Buchanan at the American Founding: constitutional political economy through the lens of 1787

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Abstract: This paper analyses James M. Buchanan’s account of constitutional choice through the lens of the real-world constitutional agreement that was the most important inspiration for his work: the American founding. Buchanan and the American founders were constitutional revolutionaries committed to a radical vision of moral equality. Their constitutional proposals reflected practices of contract and exchange and also engaged with the challenge of classical republican notions of disinterested government serving the public interest. Buchanan’s constitutional political economy also sheds light on the question of the status of slavery and the slave trade in a constitutional agreement requiring unanimous consent of all parties.

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James M. Buchanan’s work spoke to real world political economic problems and he frequently wrote with passion about the fate of individual men and women facing irresistible political authority. But Buchanan rarely used real world examples or empirical cases in his analysis – his work was principally abstract and often formal. One consequence of this has been to leave scope for others to fill-in the empirical content and practical import of his work. Recently this has been done by scholars essentially hostile to Buchanan’s world view. MacLean (2017) has argued that Buchanan’s work was a carefully disguised defence of the rights of the white elite in the Southern US states against the claims of black people still excluded from institutions that are the legacy of slavery and segregation. Biebricher (2018) has identified Buchanan as one of the key intellectual architects of neoliberalism and argued that international institutions like the European single market bear the imprint of his ideas.

This article is an attempt to present an empirical situating of Buchanan’s work that is true to Buchanan’s vision and intention. Buchanan intended that to locate his work in the intellectual tradition of the American Revolution. In the Preface to *The Reason of Rules*, Buchanan and his co-author Geoffrey Brennan (Brennan and Buchanan, 1985: xv) described their approval for, ‘the veneration Americans accord their Founding Fathers. James Madison, Benjamin Franklin, Thomas Jefferson’, individuals who were, ‘distinguished by their essential understanding of the reason of rules in political order, an understanding they implanted in the constitutional documents, the “sacred” texts that have, indeed, worked their influence through two centuries’. Buchanan (1992a: 62) also celebrated the attribution of the nomenclature Virginia Political Economy to public choice theory – an approach he argued was ‘appropriately described locationally in the commonwealth that produced James Madison and the other Virginia Founders’.
Buchanan believed that his intellectual search for a legitimate constitutional order was a continuation of the enterprise begun by the American Founders in the eighteenth century. This may seem surprising given that, as Mueller (2013: 67-8) has pointed out, the American constitutional agreement in which, ‘all citizens did not take part, and unanimity was not attained,’ and slavery was perpetuated, would seem to fall well short of Buchanan’s model of constitutional choice.

This paper will show that Buchanan shared many of the moral principles and philosophical foundations of the Founders and his work engaged with the same empirical problems in seeking to establish the constitutional basis of just government. The tensions and challenges that arise in Buchanan’s work are tensions and challenges that also confronted the Founders and the individuals who sought to navigate the early years of the American republic. Buchanan’s attempts to resolve those tensions and challenges illuminates the route that must be taken if we are to find a route out of constitutional anarchy into genuinely consensual politics. The experience of the American founding shows that painful choices must be made if liberty is to be enshrined in institutions.

**Buchanan and the Founders: constitutional revolutionaries**

Today the American Revolution is often perceived as a ‘downright conservative’ event wherein a group of privileged white men overthrew foreign rule ‘not to change the existing structure of society but to preserve it’ (Wood, 1992: 3-4). The fact that the Revolution did not abolish slavery or the slave trade, but laid the basis for their immediate continuation, is often seen as a damning indictment of the original foundation.
While the American Revolution undoubtedly produced some outcomes that today would be properly considered unconscionable, this should not obscure the fact that this was a remarkable, unprecedented moment in human history. The revolutionaries sought to create ‘a new society unlike any that had ever existed anywhere in the world’ (Wood, 1992: 6). This new society was to be a republic constituted on the consent of the governed in which the power of political authority was carefully and formally constrained. The revolutionaries intended to enact Republican ideas that had flourished in the Enlightenment. The American Revolution was an attempt to sweep away the old colonial, monarchical authority to create a tabula rasa from which a new world could emerge (Bailyn, 1967; Wood, 1992).

