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Parables of Exchange: Foundations of Public Choice Theory and the Market Formalism of James Buchanan

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PARABLES OF EXCHANGE: FOUNDATIONS OF PUBLIC CHOICE THEORY AND THE MARKET FORMALISM OF JAMES BUCHANAN*

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INTRODUCTION

Toward the end of the last century, the painted facade of legal formalism began to craze and crack, revealing the distortions beneath. The formalist project attempted to explain law as autonomous, non-coercive, non-consequentialist, acontextual and, most of all, "non-political . . . [a] buffer between state and society."[1] The formalist separated law and politics to escape from the tyranny of the majority into the realm of neutral principles, safe from legislative majorities and able to withstand their redistributive tendencies. In such a realm, a judicial decision was non-political even when it struck down legislation derived from "neutral" principles. The judicial process was analogous to the scientific method, using reason to move from the concrete to the abstract, deriving particular decisions from timeless general principles and vice versa.[2]

By the twentieth century, the realities of a rapidly expanding economy, a developing oligopoly of industry, the organization of workers, and a growing, diverse, and demanding population[3] were destroying the ability of the formalist paradigm to mediate among contending forces. The notion of a jurisprudence analogous to science crumbled at the realist recognition that neutral principles could not be found. But, the desire for law to assume a non-political character, in order to play a mediating and legitimating role, had not disappeared. The attempt to find a realm of neutral principles justifying anti-majoritarianism was too attractive to abandon completely even though the project to discover a "brooding omnipresence in the sky" had failed.

Today, at the close of the twentieth century, there continue to be those who seek a model that delegitimates majoritarian legislation on the basis that it is inconsistent with neutral principles of law. Two leading public choice scholars tell us that "[d]emocracy — understood as rule by the people or its representatives — is fundamentally at odds with the rule of law."[4] They

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[1] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 9 (1992).

[2] For an interesting explanation of the nature of the "science" that formalism practiced, see Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 16-32 (1983).

[3] ALFRED D. CHANDLER, JR., THE VISIBLE HAND 489 (1977).

[4] John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 GEO. L.J. 565, 567-68 (1992).

argue that democracy is "arbitrary" and exhibits "internal chaos and contradiction."[5] The new attack on majoritarianism does not rely on law transcendent, although it does tend to claim scientific sanction. This anti-majoritarian movement seeks to show that legislative majorities are unable to produce law that is coherent, consistent, intelligible, or in a large sense, purposeful. Not only is the legislative process flawed, but legislation itself is the factional attempt to utilize the state's coercive power for private, and generally redistributive, ends. The legislative arena is both contrasted with the marketplace — conceived as a neutral, non-coercive, and voluntary mechanism for social decision-making — and compared to the marketplace. Public choice theory models a political world equivalent to the economic market, in which legislative decisions are bought and sold.

Public choice theorists begin with what is conceived of as a natural institution, the market. The building block of this theoretical construct is the single individual in a two-party exchange. One individual trades with another. Neither individual is required to participate, nor would she if she did not judge the exchange to be in her interest. Market exchange is an interaction of free equals. In public choice theory, it is the paradigm for *all* human interactions which should be equally voluntary and self-interested. The multiplicity of individual transactions makes a market which, left to itself, will regulate human interaction to the best advantage.

The next step in constructing public choice theory is the normative extension of this model to collective, or governmental, decision-making. Like individual decision-making in the market, it too should be non-coercive, that is unanimous. Unanimous decisions are voluntary and represent the perceived self-interest of all parties to the decision. The state which acts only on the basis of unanimous decisions is by definition neutral and non-coercive.

Decisions made by a majority, on the other hand, force the state out of the preferred position of neutrality and require it to take sides. Enforcement of a majoritarian decision puts the power of the state in the hands of one group — only a portion of the whole — which imposes its will on another. The paradigmatic majoritarian decision is to redistribute wealth: the non-wealthy majority confiscates the wealth of the wealthy minority.

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[5] *Id.* at 568.

Because some parties suffer, this outcome could not occur unanimously and is thus impossible under a market-exchange model of law. This, in short and standing on one foot, is the normative public choice account of law and state. In this article, by examining the writing of one of its leading proponents, I will argue that the public choice account is not entirely coherent.

Public choice theory arose parallel to, and slightly behind, the Chicago School law and economics movement's framing of the free market as the source of and rationale for not only wealth and liberty, but the legal system as well.[6] The public choice movement of the Virginia School also attacked the post-New Deal social compact by focusing on the process of legislative decision-making, ostensibly in place of examining its substance.[7]

Like the Chicagoans a decade before, the Virginians moved into legal academia.[8] Public choice theory has since made major contributions to the study of public law and legislation. Its fundamental assumptions, however, have not received wide exposure. This article examines those foundations as presented in the works of James M. Buchanan, the 1986 Nobel Laureate in Economics and a central public choice theorist.

The Chicagoans argue that outcomes legitimate the superiority of the market as a form of collective decision-making — the market is the most efficient means to allocate resources. The work of the state is at best secondary and at worst inefficient. At best, the state can protect initial entitlements and police the forum of private transactions. At worst, the state may redistribute wealth and hinder economic growth.

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[6] *See, e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992). Judge Posner is the leading advocate of Chicago School law and economics.

[7] Public choice theory is often referred to as Virginia School theory since two of its leading proponents, James M. Buchanan and Gordon Tullock, Buchanan's close collaborator for many years, taught in the Commonwealth. Buchanan attributes the phrase to Mancur Olson and Christopher Clague. James M. Buchanan, *Politics, Property and the Law: An Alternative Interpretation of* Miller et al. v. Schoene, 15 J.L. & ECON. 439, 439 n.3 (1972).

[8] In fact, the distinction between Chicago and Virginia may be somewhat Procrustean. Chicago academicians have applied Virginia-type analysis to a variety of governmental regulations. *See, e.g.*, Sam Peltzman, *The Effects of Automobile Safety Regulation, in* CHICAGO STUDIES IN POLITICAL ECONOMY 349 (George J. Stigler ed., 1988); B. Peter Pashigian, *Environmental Regulation: Whose Self-Interests Are Being Protected?, in* CHICAGO STUDIES IN POLITICAL ECONOMY, *supra*, at 498.

Two further propositions flow from this: first, state intervention in the market is warranted only to correct market failure; second, the common law, effectively the outcome of the day-to-day interactions of market participants, orders the market more efficiently than statutory law, the artificial creature of the legislative state.

Persuasive as this may be, it is insufficient, standing alone, to overcome the presumption, apparently central to our constitution, that majority rule, however hemmed about by checks and balances, is the engine of the state created by the framers of the document. That presumption provides some legitimacy for state action that is inefficient, in the sense of producing outcomes different from those to be realized in a perfectly-functioning market. The majority may approve whatever the constitution does not forbid, and the constitution does not speak of efficiency. Chicagoans are reduced to arguing the general normative point that efficiency ought to play a central role in democratic decision-making, attacking, on policy grounds, specific pieces of legislation as inconsistent with the public interest in efficiency. Law and economics theorists, seeking to free the market from inefficient legal constraints, concentrated on the supply side, the promulgation of law.

Public choice theory focused on the demand side — interest groups' desire for certain political outcomes and their willingness to purchase such outcomes from political actors. The public choice critique of public policy was ostensibly directed not at its inefficiency, but at its origins in private interests. That critique also concluded that majority rule was necessarily incoherent, due to the nature of voting. Thus, Virginians proposed a meta-solution to the problem of delegitimating majority rule: the claim that it is not in fact democratic, or, at least, is incapable of providing outcomes that are stable, consistent or coherent.

Unlike some Chicago theorists,[9] Virginian theorists advocated change more profound than the mere reinstitution of judicial review of economic regulation. They called for a revolutionary change in the constitutional compact. James M. Buchanan, General Advisory Director of the Center for Public Choice at George Mason University, is an ardent proponent of

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[9] *See, e.g.*, Richard A. Epstein, *Judicial Review: Reckoning on Two Kinds of Error*, *in* ECONOMIC LIBERTIES AND THE JUDICIARY 39 (James A. Dorn & Henry G. Manne eds., 1987).

revising the constitutional compact. "[B]asic constitutional reform, even revolution, may be needed . . . . At the very least, it seems to be time that genuine constitutional change be considered seriously."[10]

In this article, I examine Buchanan's claims to have devised both an exchange-based description of constitutional government and a prescription for reform. After outlining Buchanan's fundamentally individualistic assumptions in Part I and his account of the state in Part II, I argue in Part III that there are serious short-comings in Buchanan's account, the most important of which are the derivation of the initial contract from a non-original position, Buchanan's inability to justify coherently the unanimity requirement, and his failure to establish a basis from which to distinguish decisions that must be unanimous from those that need not be. In Part IV, I analyze Buchanan's normative proposals for constitutional change and argue that they are based upon principles inconsistent with his previous assumptions. In the Conclusion, I suggest that Buchanan has been led astray by his categorical identification of the market with volition and the state with coercion, a philosophy similar to that of nineteenth-century legal formalism.

