals and groups, who can use the principle "To each according to his capabilities" to justify almost any *status quo* or social change. Although Buchanan's theory may be internally consistent in addressing accusations of protecting entrenched interests, the inherent vagueness undermines its utility. The *natural distribution* also impacts Buchanan's goal of engaging in political debate during sociopolitical transformations. Essentially, any critique of the *status quo*, including Buchanan's own, can be seen as an attempt to provoke renegotiations, whether grounded in capability or mere rhetoric. Ultimately, the *natural distribution* results in temporary respect for any assignment of individual rights or constitutional order agreed upon. While Buchanan aims to address issues of stability and *alienation*, this approach compromises stability and predictability. A more precise elaboration of the *natural distribution* is needed – something Buchanan does not provide. However, it remains uncertain whether such an elaboration can be achieved without compromising our considered judgments of justice.

As I have argued, Buchanan's framework reveals significant limitations of *contractarianism*, particularly his version of it. The reductionist modelling of *N* in his framework allows them to treat each other merely as means, without respecting each other's autonomy or sovereignty. This

has severe implications. First, under these conditions, Buchanan's ideal of a constitutional order might not materialize. Some individuals might benefit so much from perpetual conflict that the social contract fails to be Pareto-superior, preventing a transition from anarchy. This issue can also apply to individuals in the *status quo* who may prefer chaos over order. Buchanan's *subjectivism* means that he cannot systematically exclude preferences that are not socially compatible. Second, Buchanan's framework lacks moral constraints, potentially allowing for extreme outcomes like slavery. This extreme example shows that his *contractarianism* can lead to deeply implausible results. It seems absurd to claim that someone voluntarily enters into an enslavement contract or that such an agreement enhances their liberty. This scenario also suggests a flawed understanding of individual sovereignty, where respect is based on power rather than mutual agreement. Agreements based on the *natural distribution* are not really agreements. Third, because Buchanan values individual sovereignty above all, he must accept when people unanimously agree upon a deeply illiberal state. This obviously conflicts with classical liberalism, which places intrinsic value on individual liberty. Hence, there is a tension between Buchanan's *contractarianism* and liberalism.

Given the issues discussed in the previous two paragraphs, I argue that Buchanan's framework can also be assessed through resolute objection. To address the identified problems while retaining social contract theory, it seems necessary to incorporate moral constraints into the theory. *Contractualism* might offer a way to avoid the undesirable outcomes mentioned. Otherwise, the justification for individual liberty must acknowledge its intrinsic value, as purely instrumental rationality is evidently limited. However, Buchanan's *subjectivism* would conflict with the *non-reductionism* of *contractualism*. Regardless, an intriguing project would be to further explore his *subjectivism* from a meta-ethical perspective, which I could not undertake here.

Finally, I have examined what Buchanan actually demonstrates or justifies. It turns out that he abandons the concept of *uniqueness*. He does not justify a specific set of rules but rather a general framework that he claims is mutually beneficial. Buchanan's social contract thus outlines the broad structures of a mutually beneficial constitutional order. However, it remains unclear how his recommendation of an individualistic attitude, based on the conditional value of individual sovereignty, relates to his social contract. As discussed, it is uncertain whether endorsing individual sovereignty is necessary to achieve Buchanan's envisioned constitutional order or if, even if endorsed, individuals might prefer a different order. These ambiguities clearly require further exploration.

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