The American Revolution was also unusual in that it was not driven by poverty or hardship. On the contrary, on the eve of the revolution American society was becoming increasingly prosperous and the revolutionary leaders were among its most prosperous members. The revolutionaries were motivated by fear that the prosperity they enjoyed could be easily lost. They believed a replacement of parasitic monarchical authority with a republic would safeguard individual liberty and ensure future prosperity (Wood, 1992: 169-73).

Buchanan’s work has also been criticised as inherently conservative (Barry, 1965: Chapters XIV and XV; Shapiro, 1996: Chapter 8; MacLean, 2017), but this reading similarly misses the radicalism of his vision. Like the revolutionaries, Buchanan doubted the value of piecemeal reform to the existing structure of American society as it stood in the late-twentieth century. Buchanan (1975a) argued that the American constitutional system was in disarray and the only remedy was a ‘constitutional revolution’ to remake that system. Buchanan argued that the American constitution no longer constrained the arbitrary power of government; on the contrary, a system of government that was created to protect against
infringements of liberty now carried out such infringements as a matter of its routine 
operation. Buchanan (1975a: 210) argued that the only solution was ‘reconstruction of the 
basic constitutional order itself’. That reconstruction, in the spirit of the original foundation, 
would require the consent of the governed: ‘Little, if any, improvement in the lot of modern 
man is promised by imposition of new rules by some men on other men’ (Buchanan, 1975a: 
213).

Buchanan’s work walks a tightrope between the normative and the empirical. Buchanan 
(1972: 78) wrote that, ‘factually and historically, the “social contract” is mythological...
Individuals did not come together in some original position and mutually agree on the rules 
of social intercourse’. That is, Buchanan understood that the idea of social contract was a 
normative device ‘that facilitates the evaluation of real world institutions’, and ‘requires us to 
imagine if people would voluntarily enter into the political arrangements that presently exist’ 
(Meadowcroft, 2011: 46). If we could not imagine people voluntarily entering into present 
arrangements then their legitimacy must be questioned. But Buchanan also understood that 
the constitutional rules of any given society had a real impact on its social, political and 
economic development and therefore on the life chances of individual men and women. 
Hence, constitutional political economy was not simply a normative enterprise, but one with 
real empirical implications.

At the heart of Buchanan’s work, then, as at the heart of the American Revolution, was an 
appreciation of the power of constitutional rules to bring about dramatic changes in social 
outcomes. American society had developed in a particular way because of the rules created in 
its founding. As those rules had become deformed over time, so America had lost its way and 
its citizens had become subject to the kind of arbitrary power that the Founders had sought to
avert. For Buchanan (1975a: 211), appreciation of the power of constitutional rules brought with it a responsibility to accept the challenge of constitutional rule-making: ‘History need not be a random walk in sociopolitical space, and I have no faith in efficiency of social evolutionary process’.

Buchanan never saw America as a tabula rasa ready to made anew – on the contrary, the importance of the status quo as the starting point of any constitutional reform was an important theme of his work (Buchanan, 2004) – but he nevertheless appreciated the potential of constitutional change to impact the lives of ordinary men and women. Buchanan shared a vision of the potential and importance of constitutional revolution with the American founders.