I. EXCHANGE AND INDIVIDUAL

A. THE PARABLES OF PRIVATE LAW

Buchanan is perhaps the leading advocate of contractarian law and economics. He sees in contractarianism a "genuine economic theory of law,"[11] a non-positivist account of the development of legal institutions, and a prescription for a non-majoritarian constitution.[12] While utilitarian law and economics focuses on whether legal and political outcomes are efficient,[13] contractarians contend their theory is non-consequentialist, that is, not oriented to results. They claim to look to the *process* and

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[10] JAMES M. BUCHANAN, THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN 169 (1975).

[11] *Id.* at 53.

[12] JAMES M. BUCHANAN, *From Private Preferences to Public Philosophy: The Development of Public Choice*, *in* CONSTITUTIONAL ECONOMICS 29, 35-36 (1991).

[13] See, e.g., POSNER, *supra* note 6, *passim*, for a model which utilizes wealth-maximization as the measure of efficiency.

limit their concern with results to whether outcomes are the product of, or promote, free and voluntary exchange. The contractarians' validating model for institutions, legal and political, is the market; their teleology is described in parables of exchange.

For the Virginians, unlike the Chicagoans, the market is not a means, but an end. The market is self-validating, without reference to efficiency as an exogenous value.[14] "[V]alues are defined only in the process itself . . . . In this sense, and in this sense only, can the order generated in the economic market process be labelled or classified as 'efficient.'"[15] Recognizing the difficulty of constructing an independent and neutral set of criteria to identify efficient outcomes, Buchanan simply abandons the attempt to reach an end-state definition of efficiency and identifies efficiency with the market process itself: "[T]he trading outcome must always be 'efficient,' and there is no way the economist can define an 'efficient' allocation independently of trade itself."[16]

Voluntary exchange is the only yardstick of efficiency, for efficiency is not an independent concept, but itself a shorthand for the achievement of individual preferences.[17] Exchange would not occur if it did not serve the perceived self-interest of individuals. The existence of voluntary exchange is the only necessary evidence of efficiency. "The efficient solution [can be] depended on to emerge from the interaction between the parties in each interdependence."[18] Absent coercion, we are assumed to get what we want and want what we get.

In the marketplace, only efficient transactions occur; each party agrees only to those exchanges that she perceives to be personally beneficial. That is to say, parties agree only to exchanges that provide mutual gains. In the perfect marketplace, trade takes place until the point of equilibrium, that is the point when no surplus remains and no further transactions

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[14] JAMES M. BUCHANAN, *Notes on Politics as Process*, *in* LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980S, at 87, 87-88 (1986).

[15] *Id.* at 88.

[16] GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES 25 (1985).

[17] *See* JAMES M. BUCHANAN, *Order Defined in the Process of its Emergence*, *in* LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980S, *supra* note 14, at 73.

[18] Buchanan, *supra* note 7, at 443.

can increase the welfare of one person without decreasing the welfare of another. To the extent the market functions in this way, it is cooperatively self-executing, and thus neutral. Such a perfect market not only maximizes individual satisfaction, and is thus efficient, but also places no constraints on the will of individuals, and is thus fair.[19]

Public choice theorists contend that desirable outcomes can be reached by no means other than voluntary exchange between individuals,[20] and there are no social interests independent of those of individuals. Buchanan claims that individual preference is the only guide to the common interest of society; agreements between individuals are the only possible evidence of individual preference.[21]

The agreements that are the basis of exchanges in the economic marketplace are voluntary, while government action is coercive. In essence, voluntary decisions are individual, coercive decisions majoritarian. But, if a political world could be fashioned in which collective decisions were unanimous — the sum of every individual's volition — then law constructed as the total of all individual decisions could be freed, as it were, from politics. Buchanan's public choice theory looks to the market for a model of law innocent of politics. Thus, his meta-project is to derive public law entirely from private law, and subsume all law under the category of contract.[22]

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[19] James M. Buchanan, *Good Economics — Bad Law*, 60 VA. L. REV. 483, 486 (1974). As one would expect from a theory based upon individualism, the maximum possible expression of individual will forms the ethical basis of the theory.

[20] Buchanan makes an exception to deal with "the public goods dilemma." Buchanan, *supra* note 7, at 444; *see also*, BUCHANAN, *supra* note 10, at 39. In fact, that exception destabilizes his theoretical posture. *See infra* text accompanying notes 72-82, 104-07.

[21] These differing individual preferences are exogenous to the exchange process and are brought to it by market participants independent of the process by which the exchanges take place. The ways in which desires are formed is no part of Buchanan's public choice theory. The failure to allow or account for endogenous preference-formation is a key element of some critiques of public choice theory. *See, e.g.*, Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, *in* FOUNDATIONS OF SOCIAL CHOICE THEORY 103 (Jon Elster & Aanund Hylland eds., 1986).

[22] In this sense, Buchanan's work could be described as an inversion of the early twentieth century Realist project which attempted to break down the distinction between public law and private law and subsume both under the heading of public law. HORWITZ, *supra* note 1, at 206-08.

B. THE PARABLES OF THE STATE AS MARKET

Buchanan uses his parables of exchange to provide both the normative basis of public law and a descriptive account of politics. In its descriptive mode, public choice theory "takes the tools and methods of approach . . . in economic theory and applies [them] to the political or governmental sector, to politics, [and] to the public economy."[23] The two basic assumptions of a public choice theorist in respect to the political world are, first, that the "economists' utility-maximizing framework [extends] to the behavior of persons in various public-choosing roles . . . [and second, that] the political process and the market process are analogous."[24]

As in economic theory, a fundamental predicate of public choice theory is a reductionist definition of humanity as a congeries of discrete self-interested rational individuals who interact with each other on the basis of voluntary exchange.[25] The model of *Homo economicus* "is the most appropriate one for constitutional analysis."[26] While it is used by economists to explain market behavior, *Homo economicus*, the self-interested rational individual, should not be abandoned "in nonmarket settings, without any coherent *explanation* of how such a behavioral shift [from self-interest to other-regardingness] comes about."[27]

The other predicate of public choice, a corollary to the first, is the similarity of state and market. In Buchanan's contract-

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[23] JAMES M. BUCHANAN, *Politics Without Romance: A Sketch of Positive Public Choice Theory and its Normative Implications*, *in* THE THEORY OF PUBLIC CHOICE — II, at 11, 13 (James M. Buchanan & Robert Tollison eds., 1984).

[24] BUCHANAN, *supra* note 14, at 87.

[25] JAMES M. BUCHANAN, *The Public Choice Perspective*, *in* ESSAYS ON THE POLITICAL ECONOMY 13, 21-22 (1989).

[26] BRENNAN & BUCHANAN, *supra* note 16, at 48; *see infra* text accompanying notes 44-52.

[27] *Id.* at 50. Economists concede such a model may not be veridical, *see, e.g.*, GEORGE STIGLER, *The Economist as Preacher*, *in* II TANNER LECTURES ON HUMAN VALUES 174-77 (1981), but is used to generate "as if" hypotheses. Thus the fact that economists use the model is a weak reason for extending it to nonmarket behavior, unless there is some pre-existing reason to model politics as a market. The "politics as market" model rests on the assumption that participants are self-interested, rational individuals, much like *homo economicus*. The argument is thus circular.

arian theories of political economy, there are two separate analogies of state and market. First, in the benign sense, the democratic state and the marketplace are subsets of one category: social institutions that serve to aggregate individual preferences. "[T]he market and the State are both devices through which co-operation is organized and made possible."[28] But between these two devices, the market is preferred because "voluntary action will always be more desirable in the sense that it cannot place any unwanted restrictions on use of property."[29]

The market-subordinate state exists interstitially to protect the market and facilitate those exchanges the unrestricted market cannot arrange, but in the manner the market would if it could. This state represents the preferences of market participants about how to protect, enhance, and improve market functioning. These preferences are rewarded in market fashion, by means of a series of exchanges in which "the result of 'trade' among persons will be a set of agreed-on rules rather than a well-defined imputation of goods among separate individuals."[30] Such a state is a necessary adjunct to the market, for it may act where the market fails.[31]

In the second analogy of the state and market, the state is conceived of as a market where goods that are unavailable in the economic marketplace may be purchased in the majoritarian legislature in exchange for votes, money, influence, or future employment, *inter alia*. These goods are sold by self-interested political actors who are willing to supply political outcomes to buyers, at a price. It is in this sense that "[t]he constitutionalist-contractarian," says Buchanan, "interprets the political process as a *generalization of the market*."[32] The state is a market where private interests obtain goods unavailable in the economic market.

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[28] JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 19 (1962).

[29] *Id.*, *supra* note 28, at 56.

[30] BRENNAN & BUCHANAN, *supra* note 16, at 25.

[31] Buchanan himself does not use the term "market failure," but adopts its essence, that is, that there are public goods achievable only through state coercion. *See infra* text accompanying notes 72-74.

[32] JAMES M. BUCHANAN, *Sources of Opposition to Constitutional Reform*, *in* LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980S, *supra* note 14, at 55, 65.

The goods in which the political market deals are redistributive policies achieved by coercion. They are illegitimate because they are unobtainable either in the economic marketplace or by voluntary agreement of market participants. These politically-obtained redistributive and unproductive outcomes are known as rents.[33] While rents cannot be attained in a well-functioning economic market, they are available in the political marketplace at the expense of either the public or a less effective interest group.[34] For example, grain farmers might go to the political marketplace to purchase the right to prohibit their neighbors' cattle-raising. They could purchase the creation of such a right — by means of a statute — even in those cases where ranching created more value than farming or the farmers could not have afforded to purchase the right privately.

Within this second analogy of state and market, "public choice offers a 'theory of government failure,'"[35] parallel to the theory of market failure. In this sense, the parable of state as market delegitimates majoritarian politics. As an acute commentator points out, public choice theory reverses the old presumptions that there is "something in the nature of market organization . . . that brings out selfish motives . . . and something in the political organization . . . which in turn suppresses

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[33] Rent is the difference in value between the best use of property and the next best use. There are two kinds of rents. On one hand, redistribution from minority to majority may be a rent if more is spent to achieve the outcome than is realized. On the other hand, rents are achieved by groups too small to represent a majority of voters. Public choice theory is based on the Olsonian notion that small groups are in fact *more* likely to be effective in the governmental arena than large ones. Because of the difficulty of organizing large groups of people whose interests may be varied, information limited, and demands diffuse, the mere fact that large groups can be widely benefitted or broadly hurt by a measure is not enough to predict whether a measure will succeed or fail. Small groups with a clear agenda and the ability to police their members have the advantage in securing their ends through the process of political exchanges. They succeed *because* they are small and single-minded. Even in a democracy, producers (who are few), rather than consumers (who are many), usually prevail. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 53-65 (1965). Thus, there are two redistributive dangers that majoritarian democracy poses. On one hand, an intense minority can overcome the less-interested majority; on the other hand, majorities may similarly achieve redistributive outcomes.

[34] GORDON TULLOCK, THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING 55 (1989).

[35] BUCHANAN, *supra* note 23, at 11.

these motives."[36] The process of exchange in the economic market enhances social welfare; in the political market, it diminishes it.

There is one further point to be made in describing the nature of the legislative process in a majoritarian voting regime. According to public choice theory, *no* legislative outcome expresses the will of the majority because no majoritarian voting regime based on some widely-accepted principles of democracy can produce coherent, consistent, or stable outcomes. As Buchanan puts it, "collectivities in which individual preferences differ cannot . . . make up their collective or group mind."[37]

This conclusion is based on Arrow's Theorem, a mathematical proof of the proposition that majoritarian voting is not a rational means to aggregate individual preferences.[38] For a democratically-made, non-unanimous decision that has more than two possible outcomes, majorities for every outcome are simultaneously possible. For example, even though voters may prefer spending more money to the status quo and the status quo to spending less money, they may prefer spending less money to spending more money.[39] The majority outcome cycles among possible results unless outside political factors, such as agenda control and voting rules, are brought to bear.[40] Those

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[36] Steven Kelman, *"Public Choice" and Public Spirit*, 87 PUB. INTEREST 80, 85 (1987).

[37] BUCHANAN, *supra* note 23, at 17.

[38] For a good introduction to Arrow's Theorem for the non-mathematician, see ALFRED F. MACKAY, ARROW'S THEOREM: THE PARADOX OF SOCIAL CHOICE (1980).

[39] The linear arrangement suggested here — more money, the same amount, less money — provides a partial answer to the problem of cycling. If preferences can be arranged linearly and the community of potential voters agree, not on their preferences, but on the transitive arrangement (such that those who prefer more spending prefer no change to less spending and vice versa), then a definite and unique majority position can be produced at the median position, in this case, no change in spending. *See* DUNCAN BLACK, *On the Rationale of Group Decision Making, in* 12 READINGS IN WELFARE ECONOMICS 133, 141 (Kenneth J. Arrow & Tibor Scitovsky eds., 1969). Of course, if individual voters have different preferences *within* the spending question, for example, some who wish to spend more on education prefer to spend less on prisons, while others do not, it is harder to avoid cycling. It is in such circumstances that coalitions and log-rolling emerge.

[40] Another answer to the problem of the incoherence of democratic majorities could be provided were it possible for voters to express not merely their ordinary preferences, but the *intensity* of preference that they experience as to

outside factors are exogenous to majoritarian voting though not to the political process itself. Given Arrow's Theorem, it is incoherent to justify the majoritarian state on the basis that it is a necessary corrector of market failures caused by the aggregation of individual preferences.[41] Even those tasks which the market cannot do better, the majoritarian legislature cannot do coherently or stably. It can arrive at a decision about how to correct market failures, but that decision will not represent a defensible aggregation of a majority of individual preferences.

Considering the state as a market for illegitimate goods, obtained by coercive and unstable majoritarianism in the service of aggressive minorities, Buchanan concludes that legislative unanimity is the only prescription that can ensure the probity and coherence of a democratic voting regime. "The unanimity rule must occupy [the central place] in any normative theory of democratic government."[42] Only under a unanimity regime is "collective or governmental decision making . . . equivalent to freely negotiated voluntary exchange."[43]

II. THE ORIGIN OF PROPERTY AND STATE

A. THE INDIVIDUAL AND THE CREATION OF THE STATE

Contractarian political theory begins with individualism and uses a set of assumptions about the self-interested, rational, and conflicting character of individuals to draw conclusions about the creation and continued functioning of collective choice mechanisms like the market and the state.

1. *The Non-Communitarian Account of the State*

Buchanan's account of the creation of the state is more Hobbesian than Rousseauian: the state does not express a

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the desirability of each potential outcome. But our inability to measure intersubjective intensity of preference is precisely what leads us to posit *homo economicus*, whose preferences can be measured objectively in cardinal dollars.

[41] Buchanan describes the shift from a sort of simple-minded pragmatism which accepted the usefulness of any government program, to the more rigorous, market-oriented view of government failure as being centrally assisted by the proof of Arrow's Theorem. BUCHANAN, *supra* note 10, at 172.

[42] BUCHANAN & TULLOCK, *supra* note 28, at 96.

[43] JAMES M. BUCHANAN, *The Coase Theorem and the Theory of the State*, *in* THE THEORY OF PUBLIC CHOICE — II, *supra* note 23, at 159, 163.

general will, but merely aggregates the preferences of individuals.[44] The "state cannot be conceived as some community embodiment of abstract ideals, which take form over and beyond the attainment of individuals."[45] There is "no 'public interest' as such in a society of freely choosing individuals."[46]

Buchanan's version of public choice theory asserts that community has no independent value: "We live together because social organization provides the efficient means of achieving our individual objectives and not because society offers us a means of arriving at some transcendental common bliss."[47] The values of community simply do not exist for the rational self-interested individual: "[A]ny person's ideal situation is one that allows him full freedom of action and inhibits the behavior of others so as to force adherence to his own desires. That is to say, each person seeks mastery over a world of slaves."[48] But this is a "utopian dream."[49] To the extent that the state is fair or just, it is not the ideals of the community that make it so, but rather the individuals, who demand a neutral umpire in the inevitable struggles for mastery among themselves.[50]

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[44] Buchanan's version of the initial contract is not Hobbesian, but Lockean, in the sense that the sovereign created by the contractors has no rights independent of them. *Id.* at 162.

[45] BUCHANAN, *supra* note 10, at 68.

[46] JAMES M. BUCHANAN, *An Individualistic Theory of Political Process, in* ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY 223, 226 (1987).

[47] BUCHANAN, *supra* note 10, at 1.

[48] *Id.* at 92.

[49] *Id.*

[50] Indeed, the pursuit of the common good may well have brought the nation to its current sad state: "Those who have promoted the extension of government's role under the folly that some national interest exists have, perhaps unwittingly, aided in the breakdown of effective moral order." JAMES M. BUCHANAN, *Moral Community, Moral Order and Moral Anarchy, in* LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980S, *supra* note 14, at 108, 117 [hereinafter BUCHANAN, *Moral Community*]. The idea of "some transcendent 'public good'" is part of the "socialist mystique [that] . . . is with us yet, in many guises." BUCHANAN, *supra* note 23, at 12.

There is no social predicate to the creation of the state. The individual recognizes the need for the state only because he sees in others the same self-interest he finds in himself:[51]

> When he recognizes that there are limits to the other-regardingness of men, and that personal conflict would be ubiquitous in anarchy, the extreme individualist is forced to acknowledge the necessity of some enforcing agent, some institutionalized means of resolving interpersonal disputes. The origins of the state can be derived from an individualistic calculus.[52]

2. *The Natural Distribution and the Creation of the Market*

The "anarchy" to which Buchanan refers is the horrid Hobbesian state of war, each person against all, with predation and defense necessarily claiming everyone's attention. Prepolitically, individuals possess goods and wealth but can protect these possessions only by force. They must always be aware of both the need for protection and the opportunities for predation. They must invest resources in both activities: each individual must protect her own goods and wealth *and* seize her neighbor's. The "natural distribution" of property is "secured upon investment of effort in attack and/or defense . . . ."[53] This initial distribution is neither a political nor a legal question,[54]

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[51] There are virtually no examples of Buchanan's uses of non-gendered language and the female pronoun. I do recall, however, coming across a single exception in a reference to the constitutional moment, when contractors are supposedly in the original position and thus unaware of their gender, *inter alia*. In the course of that single sentence, Buchanan, apparently consciously, switches from use of the male pronoun, to use of both male and female pronouns, and then back. Apparently, the dominance of the male gender is established immediately upon the close of that moment. This seems a peculiar notion for a theory that stresses the individual above all else.