**A society of equals and unequals**

The American Revolution was a revolt against a monarchical, undemocratic government. That government ruled according to lines of patronage and ties of privilege that went back across the Atlantic Ocean to the British monarch. The monarchical government of the American colonies was founded upon the idea of inequality – that some people were born to rule and other, lesser people were born to be ruled. The American Revolution rejected that idea and overthrew those relationships. The revolutionaries dismissed the age-old principle of aristocracy of birth and replaced it with the principle of equality – that all men were fundamentally, morally equal. As the Declaration of Independence stated: ‘We hold these truths to be self-evident, that all men are created equal’. Men were deemed to be of equal moral worth and equal in their capacity for self-government (Bailyn, 1967; Pole, 1978; Wood, 1992).
The Founders’ belief in equality reflected the thinking of the Enlightenment and the teachings of the leading Enlightenment scholars that traditional hierarchies were not natural and ordained by God, but were man-made and artificial. Wood (1992: 236-40) has described the widespread belief in Lockean sensationalism during the revolutionary period – the belief that all people were born intellectually and emotionally identical and the differences that emerged came from the impact of their different experiences on the senses. Perhaps the most famous Enlightenment statement of Lockean sensationalism was Adam Smith’s (1776: 28-9) claim, published in the same year as the Declaration of Independence, that the difference between a philosopher and a street porter ‘arise not so much from nature, as from habit, custom and education’, so that there was no difference between the two at birth and in infancy, but the differences only developed gradually over time until appeared that the two were markedly different people. Not all the revolutionaries subscribed to such a strong account of the individual as a clean slate, but its wide currency nevertheless reflects the belief shared by many that there was enormous scope for human improvement if society could be organised to the benefit of all and not just a privileged minority (Bailyn, 1967; Pole, 1978; Wood, 1992).

Buchanan’s work similarly starts from recognition of the fundamental, moral equality of persons. In opening The Limits of Liberty with a statement of his methodological and ethical individualism, Buchanan (1975a: 3-4) wrote: ‘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… Each man counts for one, and that is that’. Similarly, in The Reason of Rules, Brennan and Buchanan (1985: 26) explained that their approach to constitutional political economy ‘requires that all persons be
treated as moral equivalents, as individuals equally capable of expressing evaluations among relevant options’.

For Buchanan it was also important to recognise the dimensions upon which people were unequal; the unique moral value of each individual followed from their individual differences. Buchanan (1971: 237) wrote that people ‘differ in capacities; even at some defined point in time, inequality in endowments (human and nonhuman) is characteristic of the real world’. Buchanan unequivocally rejected Lockean sensationalism – he argued it was a fact that people differed in their innate capacities – intellectual, psychological and physical. Furthermore, in the real world, people differed in their possessions of property and wealth. Hence, in one of his few published comments on the American Revolution, Buchanan (1975a: 17) argued that the opening words of the Declaration of Independence had allowed confusion to enter our understanding of the kind of equality imagined by the Founders and that Jefferson should have written, “to their creator, all men are equal”, to more accurately capture the Founders’ vision of moral equality. A constitutional agreement must be founded on moral equality but also recognise the fact of material inequality. Hence, Buchanan’s political economy involved recognition of natural equality and natural inequality (Levy and Peart, 2018).

While Buchanan (1971; 1979) rejected the idea that individuals were human putty ready to be moulded into perfect human beings by a benevolent overlord, he nevertheless contended that the desire for self-improvement, even self-transformation, was a defining human characteristic. It was this human ability to conceive the possibility that one could become a different person that drove purposeful behaviour in the marketplace and in the political realm. Buchanan’s (1979: 259) political economic project was driven by the idea that, ‘Man wants
liberty to become the man he wants to become’ [original emphasis]. A life involves imagining different possible lives – a student imagines being an academic, a waiter imagines being a chef, an accountant imagines being a novelist – and liberty is the freedom to imagine and to pursue those alternatives. Political and economic theories that believed individual preferences were given and fixed and could be accurately captured by external agents were inimical to liberty and the ideals of self-transformation and self-governance.