[52] BUCHANAN, *supra* note 10, at 6 (citation omitted).

[53] *Id.* at 24. Buchanan attributes to Winston Bush the term "natural distribution" to describe the pre-contract state of predation and defense. *Id.* at 58.

[54] *See* BUCHANAN, *supra* note 10, at 23 (stating that there are "no property rights, no law," in the initial distribution). Buchanan says that he does not examine closely the means by which the initial distribution of property occurs because the analysis of the original division "would carry us too far afield." BUCHANAN & TULLOCK, *supra* note 28, at 47 n.3. He claims to "jump over' . . .

and "[emerges] from actual or potential conflict."[55] This process necessarily occurs before the state can be constituted. Until the "natural distribution" is established, by means of occupancy and predation, "it is difficult even to discuss the problems of individual constitutional choice . . . ."[56]

Once the initial distribution has taken place, individual self-interest begins to indicate the need for a state. Beyond predation, opportunities exist for mutual gains from trade among individuals. However, to facilitate potential trades for mutual gain, property must be secure and exchanges between individuals enforceable. Absent such security, predation is a rational practice. Moreover, informal agreements alone will not suffice to promote trades for mutual gain. It is rational to defect from such agreements as long as no enforceable penalties attach to defection. The inability to engage fully in voluntary exchanges prior to a constitutional contract is a form of the prisoner's dilemma, in which the individual's rational pursuit of her self-interest leads to larger-scale irrationalities.

Predator-defenders, all rational, come to recognize that collective action could limit the "*external costs* that the private actions of other individuals impose . . . ."[57] Thus, rationality dictates the creation of a mechanism to enforce the right to exclude, to reduce the costs of both further predation and defense against predation. Joint state-creating action, in the form of a constitutional contract, provides each individual with "*external benefits* that cannot be secured through purely private behavior."[58]

Buchanan's state thus functions to protect, rather than create, property. It comes into being to facilitate exchanges. States are "merely extensions of [preexisting] markets . . . ."[59] Possession of wealth predates the original contract which

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the initial definition of human and property rights." *Id.* at 46.

[55] BUCHANAN, *supra* note 10, at 28.

[56] BUCHANAN & TULLOCK, *supra* note 28, at 46.

[57] *Id.* at 43. These costs are "external" to the individual's own behavior. *Id.* at 44. The individual incurs "decision-making costs" in attempting to eliminate "external costs," and the authors call the sum of the two "interdependence costs." *Id.* at 46.

[58] *Id.* at 43-44.

[59] JAMES M. BUCHANAN, *What Should Economists Do?*, *in* ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY, *supra* note 46, at 21, 29.

creates the state, but the right to be protected in possession cannot be said to exist until a protective force external to individuals is created. That protective force is born when individuals recognize that predation and defense may cost more than agreeing on collective action to eliminate them.[60] After such agreement, "'law' of a sort has . . . emerged."[61]

B. CONSTITUTING THE STATE

The creation of the state is a two-step process.[62] First, a judicial state appears and then a legislative function is added.[63]

1. *The Judicial State*

In Buchanan's account, the initial form of law is "the mutual acceptance of some disarmament,"[64] accompanied by some form of enforcement to discourage what would otherwise be rational defection from the agreements of one's fellows. In its *ur*-form, then, the state is the neutral enforcer of rules of non-aggression agreed to by the parties. Buchanan calls this the "judicial" state, or state as referee. This state is fair or just in the sense that referees may be, that is, it enforces the rules to which the players have agreed *ante hoc*.[65] It is non-coercive in the sense that each contractor has agreed specifically to abide

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[60] *See* BUCHANAN & TULLOCK, *supra* note 28, at 48-49.

[61] *Id.* at 59. The disarmament agreement is not necessarily a "stand-in-place" agreement but may be accompanied by redistribution of goods to obtain the agreement of all. *Id.* at 63-64.

[62] Buchanan does not claim that his account of the creation of the state is historically valid. Rather he claims to be seeking a *post hoc* rationalization. He believes that this will allow the contractarian to concede the legitimacy of the state and at the same time provide the outline for its "constructive constitutional reform." BRENNAN & BUCHANAN, *supra* note 16, at 22.

[63] There is some difference between BUCHANAN & TULLOCK, *supra* note 28, and BUCHANAN, *supra* note 10, in this respect. In the latter, Buchanan is more willing to see the initial contract as an integral one which creates allocative and redistributive functions simultaneously. BUCHANAN, *supra* note 10, at 72-73. This is because obtaining the agreement of all to such a contract may require distributional concessions. Nonetheless, he continues to recognize that the two are separate, and I follow that lead. *See id.* at 28-30, 51.

[64] BUCHANAN, *supra* note 10, at 59.

[65] *Id.* at 68.

by rules and if a contractor breaks a rule, she has agreed to be sanctioned.[66]

In a referee state, courts exist and legislatures do not. There is no room for legislation, either direct or, as in judicial law-making, indirect. Courts apply pre-existing constitutional rules to facts mechanically. This formalist notion limits the judicial function to fact-finding:

> [The judge] makes no "choices" in the strict meaning of this term . . . . The participants agree on a structure of individual rights or claims that is to be enforced, and violation requires only the findings of fact and the automatic administration of sanctions. A contract or right is or is not violated; this is the determination to be made by "the law" . . . . Properly interpreted, "the law" which is enforced is that which is specified to be enforced in the initial contract, whatever this might be.[67]

The judge's task is "purely scientific"[68] and involves no element of choice. Judicial decisions are noncoercive factual determinations that simply give effect to contracts entered voluntarily. The law — the common law — works neutrally to facilitate voluntary and private interactions. The purpose for which the judicial state exists is simple: it "provide[s] the basis upon which individuals can initiate and implement trades and exchanges . . . ."[69]

The story might end here. "This state is law embodied, and its role is one of enforcing rights to property, to exchanges of property, and of policing the simple and complex exchange

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[66] *See* BRENNAN & BUCHANAN, *supra* note 16, at 103 ("Tacit consent can be construed to be given to rules of a game by participants when they voluntarily participate.")

[67] BUCHANAN, *supra* note 10, at 69. By 1985, Buchanan, with his collaborator, Geoffrey Brennan, developed a somewhat more sophisticated perspective on the judiciary and conceded that "judicial interpretation may, in some cases, amount to a change in the rules and, in this sense, raise the issue of what role the courts properly exercise in the whole institutional order." BUCHANAN, *supra* note 16, at 109.

[68] BUCHANAN, *supra* note 10, at 95, 104. Limiting the judicial function as to fact-finding conflates the role of judge and jury.

[69] BUCHANAN, *supra* note 10, at 50.

processes among contracting free men."[70] Individuals have secured not only protection of their rights to exclude others from their possessions, but protection of their rights to trade their possessions. These rights can be enforced by appeal to a body that maintains order. Doubtful cases can be resolved by a body that resolves disputes. Thus, "there is no need for 'governing' as such."[71]

2. *The Legislative State*

The judicial state would suffice but for the fact that rational outcomes cannot always be achieved simply by virtue of the rational acts of individuals. The development of the legislative state is necessary because there are potential gains from trade in public goods that cannot be realized without coercion. Individuals agree to such coercion because these gains will not be achieved spontaneously.[72] Such gains are unrealized due to the market's inability to produce public goods.

Public goods are nonpartitionable interdependencies — goods from which all benefit and none can be excluded. They will not be produced by self-interested individuals because of problems of monopolies, hold-outs, free-riders, imperfect information and high transaction costs. In consequence, some voluntary exchanges, and their accompanying gains, will not be realized in the judicial state. Voluntary exchange *can* produce public bads and generalized externalities, such as environmental degradation, from which all suffer but whose creation is a private good.

The realization of public goods is only possible with coercion.[73] Coercive legislation can reach solutions which the voluntary market cannot because coercion can eliminate strategic behavior like free-riding, refusing to pay one's share for the provision of public goods. According the state a legislative function signifies the agreement of individuals to be bound by the aggregation of individual preferences in order to realize mutual gains that the unaided market cannot achieve.[74] The individuals agree to submit to particular future decisions, which they

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[70] *Id.* at 163.

[71] BUCHANAN, *Moral Community*, *supra* note 50, at 111.

[72] BUCHANAN, *supra* note 10, at 37.

[73] For this account, see BUCHANAN & TULLOCK, *supra* note 28, at 43-84.

[74] BUCHANAN, *supra* note 10, at 42-43.

themselves might oppose, as a means of achieving a variety of outcomes not otherwise ensured that will, on the whole, be beneficial.

The legislative state will not always function neutrally. It "must include departures from any rules that would be fully analogous to voluntary exchanges."[75] It may impose outcomes that are not beneficial to all. "[T]he essence of the collective-choice process under majority voting rules is the fact that the minority of voters are forced to accede to actions which they cannot prevent and for which they cannot claim compensation for damages resulting."[76] This makes possible "politics for predation."[77] Thus does the serpent enter Eden.

C. ESTABLISHING THE UNANIMITY RULE

Buchanan seeks to scotch the serpent by creating an account in which coercion and volition are compatible. He attempts to square coercion and unanimity. His answer is to postulate a state whose coercive power is brought to bear only to achieve the results the market would achieve non-coercively were it not for strategic behavior.

1. *Unanimity and Coercion*

Individual volition is uniquely lodged in a rule of unanimity and Buchanan is thus actively hostile to legislative majoritarianism. The insistence on majority rule in western democracies represents an inversion — "majority rule has been elevated to the status which the unanimity rule should occupy."[78] Under majoritarian voting rules, the state as conceived by the contractors' agreement — a turn to collective action for external benefits — may become the state as marketplace for coercive redistribution. Only under the unanimity rule are we assured "that all external effects will be eliminated by collectivization."[79] Only unanimity in legislative decision-making can ensure that the state functions on the same basis of voluntary exchange that characterizes the market and ensure that the state does not

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[75] *Id.* at 100.

[76] BUCHANAN & TULLOCK, *supra* note 28, at 89-90.

[77] BUCHANAN, *supra* note 14, at 90.

[78] BUCHANAN & TULLOCK, *supra* note 28, at 96.

[79] *Id.* at 89.

impose burdens on individuals which they would not themselves choose to carry.[80]

But Buchanan recognizes that even voluntary exchange — the marketplace — cannot exist without coercion. Strategic behavior will, in the absence of coercion, always dictate defection from agreements where the contracting parties are unequal in power. To create a market, a place where all agreements are voluntary, market participants must agree to be coerced. Voluntary exchange in the marketplace was impossible until the pre-contract predator/defenders agreed to bind themselves to coercion. That agreement created the state. Thus, although the market mechanism relies on unanimity, it is created by coercion.

Coercion is requisite to the existence of the voluntary marketplace. Such is the paradox of the market. But once the coercive mechanism is created, it may be used to attain ends other than those to which market participants would voluntarily agree. Such is the dilemma of the state. It is Buchanan's project to give us an account of a state that is *both* coercive and unanimous. He does so by concluding that the original contractors, in agreeing to form the state, in effect agreed that unanimity was so important it could be coerced.

Consider an example of coerced unanimity. Assume that it is in the interest of everyone to have a fire department. Any single individual is better off letting her neighbors pay for fire equipment and free-riding on the services they provide. If voluntary exchanges in the market are the only means by which such nonpartitionable interdependencies can be provided, she will allow her neighbors to purchase the services that cannot be denied to her.

But collective coercion is an alternative. Her neighbors may threaten to exclude her from the community if she fails to contribute a proportionate share to the provision of the services from which she benefits. She has chosen to enter the community on the basis of self-interest, to enjoy protection of her ownership of property and her participation in the market. Therefore, she will recognize her interest in joining a unanimous scheme to provide the service and distribute the cost

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[80] Buchanan attributes this insight to Knut Wicksell, a German scholar whom Buchanan himself rediscovered as a student in the late forties. BUCHANAN, *supra* note 10, at 38; *see also*, JAMES M. BUCHANAN, *Better than Plowing*, *in* ESSAYS ON THE POLITICAL ECONOMY, *supra* note 25, at 67, 72 [hereinafter BUCHANAN, *Better than Plowing*].

equitably, rather than risk her neighbors excluding her from the community and negating her ownership claims.[81] Fire services will be supplied to everyone at a cost everyone is willing to pay. Thus a solution which makes everyone better off can be reached by collective action where it could not be reached in the marketplace.

If the benefit the individual derives from the coerced decision exceeds its cost to her, then coercing her contribution does not amount to non-unanimity. She would have voluntarily undertaken an equivalent exchange in the economic marketplace if that were the only means to acquire the good. While she might prefer to get fire services free, she still benefits from their social provision at a cost of ten dollars, if the market alternative were to pay fifty dollars for their individual provision. So long as the cost of the benefit in the market exceeds its cost socially provided, legislatively-coerced payment for benefits simply eliminates the alternative to payment that strategic behavior — holding out on payment and free-riding on the payments by one's neighbors — represents. Assuming previous consent to coercion, some cost-imposing legislative decisions *can* be made unanimously.[82]

2. *Coerced Unanimity and Legislation*

Buchanan uses *Miller v. Schoene*,[83] a case upholding a legislative decision that cedar trees carrying disease to apple trees could be destroyed without compensation to their owners, as the starting point for a discussion of how coercive legislative power can legitimately be used to achieve unanimity.[84] According to Buchanan, that decision amounted to a legislatively-ordered taking of the value of the cedar trees. He would have preferred a legislative mandate that the apple tree

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[81] BUCHANAN, *supra* note 10, at 41.

[82] Consenting to coercion is of course a tricky proposition; Buchanan suggests that consent is freely given when the alternative is expulsion from the community accompanied by confiscation of wealth. BUCHANAN, *supra* note 10, at 39. Few practicing lawyers would fail to argue that their clients who "consented" in such circumstances could not be held to the agreement. Nonetheless, the necessity to accord the state a coercive role requires this strained reading of consent.

[83] 276 U.S. 272 (1928).

[84] *See* Buchanan, *supra* note 7.

owners purchase from cedar tree owners the right to be disease-free, a purchase that would benefit both parties.

Although Buchanan assumes that the apple tree owners had no pre-existing property right to eliminate diseased cedar trees, he does not argue that such a property regime could not have justifiably existed. Instead, he says, given that an *existing* structure of rights presumably gave cedar tree owners the right to continue to grow diseased trees, an opportunity for mutual gains from trade existed. Apple tree owners could have paid cedar tree owners to destroy cedar trees. The price would have reflected the apple tree owners' estimate of the worth of their crop and the cedar tree owners' estimate of the worth of their trees. Assuming the former estimate greater than the latter, a deal could have been made voluntarily.

Legislation would be justifiable only if strategic behavior made it impossible for the apple tree and cedar tree owners to strike a fair bargain themselves. Suppose, for example, the cedar tree owners took advantage of their monopoly position in negotiation with apple tree owners and overstated the value of their trees, refusing to negotiate a lower price. In such a case, the legislature could justifiably order a forced sale equivalent to an eminent domain purchase. If, however, the cedar tree owners set a realistic price, but one higher than the total value of the apple crop, the legislature should not act to protect the apple tree owners. In such a case, the market result would be that the apple trees would be allowed to die of cedar-borne disease. The legislature would have no reason to order a sale that would not occur in the marketplace.

Legislatively-mandated transactions also make it possible to eliminate free-riding, another form of strategic behavior. Suppose an apple tree owner refused to join her fellows in bargaining with cedar tree owners. If her fellows reached an arrangement which provided for the destruction of diseased cedar trees, she could not be excluded from the benefits of their actions, though the others would have to incur higher costs than if she participated. Or suppose the apple tree owners reached agreement with all but one cedar tree owner, who could then hold out for a higher price than his fellows had received for their diseased trees, or receive a side-payment from them in order to close the deal. In such cases, the legislature could intervene to order, through compensated transfer, an exchange the parties would have reached themselves, *sans* these free-rider and hold-out problems. The legislature could coerce the

participation of all apple tree owners and all cedar tree owners in an exchange of money for performance.

A market result is achieved if all apple tree owners are willing to offer an amount equal to what all cedar tree owners would voluntarily accept.[85] Legislatively-mandated compensation duplicates the payment necessary to secure an exchange in the economic marketplace and eliminates the strategic behavior that can stymie the market result. Although the product of coercive legislation, such compensation would make both parties better off than they were before, since each side would receive the benefits it would have obtained in a market transaction.

In essence, then, the role of the state, according to Buchanan, is to enable transactions the market would achieve if it could. The state's coercive force is to be used only to bring those transactions about, not to obviate the need for them. The transactions involve trading consent for compensation; no one ever suffers a net loss by virtue of government action, for no uncompensated transfer ever takes place. Even though the state is coercive, it reaches results that are universally acceptable. The representatives of apple and cedar tree owners agree to coerce their constituents to accept an outcome that benefits all constituents, even though hold-outs and free-riders derive less than they would if they were not coerced to abandon their strategic behavior. Thus unanimous outcomes are achieved by coercion. Such a state is the market writ large, and nothing more.

III. THE CRITIQUE

I will now offer a critique derived solely from an examination of the structure on its own terms. I begin with a discussion of Buchanan's account of the creation of the state and move to a discussion of the unanimity requirement.

A. THE DILEMMA OF THE ORIGINAL POSITION

A key objection to the Buchananite project is its inability to give a normatively defensible account of the pre-political distribution. The lack of normative defensibility is a failing because of the weight that necessarily attaches to the initial distribution by the requirement that any subsequent change be unanimous.

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[85] *Id.* at 447-48.

The unanimity requirement, and thus the initial distribution, is institutionalized through the constitutional agreement among those who have obtained goods in the state of nature, the constitutional agreement which creates the rules that must be followed in the creation of all other rules. In other words, those who have property, *ex post* that distribution, may constitutionally require unanimity for any change in the status quo. Buchanan claims that the unanimity requirement is *ex ante* the state because the constitutional contract, which embeds unanimity, forms the state. But the initial contract is not *ex ante* the distribution of goods and wealth, nor is it *ex ante* the market.