Buchanan and the American revolutionaries derived very different understanding of rights from their similar conceptions of individuals as moral equals. The Declaration of Independence may be understood as a classic statement of natural rights – the idea that people possess basic human rights as people irrespective of whether other people or institutions recognise and respect those rights. This reflects the views of the key Enlightenment thinkers who inspired the revolutionaries, notably Locke (1689). By contrast, Buchanan (1975a; Brennan and Buchanan, 1985: Chapter 2), rejected the idea of natural rights because their existence would imply a source of values external to individual men and women. For Buchanan, rights only came into existence when people agreed to assign rights to one another and to respect them (Meadowcroft, 2011: 50-1).

Contract and exchange

The American Revolutionaries rejected monarchical government founded upon historical antecedence and patronage and instead demanded that the legitimacy of the state be grounded in popular consent. A society of natural equals did not contain separate classes of governors and governed, but was constituted of men with equal claims to self-rule. The revolutionary rallying cry of ‘no taxation without representation’ reflected a wider critique of the rule of an
unelected, unaccountable elite. The revolutionaries’ rejection of monarchical authority reflected Enlightenment thinking about the importance of reason and scientific knowledge over superstition and tradition, but it also reflected important trends that had emerged with the development of American society in the eighteenth century.

First, contractual relationships had become increasingly important. Whereas in the past, society had been dominated by hierarchical relationships founded upon duty and obligation – between master and servant, landlord and tenant, husband and wife, parent and child – by the late-eighteenth century relationships in America were increasingly between people who considered themselves to be equals and were formally mediated by contracts that both parties entered into voluntarily. As Wood (1992: 162) has described: ‘in the commercialized eighteenth century contracts became much more voluntary, explicit, and consensual, much less declaratory of previously existing rights and duties and much more the consequences of conscious acts of will’. As such, the hierarchical relationship between distant monarch and colonial subjects was coming to seem anachronistic in a world where most relationships were contracts voluntarily agreed by equals.

Second, the development of American society was driven by an economy founded upon the principle of exchange. Whereas monarchical economies were founded on agricultural production based upon traditional tenant farming or on mercantilist acquisition abroad, eighteenth century America was a commercial society in which cottage industries abounded and trade was near-universal. America’s colonial masters did not understand this new economy founded upon commercial exchange because it had not existed before. Hence, the colonial government’s attempt to regulate, tax and control it was destined to fail (Bailyn 1967: Chapter V). Furthermore, exchange was a powerful democratising force in American
society. Whereas in the past, economic advancement had been restricted to property owners and office-holders able to obtain credit or favour from government, now any individual (and in practice women often led the way) could produce goods for sale at home and cumulatively improve their economic position (Wood, 1992: Chapter 18).

Contract and exchange were similarly at the heart of Buchanan’s political economy. Buchanan’s contractarian vision was founded upon the view that, ‘the whole enterprise of politics can be viewed only as a complex many-person system of exchanges or contracts’, in which, ‘Individuals must be conceived to join together to explore and ultimately to agree on the establishment of collective entities or arrangements that prove mutually beneficial’ (Brennan and Buchanan, 1985: 25) Just as a market economy emerged from a series of bilateral, voluntary exchanges between individuals, so that a market economy could be said to require the ‘consent’ of all the participants of those bilateral exchanges, legitimate political institutions may be said to similarly emerge from a series of voluntary exchanges between individuals who reciprocally agree to respect one another’s rights (Brennan and Buchanan, 1985: Chapter 2; Buchanan, 1975a; Buchanan and Tullock, 1962: Chapter 1).