The Buchananite constitution is a contract among individuals to protect the property they have already obtained[86] as a result of an "initial definition of human and property rights."[87] This contract represents a decision of property-holders that there is benefit in "reductions in predation-defense effort."[88] Thus, any uncertainty with which Buchananite contractors are confronted at the constitutional moment does not involve their current status, but their "precise role[s] in any one of the whole chain of later collective choices that will actually have to be made."[89] To use Buchanan's metaphor, the contractors are not uncertain about the game, but about the plays.[90]

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[86] James M. Buchanan, *The Contractarian Logic of Classical Liberalism*, *in* LIBERTY, PROPERTY AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 9, 10-12 (Ellen Frankel Paul & Howard Dickman eds., 1990).

[87] BUCHANAN & TULLOCK, *supra* note 28, at 50.

[88] BUCHANAN, *supra* note 10, at 28.

[89] BUCHANAN & TULLOCK, *supra* note 28, at 78.

[90] *Id.* at 79-80, 261.

The Buchananite contract is therefore non-Rawlsian.[91] This is a serious flaw, for Buchanan himself recognizes that Rawlsianism is important to his project.

> Rawlsianism represents a possible major justification for the whole "constitutionalist" [contractarian] approach. If individuals are totally ignorant as to their future positions, they have no separately identifiable interests; there is a fundamental equality of position. It seems impossible that agreements reached in such a context could reflect unacceptable differences in status quo positions.[92]

But, the Buchananite contract is made *after* the parties have gained what Buchanan calls the "individual power of disposition over human and nonhuman resources."[93] Indeed, says Buchanan, "[u]nless this preliminary step is taken, we do not really know what individuals we are discussing."[94] However, once this preliminary step is taken and we "know what individuals we are discussing," they know far more than contractors in the Rawlsian "original position." Thus, although Buchanan at various points claims the Rawlsian mantle for his version of the pre-political contract,[95] that is inaccurate. Unlike Rawls, Buchanan conflates his contractors' ignorance of their future with ignorance of their present.[96]

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[91] JOHN RAWLS, A THEORY OF JUSTICE (1971), attempts a liberal contractarian account of the creation of a just society. The contract is made by individuals in what he calls the "original position of equality," *id.* at 12, aware of their individuality but not of their individual traits. Hence, the rules they select to govern society are free of narrow self-interest. *Id.* A social contract not arrived at from the original position will embody the preferences of its witting framers and is thus non-Rawlsian. For a good discussion of Rawls, see Stephen M. Griffin, *Reconstructing Rawls' Theory of Justice: Developing a Public Values Philosophy of the Constitution*, 62 N.Y.U. L. REV. 715 (1987).

[92] BRENNAN & BUCHANAN, *supra* note 16, at 107.

[93] BUCHANAN & TULLOCK, *supra* note 28, at 47.

[94] *Id.* at 47.

[95] BRENNAN & BUCHANAN, *supra* note 16, at 30-31; BUCHANAN, *supra* note 12, at 35.

[96] *See, e.g.*, BRENNAN & BUCHANAN, *supra* note 16, at 107.

I am not claiming that inequality of persons alone defeats Rawlsianism among Buchanan's contractors.[97] Rawls himself recognizes inherent inequality:

> [W]e may reject the contention that the ordering of institutions is always defective because the distribution of natural talents and the contingencies of social circumstance are unjust, and this injustice must inevitably carry over to human arrangements. . . . [This] is neither just nor unjust; nor is it unjust that persons are born into society at some particular position. These are simply natural facts. What is just and unjust is the way that institutions deal with these facts.[98]

The Rawlsian argument for assigning rights from the "original position — the position of the uncharacterized individual without status, gender, property, physical, or mental attributes — is precisely that any other account of pre-political contract risks institutionalizing the status quo:

> What is lacking [in other accounts] is a suitable definition of the status quo that is acceptable from a moral point of view. We cannot take various contingencies as known and individual preferences as given and expect to elucidate the concept of justice (or fairness) by theories of bargaining. The conception of the original position is designed to meet the problem of the appropriate status quo.[99]

The Rawlsian contract is made from behind the famous "veil of ignorance." No parties to the contract know either their current or their post-contract position.

By contrast, the Buchananite constitution is made by witting individuals who contract in order to preserve the positions they have obtained pre-contract. Institutions constitution-

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[97] BUCHANAN, *supra* note 10, at 54 (Buchanan explicitly modifies his earlier assumptions in BUCHANAN & TULLOCK, *supra* note 28, by assuming personal inequalities. He claims that "the unsupported presumption of natural equality" pre-contract introduces normative biases into the analysis of subsequent institutions.).

[98] JOHN RAWLS, A THEORY OF JUSTICE 102 (1971).

[99] *Id.* at 134-35 n.10.

ally created to protect property enhance rather than diminish the natural facts of inequality. Such a contract must, and indeed is designed to, stabilize an existing situation. The Buchananite contract institutionalizes a "natural distribution" not normatively justifiable by its roots in occupancy and predation.

Perhaps in response to criticism that he institutionalizes the status quo, Buchanan has given multiple accounts of the creation of the state, which conflict as to whether property, market, or state are prior. In his 1962 work, *Calculus of Consent*, and again in his 1974 work, *The Limits of Liberty*, Buchanan indicated that possession predated both market and state.[100] Hence, the state-creating contract was the product of the agreement of knowledgeable and identified individuals.

However, in a 1984 article, Buchanan wrote that "constitutional order . . . must precede any meaningful economic interaction,"[101] placing the state prior to the market. And, in 1985, Buchanan and his collaborator, Geoffrey Brennan, argued even more explicitly that "contractual agreement on rules must precede any ordinary trading of partitionable goods . . . . Political order must, therefore, be antecedent to economic order."[102] This position puts the state prior not only to the market, but apparently to possession as well. This solves the problem of institutionalizing a property regime based at best on occupancy and at worst on predation. It creates, however, an even more serious problem. Now the contract is made by individuals who have no specific need for it, for they have neither possession to protect, nor republican impulses to create a formal governing mechanism.

While understandable, this shift leaves Buchanan in an odd position. The market is normatively superior to the state because the market requires voluntary exchange. And the state is the creation of predator-defenders who organize to protect their pre-existing holdings and facilitate market exchange. But in order to conceive of this state as just in the Rawlsian sense, Buchanan must postulate that the state precedes the market

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[100] *See, e.g.*, BUCHANAN, *supra* note 10, at 24 (Buchanan asserts that the assumption of an initial distribution of property by means of "attack and/or defense" is necessary, for without it, "there is simply no way of initiating meaningful contracts, actually or conceptually.").

[101] BUCHANAN, *supra* note 23, at 14.

[102] BRENNAN & BUCHANAN, *supra* note 16, at 26.

and creates it. This, it appears, is the consequence of an attempt to escape from the bind of non-Rawlsianism which attaches to a constitutional contract made *ex post* the initial distribution.

But while placing the state prior to the market may satisfy the Rawlsian model, it betrays the contractarian one, derived from Hobbes, which imagines the creation of the state as the response of self-interested individuals to the crisis of anarchy. The contractarian account of the creation of the state rests upon the contractors' recognition that collective action is needed to correct the deficiencies attendant upon collectively-irrational outcomes of individually-rational actions, i.e., predation and defection. But without the initial distribution of goods, there would have been no predation and defection and hence no recognition of the need for collective action.[103] If the contractors have no recognizable need for collective action, Buchanan cannot tell us why they contract.

It seems that this is an inescapable dilemma. Either the original contractors act from behind the Rawlsian veil of ignorance and thus have no Hobbesian need to contract because they have no wealth to protect against each other, or they have already distributed the wealth around them and are contracting to protect it. The hypothetical contract then loses its moral force as a justification for existing institutions and market contractarianism collapses back into positivism. Hence, Buchanan's inability to justify the initial distribution undermines his later insistence that the existing order can be changed only by unanimous agreement.

B. THE CRITIQUE OF UNANIMITY

1. *Normative Justifications of Unanimity*

a. *The Preservation of the Status Quo*

In Buchanan's model of coerced unanimity, the status quo cannot be changed without unanimous consent no matter how the status quo came to exist. Although there is no normative character to the initial distribution and certainly no requirement that *it* be agreed to unanimously, Buchanan holds the view that if "'efficiency' is acknowledged to be the desired

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[103] BUCHANAN, *supra* note 10, at 26.

criterion . . . normative improvement in process is measured by movement toward the unanimity requirement."[104] Unanimity as the test of good government amounts to a measure of how well government protects the initial distribution.[105] Absent an independent justification for such an agreement rule, it is difficult to see why unanimity must be regarded as an ethical principle, unless the relevant ethic is one of opposition to redistribution.

Buchanan, who admits to a prejudice for the status quo,[106] justifies his bias as a preference for voluntary agreement over the imposition of public solutions. "[O]nly such a prejudice offers incentives for the emergence of voluntarily negotiated settlements among the parties themselves. Indirectly, therefore, this prejudice guarantees that resort to the authority of the State is effectively minimized."[107]

This rationale is puzzling. Protection of the status quo is positive because it promotes market exchange and minimizes government intervention. Governmental intervention is only tolerated because on rare occasions the status quo may be unsatisfactory and unanimity ineffective to change it. For instance, voluntary agreements cannot eliminate hold-out and free-rider problems, eventually making government intervention necessary. It is the market's own unanimity requirement that is at the root of the problem of supplying public goods and preventing public bads, for the market cannot coerce free-riders into participation in the payment of benefits they can receive freely. Coercion, and the resulting possibility of non-unanimity, is required because the status quo must change, and it must change by means other than voluntary transactions. To say one privileges the status quo because it favors voluntary agreements

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[104] JAMES M. BUCHANAN, *The Constitution of Economic Policy*, *in* ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY, *supra* note 46, at 303, 309.

[105] This is not to say that first possession as the basis of property ownership necessarily requires an independent normative underpinning. *See, e.g.*, Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979) (first possession justifies title on a pragmatic and comparative, not a normative and absolute, basis). The normative analysis is introduced by insisting, as Buchanan does, that *subsequent* to first possession, any change in entitlements ought to be unanimous.

[106] Buchanan, *supra* note 7, at 452.

[107] *Id.*

simply does not respond to the question of what should be done when voluntary exchange fails.

b. *Unanimity and Democracy*

Buchanan's chief claim for unanimity is a normative one based upon democracy.[108] What, after all, is more democratic than an action taken by unanimous consent? The requirement of unanimity seems to answer the argument that the market does not provide a good model for politics because the decisions of an individual consumer cannot appropriately be imposed upon others.[109] By definition, unanimous decisions are not imposed, but chosen. They are outcomes upon which all have agreed.

In order to see the flaw in the democracy argument, one must look not at what is done by unanimous consent, but at what is *not* done when one voter frustrates unanimous consent. Inaction and the preservation of the status quo may be the will of one voter. Yet that voter will prevail regardless of the number of votes cast for action.

But does inaction amount to imposition of individual choice upon others? To say that would lead to "the paradoxical result that the rule of unanimity is the same as the minority rule of one."[110] According to Buchanan, "[i]t does not seem meaningful to say that the power to block action constitutes effective 'rule.'"[111] He contends that there is a "difference between the power to impose external costs on others and the power to

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[108] BUCHANAN, *supra* note 10, at 151.

[109] For example, Jon Elster says the theory:

> [E]mbodies a confusion between the kind of behaviour that is appropriate in the market place and that which is appropriate in the forum. The notion of consumer sovereignty is acceptable because, and to the extent that, the consumer chooses between courses of action that differ only in the way they affect him. In political choice situations, however, the citizen is asked to express his preference over states that also differ in the way in which they affect other people.

Elster, *supra* note 21, at 111. Critics like Elster argue that it is inappropriate to transfer the "consumer sovereignty" of the market into the forum. In the market, the consumer's decisions affect only herself; in the political realm her choices may be imposed on others. *Id.*

[110] BUCHANAN & TULLOCK, *supra* note 28, at 259 (emphasis deleted).

[111] *Id.* at 258.

prevent external costs from being imposed."[112] The suggested difference is between preserving the status quo and changing it by imposing costs.

However, preserving the status quo is not necessarily the same as imposing no costs. Assume that eminent domain proceedings require a unanimity rule. If a landowner refuses to sell her land for flood control purposes, her neighbors must either bear the flood costs or bear the flood abatement costs *sans* her participation. The status quo remains with respect to the recalcitrant landowner, whose costs are unchanged, but not with respect to her neighbors. The landowner has preserved her status quo precisely by imposing external costs on others. Once again, strategic behavior overcomes the community's ability to acquire public goods on a shared payment basis.

Just as the majority may impose costs upon the minority where majority voting prevails, the single uncoerced voter may impose costs upon all other voters where unanimity is the rule. Indeed, the hold-out, whether voter or party to a private exchange, behaves rationally. The landowner may demand a higher price for her property as an inducement for her vote, just as the market participant in a monopoly position holds out for a better price before closing a deal. In either case, a single actor may impose her will by virtue of her ability to veto otherwise unanimous outcomes.

c. *Unanimity and Intensity of Preference*

Buchanan also argues that unanimity is democratic because it allows the expression of preference *intensity*, not just its mere existence.[113] But, a unanimity regime only expresses intensity of preference for the status quo. A unanimity rule, which privileges opposition to change, cannot express the of opposition to the status quo. Unanimity only recognizes those preferences expressed as a negative, as a veto. Proponents' preferences go unregistered unless unanimous, while the intensity of opposition to change is accorded an undeniable voice.

The preference for unanimity over majority rule implicitly assumes that redistribution is unacceptable. Allowing redistribution only upon unanimous consent recognizes the preference of the single opponent of redistribution and ignores the prefer-

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[112] *Id.* (emphasis deleted).

[113] Buchanan, *supra* note 7, at 446.

ences of its proponents. Redistribution is assumed to injure a member of the minority more than it helps a member of the majority.[114] As a result, intensity of preference *for* redistributive change will not be measured, but intensity of preference *against* will prevail.

The assumption that opponents' preference is necessarily stronger than that of proponents may not be accurate. Imagine a community of four voters. Three are wealthy and one is poor; the poor voter's child requires medicine that only the other three together can provide. The poor person persuades two of her fellow-citizens to provide for the child, but not the third. Under a unanimity rule, the child will die.[115] The intensity of the third voter's preference not to suffer redistribution in order to provide for the child has been expressed, but it can hardly be said that the unanimity rule has accurately expressed the intensity of preferences of all voters, including the mother. Unanimity is a means by which the intensity of a minority's oppositional preference for the status quo will be expressed, and the potential intensity of the majority's preference for change will be ignored.

It is difficult to understand why Buchanan posits the recognition of intensity of preference as a unique virtue of a unanimity requirement. Accounting for intensity of preferences is generally an argument in favor of a majority, rather than a unanimity, rule. In a majority regime, those with intense preferences can express them through logrolling, in essence the purchase of the votes of those slightly affected by those more greatly affected in return for a similar purchase when the levels of intensity are reversed.[116] In our example, logrolling could

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[114] BUCHANAN, *supra* note 10, at 154; *see supra* text accompanying notes 108-13.

[115] Buchanan does not explore the category of special relationships, e.g., those based upon affective or status ties, that are exceptions to the rule that individuals are discrete market agents. Thus, the existence of non-market duties of beneficence that recognize such special relationships also remains generally unexplored. Although Buchanan does not discuss the duty to rescue doctrine within which my example arguably falls, Richard Epstein, who does examine it, rejects such a duty because, *inter alia*, it is extendable to a duty on the part of the rich to succor the poor, and is thus redistributive. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 203 (1973).

[116] Buchanan is ambivalent about the virtues of logrolling. While he has praised it as an effective tool of minorities, he has also noted that it is one of the vices of majoritarianism. *See, e.g.*, BUCHANAN & TULLOCK, *supra* note 28, at 132-45; Buchanan, *supra* note 7, at 449.

have won the poor person majority support. But, under a unanimity rule, there is little to trade, for the satisfied hold-out can never lose her veto and thus need not bargain for the support of others.[117]

2. *Unanimity, Coercion and Market Outcomes*

A legislative outcome is a decision by representatives of the parties to select an outcome and impose it.[118] The test Buchanan enunciates with respect to *Miller v. Schoene* judges the acceptability of legislative coercion by whether it is directed toward the achievement of the same outcome that the market would reach if it could.[119] But a distinction between legislation that achieves a market solution and that which does not may not be coherent. A forced transaction that the parties *might* have made is not necessarily the same result the market *would* have achieved.

What compensation would the cedar tree owners have demanded in the market? What price would the apple tree owners have paid? There are a variety of solutions, realizing gains from trade, that might have been reached in the market. But if a market solution is not available, we cannot judge how well a legislative solution duplicates it. In the apple and cedar tree case, we do not know — and cannot know — what solution would have emerged in the market. A forced transfer requires cedar tree owners to sell to apple tree owners, regardless of whether they would actually have done so in a market-driven process and regardless of how they would have divided surplus in face-to-face bargaining. It is easy to say that if the value of the apple crop is less than the value of the cedar trees, the cedar tree owners need not sell. But we cannot know, lacking a market, whether the cedar tree owners are truly unsatisfied with the offered price, or are simply holding out.

The answer might be that, so long as the result is mutually beneficial, it is definitionally a potential market outcome. However, strategic behavior may take place not only between

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[117] Of course, should the satisfied hold-out become unsatisfied and seek some redistributive outcome, he might then be forced to bargain for other votes. However, assuming that the person whom the status quo serves best is satisfied, that person will never need to bargain.

[118] Buchanan, *supra* note 7, at 446-48.

[119] *See supra* text accompanying notes 84-86.

the representatives of apple and cedar tree owners, but also within the two groups. The collective of owners on each side may have reached its position only by imposing a solution upon individuals within each collective. Each group's bargaining position itself represents the outcome of a coerced negotiation. Thus, even a result which appears to be unanimous may be distorted by coercion.