The definitive example of Buchanan’s perception of politics as exchange is the unanimous agreement to a social contract that establishes political rights and sets over-arching laws and rules to govern the future conduct of politics. Buchanan showed that theoretically unanimous, voluntary agreement to leave the state of nature and enter into the state should be expected. The state of nature will be characterised by extensive predation of the weak by the strong, so the weak will voluntarily enter into the social contract to obtain protection from predation. The strong will enter into the social contract because resources they have previously devoted to predation and protection may be reassigned to productive activities, so they will also
expect to gain from the establishment of a monopolistic political authority. In other words, there will be mutual gains from multilateral disarmament and this leads to the agreement of the social contract. Importantly, the social contract is not conceived as one multilateral agreement signed by every member of society in a single moment, but is conceived as a series of bilateral agreements made between individuals that come to encompass all members of society like a vast web. Buchanan’s principle of unanimity does not imply that everyone raises their hand or casts their ballot in one moment of decision (and one no-vote means no decision is possible), but that people’s interactions with one another constitute a never-ending series of voluntary, welfare-increasing exchanges that encompass every member of society (Brennan and Buchanan, 1985; Buchanan, 1975a: Chapter 4; Vanberg, 2004).

Buchanan shared the American revolutionaries’ vision of a society founded upon contract and exchange between free individuals. This vision was contrasted with the view of political authority and social order imposed from above. As Buchanan (2007: 17) wrote: ‘the simple exchange of apples and oranges between two traders’ is the ‘institutional model’ that serves as ‘the starting point for all that I have done’. A market economy may be ultimately reducible to the exchange of apples and oranges between two individuals, just as legitimate political institutions may be reducible to the decision of two individuals to recognize and respect one another’s rights. As Vanberg (2004: 154) has described, in the contractarian vision a market economy emerges from ‘mutual gains from trade’ and legitimate political arrangements arise from ‘mutual gains from joint commitment’.

**A republic without virtue**
At the heart of the republican ideal to which the American revolutionaries subscribed was the idea that there was an identifiable public good and republican government should be peopled by virtuous individuals willing to set aside their own private interests to pursue the public good. The distinction between individual self-interest and the public interest was an important idea of the Enlightenment philosophers who advocated republicanism as an ideal form of government. Rousseau (1761: 25) wrote that republican government involved the enactment of laws that reflected the ‘general will’, which he defined as an amalgamation of the private interests in society: ‘the will of all… considers private interest and is merely the sum of private wills. But remove from these same wills the pluses and minuses that cancel each other out, and what remains as the sum of differences is the general will’. Montesquieu (1748: 67) wrote that republican government ‘requires a constant preference of public to private interest’ and this required education to teach governors the virtue of ‘self-renunciation, which is ever arduous and painful’. Republicanism involved replacing monarchical government in which the right to pursue one’s own interest through offices of state was accompanied by some limited obligation to engage in public service, with a government whose personnel set aside private interests to work for the public good.

The American revolutionaries embraced the classical republican ideal that government should be undertaken by virtuous men disinterestedly pursuing the public interest. For classical republicans that meant that officeholders should receive no salary so that government service was literally a burden shouldered at personal cost. At the Constitutional Convention Benjamin Franklin, the oldest and one of the wealthiest delegates, argued that paying officeholders would attract into government, ‘the bold and the violent, the men of strong passions and indefatigable activity in their selfish pursuits. These will thrust themselves into your government and be your rulers’. Many of the delegates agreed with Franklin’s
sentiments, but few believed that the government could attract sufficient officeholders without financial compensation and Franklin’s proposal was quietly ignored (Wood, 1992: 291-2).

Buchanan vociferously rejected the idea that there was such a thing as the general will, public interest or the common good. This rejection followed from Buchanan’s methodological and ethical individualism – the view that there was no such thing as ‘society’, other than the sum of the individuals who composed it, and there are no moral values external to the values of individuals. For Buchanan (1989: 56) it was an empirical fact that, ‘Only individuals choose; only individuals act’, and so actions that might be attributed to institutions like governments or firms were in fact the actions of the individuals who populated those organisations. Accordingly, it was an error to speak of the ‘public interest’ because empirically only individuals have interests. Buchanan argued that there were no transcendental ‘social’ or ‘public’ values or ends, only the values and ends of different individuals. As Brennan and Buchanan (1985: 27) put it: ‘The state does not act as such, and it cannot seek its own ends or objectives. “Social welfare” cannot be defined independently, since, as such, it cannot exist’.

In the absence of a public interest independent of the private interests of individual men and women, there is no basis to judge any social outcome preferable to any other, except in so far as an outcome may enable individuals to attain their own ends: ‘A situation is judged “good” to the extent that it allows individuals to get what they want to get, whatsoever this might be, limited only by the principle of mutual agreement’ (Buchanan, 1975a: 4).

The fact that there are no values other than those of individual men and women means that any attempt to discover or purse the ‘public interest’ or the ‘common good’ must necessarily
involve the imposition of one person’s or one group’s interests on others in the name of the ‘general will’. Hence, the idea of virtuous politicians setting aside their own interests and pursuing the common good was a mirage because the common good simply did not exist.

Indeed, Buchanan argued that even the American Founders – whose efforts had undoubtedly produced benefits for others – should be understood to be acting self-interestedly by investing effort to become well-informed about constitutional matters, ‘because of the directly instrumental effect exerted through enhanced power to determine the ultimate collective result’ (Buchanan and Vanberg, 1989: 21). Hence, even a figure like James Madison, invested in knowledge about different constitutional alternatives and their likely consequences because if it conferred a position of leadership that allowed the individual to decisively influence the final outcome of constitutional choice then it was an excludable, personal benefit (Buchanan and Vanberg, 1989).

It would not have been a surprise to Buchanan that the difficulties of finding disinterested politicians willing to serve for the public good emerged as an important political problem in the early days of the republic and this became an immediate point of contention between the Federalists and their opponents. The Anti-Federalists denied that there existed a disinterested, gentlemen elite who could govern in the public interest – they argued such gentlemen would in fact use their position of power to advance their own elite interests (Wood, 1992: 255-6). Indeed, as the state legislatures became filled with self-serving local politicians, the classical republicans had little option but to admit that genuinely disinterested politicians were rare; John Adams wrote that there was “only one actual disinterested character every five hundred years” (Wood, 1992: 289). Accordingly, the key question facing the Founders ceased to be how to recruit enough disinterested individuals into public office to enable government in the
public interest, and became instead how to put in place the necessary safeguards given the fact that government would be by self-interested individuals. Hence, in arguing for the separation of powers in *Federalist 51* James Madison (1788: 257) famously wrote:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in next place oblige it to control itself.

The Founders had to face the fact that in the absence of a government solely populated by disinterested officeholders serving in the public interest, overthrowing the colonial government of the British monarch did not put an end to the possibility of tyranny. On the contrary, popular, democratic government could produce a popular tyranny that was unfettered by the practices of patronage and norms of duty that had constrained monarchical authority.

This predicament of the modern, post-revolutionary era was the central theme of Buchanan’s (1975a: 188) work, wherein, ‘When we speak of controlling Leviathan we should be referring to controlling self-government, not some instrument manipulated by the decisions of others than ourselves’. Buchanan (1975a: 188) wrote that the American revolutionaries overthrew the rule of George III, the French revolutionaries had ousted the ancien régime, and the Bolsheviks had toppled the Russian aristocracy, but for ‘modern man tangled in the web of bureaucracy, there is only himself, or others of the same breed’. Tyrannical rule in the
modern era will be exercised by people indistinguishable from ourselves and therefore its threat can only be extinguished by the agreement of self-constraints.

**Slavery, the status of the status quo and American liberty**

The question of slavery has become increasingly important to analysis of the American Revolution. In 1972 Freehling (1972: 81-2) wrote that, ‘Only a few years ago, in a historical age now grown as arcadian Jefferson himself, no man needed to defend the Founding Fathers on slavery,’ but that had changed, so that, ‘The Declaration of Independence, it is now argued, was a white man’s document that its author rarely applied to his or any slaves’. Concern and controversy over the issue of slavery in the Founding has grown not diminished in the last half-century. The United States of America was founded on the principles of life, liberty and the pursuit of happiness for men who were self-evidently created equal, but the failure of the Founders to abolish slavery and the slave trade seems increasingly remiss and casts doubt on the veracity of those principles.

In *Federalist 42*, Madison (1788: 209-10) condemned slavery as ‘barbarism’ and ‘unnatural’, but in the Constitutional Convention he had supported a compromise on the issue to ensure that the Southern states joined the union. This compromise involved giving Congress the power to abolish the slave trade after 1808 (if there was a majority in favour of so doing) and taxing the trade before that date – in part because the Northern states would be expected to help put down any slave insurrection and their delegates demanded that the Southern states contributed to the anticipated cost (Collier and Collier, 1986: Chapter 16).
It was also the case that many of the Founders were themselves slaveowners. Madison’s moral abhorrence of slavery ‘led him to act the part of humane master’, but the privileged lifestyle that he and his family enjoyed, ‘rested on their ownership of black slaves’ and ‘in the final judgement, he was no better prepared to live without slaves than the other members of the great planter class to which his family belonged’ (Rakove, 2007: 146). Jefferson, similarly, combined his public commitment to equality with ‘his private life as a slaveowner whose expensive pursuit of his own happiness… made it impossible for him to free any of his human chattel’, other than those ‘whom were almost certainly his own offspring’ (Rackove, 2007: 219-20).

Although properly unconscionable today, the fact is that the Founders did not consider African men and women to be equal humans to white Europeans. Hence, the Founders who supported abolition believed that freedmen should ultimately return to Africa, rather than become equal citizens of the new American republic, and accordingly supported the colonialization movement to establish Liberia as a home for freed slaves. However morally troubled they were by slavery, it must be accepted that the views of the Founding Fathers reflected an age in which it was generally accepted that black people were inferior to white people (Collier and Collier, 1986: 141; Freehling, 1972; Rackove, 2007: 213).

Of course, the failure of the Founders to apply the principle of moral equality to non-whites does not undermine that principle. On the contrary, it is the asymmetric application of this universal principle which is so problematic, and, indeed, was apparent to many contemporaries: it has been argued that the principles of the Revolution made ‘slavery seem more and more anomalous. Americans now recognized slavery in a republic of workers was an aberration’ and in this respect the Revolution ultimately doomed slavery to its eventual
demise (Wood, 1992: 186; Berlin, 1974: Chapter 3; Freehling, 1972). But if slavery does not undermine the principle of natural equality that the Founders espoused then there surely is no reason why it should undermine other principles that they advocated.

The issue of slavery in the American founding raises the place of the status quo in Buchanan’s account of constitutional agreement. The requirement that constitutional agreement be unanimous would seem to mean that any beneficiary of present arrangements, however egregious those arrangements may be, is able to veto change, so that, ‘The abolition of slavery is blocked by the slave owners, the redistribution of income by the rich’, and, ‘If one group achieves a larger than average share of the community’s income or wealth via luck, skill, or cunning… this distribution cannot be upset by collective action of the community’ (Mueller, 2003: 143-44).

The unanimity principle does give a privileged position to the status quo, but not, as Buchanan (1975b: 124) explained, because the status quo is deemed desirable, but because it is the inevitable starting point of change: ‘In a very real sense, the starting point is always the status quo, and proposals for improvement must be informed by this existential reality’. Genuinely consensual politics must begin from a starting point that is the legacy of non-consensual politics; a line must be drawn under the past so that a new era of politics without losers can begin (Meadowcroft, 2014).

Buchanan’s rejection of natural rights means that there is no a priori reason why one person should not be the slave of another if people enter into such an agreement. Accordingly, Buchanan (1975a: 78) argued that slavery could be anticipated to emerge within his framework if both parties consented to a ‘contract of slavery’. This could be anticipated to
happen, ‘to the extent that this assignment is mutually accepted, [and] mutual gains may be secured from the consequent reduction in defense and predation effort’. In other words, an individual might agree to become a slave if this represented an improvement on their present situation in the state of nature. The rights thereby assigned – as with all rights – could only be altered thereafter with the consent of both parties – slave and slaveowner.

It is evident that the men and women forcibly transported from Africa into slavery in America did not agree to their enslavement. These practices therefore took place in the pre-constitutional state of nature which people seek to escape by entering into constitutional agreement. Indeed, enslavement is precisely the kind of predation that Buchanan imagined people would seek to escape when entering the social contract. But the hundreds of thousands of slaves in America were not given the opportunity to enter into constitutional agreement in – they were effectively unrepresented at the Constitutional Convention.

The example of slavery would also seem to pose an empirical problem for Buchanan’s theoretical claim that both the strong and the weak will agree to respect one another’s rights and enter into constitutional agreement in order to realise the mutual gains from multilateral disarmament. The evidence suggests that the wealth that the slave trade created for many individuals far outweighed the expected benefits of the cessation of predation (i.e. slavery). At the Constitutional Convention representatives of the Southern states successfully argued for the continuation of the slave trade in order to protect the significant profits made therein (Collier and Collier, 1986: Chapter 16). If we judge that in the long-run a free economy without slavery will be more prosperous than one based on slavery, then slavery may be an example of the transitional gains trap that Tullock (1975) famously identified whereby short-
term losses concentrated on a small number of individuals thwart welfare-enhancing reforms because those individuals mobilise to prevent change.

Buchanan’s unanimity principle does mean that the consent of slaveowners would be required before slavery could be abolished. In the absence of natural rights, slaves (like everyone else) do not possess rights until others agree to assign and respect rights to them. In a constitutional agreement modelled as a series of bilateral exchanges the recognition of the rights of slaves by their masters is required for manumission. The fact that Buchanan’s model of constitutional agreement does not automatically rule-out slavery as illegitimate is undoubtedly challenging, even troubling, but it is important to understand that Buchanan believed non-consensual politics – politics where any individual’s rights may be altered without their consent – leaves everyone open to (what amounts to) enslavement. As Brennan and Buchanan wrote in *The Power to Tax*, if individual tax liabilities may be varied arbitrarily without the consent of taxpayers, then individuals are exposed to exploitation via the routine operation of normal politics:

>[If] the allocation of tax shares among individuals and groups in the economy and the choice of tax instruments that generate the imputations of such shares are considered “up for grabs” during each and every new budgetary period... [then] the prospective taxpayer is, of course, vulnerable to exploitation by government to the maximum limits of his taxpaying capacity (Brennan and Buchanan, 1980: 221).

For Buchanan, taxation without consent involved the exploitation of those individuals forced to work for the ends of others under threat of violence – conditions that amounted to slavery. Finding a way out of this labyrinth of non-consensual political arrangements by demanding
that all consent to new arrangements clearly demands significant bullet-biting, but Buchanan believed this was necessary because genuinely consensual politics offered the only escape route from exploitative political arrangements.

**Conclusion**

In May 1992 Buchanan (1992b) gave the commencement address at Lycoming College in Williamsport, Pennsylvania. In a speech entitled, ‘We have lost our constitutional way’, Buchanan told the graduating students that the ““good society” is attainable in the here and now’ if democracy could be placed within constitutional limits. He closed his address: ‘Two centuries, James Madison showed us the way. We only need to translate his vision into the realities of our time.’

This paper has shown that Buchanan’s work should be properly situated – as he intended – in the tradition of the American revolution that envisions a society of moral equals founded upon a network of contract and exchange. Realising that ideal from a status quo that is the historical legacy of constitutional anarchy faces significant challenges, but the promise of a society founded on genuinely consensual politics makes the task worthwhile.
References


Buchanan JM (1992b) *We have lost our constitutional way*. Commencement address, Lycoming College, 3 May 1992, James M. Buchanan archives, Box 30, George Mason University.