Negotiation between representatives of the two sides, rather than the concerned individuals themselves, creates a second level of analysis. We have to not only identify the market outcome in a negotiation *between* the organizations, but also to identify the result where the individual members of an organization constitute a market among themselves. This analysis may reveal that individuals within each organization are forced to accept an outcome they would not have chosen themselves, an outcome without a market equivalent. Buchanan eludes this problem by simply assuming that representation of individuals is achieved unanimously, without discussion of how this process occurs.[120] But, assuming unanimity among a constituency in order to legitimize its representatives' unanimous behavior begs the question.

The problems of strategic behavior implicit in reaching a unanimous legislative solution also exist when the collective entity is private. Buchanan himself recognizes that "[s]trict adherence to a rule of unanimity in . . . [such a] body is not practicable . . . [due to] the opportunities for strategic bargaining."[121] Strategic behavior, in the form of defection from unenforceable agreements, is precisely what necessitated the creation of the state as an instrument of coercion. The inability to achieve important private bargains is what led to the creation of a public order. Thus, insisting that both the public and private order be unanimous simply repeats the dilemma with which the public order began.

3. *When is Coercion Appropriate?*

Buchanan admits some coercion into his conception of the state because it is otherwise impossible to deal with strategic behavior. Implicit is the notion that it is possible to sort decisions that are appropriately unanimous — those that forestall

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[120] Buchanan, *supra* note 7, at 446-47.

[121] *Id.* at 447.

strategic behavior — from those that are not — those that impose a net loss on a minority. Buchanan assumes that the constitutional contractors in fact did so in allowing non-unanimity into their state.[122] But he is not clear on the appropriate conditions for making such a sort. It would seem that unanimity is most difficult to achieve for precisely those decisions that would be most costly to the minority. Under what circumstances would one be willing to forego one's veto on just the decision most likely to be devastating?

Buchanan says that those legislative decisions "which modify or restrict the structure of individual human or property rights after these have once been defined and generally accepted,"[123] should be unanimous, while others need not be. Buchanan does not describe the "other" category — decisions that may be non-unanimous — any more specifically than as "those most characteristically undertaken by governments."[124] They are defined by example: education, fire safety, mosquito control, and police.[125] These decisions apparently do not implicate individual human or property rights; thus, the parties to the constitutional contract will not require unanimity.[126]

It is difficult to use this distinction as a practical guide to separate those decisions which must be unanimous and those which need not be. We can easily create scenarios in which the decision to provide services from the "other" category implicates privileged rights. If, for example, a community votes by a majority to provide segregated education to a minority, it would appear that individual human rights are implicated. Similarly, a majority decision to provide police and fire protection to some citizens' property and to expose others' property to danger would affect basic property rights. These examples merely suggest the practical difficulty in defining the categories to which non-unanimity rules might apply in collective decision-making. The

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[122] BUCHANAN, *supra* note 10, at 151-54.

[123] BUCHANAN & TULLOCK, *supra* note 28, at 73.

[124] *Id.* at 74-75.

[125] Buchanan himself, however, also refers to the organization of fire services as a "purely voluntary [hence unanimous] co-operative action." *Id.* at 49. This illustrates the difficulty of appropriately sorting unanimous from non-unanimous decision-making.

[126] Elsewhere, however, Buchanan states that "any departure from unanimity in collective decision processes modifies the structure of rights." BUCHANAN, *supra* note 43, at 165.

constitutional contractors would find it difficult to carve out a coherent category of government decisions which did not implicate someone's individual rights.

One answer might be to claim that decisions the original constitutional contractors determine do not require unanimity do not affect individual rights. One need merely assume that the contractors, already-nervous holders of differing amounts of wealth and resources at the time of the initial contract, were unlikely to omit from the category of unanimous decision-making any really important claims and must have converted them all into rights. This is functionally useful, but theoretically subversive. It is equivalent to deciding that the original contract created, rather than recognized, the initial distribution, a formulation Buchanan has rejected.[127] Since the original distribution of property is said to occur pre-politically, public choice theory can hardly accept this sleight-of-hand.

The long and short of the matter is that the only justification for non-unanimous action is a functional one: it is necessary to defeat strategic behavior. There is no assurance that coercion will be used exclusively to achieve market outcomes and not to impose costs on participants. If the justification for the coercive legislative state is providing public goods and eliminating public bads when the market fails, there appears no coherent argument that coercion is process- rather than outcome-based. Volition is not at center stage; the centrality of the market as a measure for political action is lost.

In sum, the requirement of unanimity in political decision-making cannot be shown to be compatible with coercion or more democratic than majoritarianism. It neither achieves a heightened democracy nor solves the problem of providing public goods volitionally. It appears that the signal result of insistence upon unanimity as a predicate for collective action is preservation of the status quo.

IV. REFORMING THE CONSTITUTIONAL CONTRACT

A. RECOGNIZING THE DANGER

A state may solve free-rider or hold-out problems through majoritarian coercion, but the coercive potential of majoritarian

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[127] *See supra* text accompanying notes 122-24.

voting rules also allows the state to redistribute resources. We can categorize coercive decisions based on their potential for unanimity. First, there are those decisions that might have been unanimous because they produce gains for all. Second, there are those decisions that would never have been unanimous because they redistribute, thus assigning net loss to some and net gain to others.

The first category contains coerced decisions like the resolution of the apple/cedar tree dispute. A result is reached from which even hold-outs will benefit, though less than they would have had they been able to continue to hold out.[128] In the second category are decisions Buchanan calls "unconstrained" non-unanimous choices. Here, "[c]ontrol over the collective decision-making apparatus becomes the instrument for securing the winnings of a zero-sum component of the game of politics."[129] Unconstrained decision-making amounts to a return to the pre-contractual situation of predation and defense. "To the extent that collective action . . . break[s] beyond the boundaries imposed by the mutuality of gains from exchange, both direct and indirect,[130] the community has taken a major step backward into the anarchistic jungle . . . ."[131] Although no rational contractor would agree to an unconstrained decision-rule at the constitutional moment, the current historical context indicates that we have devolved into a period of such unconstraint as "the structure of individual and collective rights . . . [has] eroded over time."[132]

Once the mechanism of legislative coercion has been created, it is difficult to police. As we have seen, the initial, or "natural," distribution of property was pre-constitutional.[133] The application of a non-unanimity rule in the legislative state thus represents the first opportunity for coercive redistribution *ex post* the constitutional contract, which was intended to stop

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[128] *See* BUCHANAN, *supra* note 10, at 43-44. *But see supra* text accompanying note 120.

[129] *Id.* at 49.

[130] In using the terminology "indirect" gains, Buchanan means that resolving holdout problems benefits, in the long run and indirectly, the holdout as well as everybody else. *See id.* at 44-48.

[131] *Id.* at 50.

[132] *Id.* The evidence of non-constraint suggests "that general agreement could be attained for genuine constitutional revision." *Id.* at 51.

[133] *See supra* text accompanying notes 53-56.

involuntary redistribution. When non-unanimity is possible, "there is necessarily an opportunity offered to those who would use politics for predation, who would leap outside of any boundaries defined by the range of mutuality of advantage."[134]

The apple tree owner who can be coerced when her agreement is withheld because she seeks to avoid contribution to obtain a mutually-beneficial public good, like eliminating diseased cedar trees, can also be coerced when her agreement to a measure is withheld because she would suffer a net loss. The coercive state differs from the market in this respect: when the state acts, there may be *both* winners and losers. The state may coerce loss because the participants have agreed to give to that aggregative mechanism certain coercive powers that the marketplace is thought to lack. While market participation can only result in benefits to all participants, the majoritarian state can coerce an individual to absorb a loss based on aggregate preferences, regardless of that individual's preference.

For Buchanan, the paradox of the majoritarian state is that it is created voluntarily to protect and enhance market participation, but its power to overcome predation and market failure is inevitably available for redistributive ends, which are in themselves a form of the predation and inefficiency the state was created to eliminate. The majoritarian political process is one of "political exchanges,"[135] in which coerced redistribution is offered for sale by politicians and purchased by interest groups who demand and can afford it. The consequence of the state's ability to coerce individuals is that a "potentiality of exchange,"[136] i.e., a market, exists for coercive redistributive decisions of the state.

The spontaneous order of a functioning economic market does not emerge in the political marketplace.[137] "[T]here is no invisible hand operative in majoritarian political institutions analogous to that operative in the market setting . . . ."[138]

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[134] BUCHANAN, *supra* note 14, at 90.

[135] *Id.* at 90.

[136] BUCHANAN, *supra* note 59, at 21, 31.

[137] Buchanan is cutting about economists who subscribe to a passive view of institutional change. "[G]reat damage has been and is being done by modern economists who argue, indirectly, that basic institutional change will somehow spontaneously evolve in the direction of structural efficiency." BRENNAN & BUCHANAN, *supra* note 16, at 149 n.11.

[138] Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral?*

Thus, "[t]o improve politics, it is necessary to improve or reform the rules."[139]

B. REJECTING JUDICIAL REVIEW

The specter of majority rule threatening minorities is not a new fear.[140] The framers had a similar concern and adopted judicial review, a clearly undemocratic mechanism, as one check on majorities.[141] Buchanan originally rejected judicial review as a means to restrain democracy.[142] Unlike some other public choice theorists,[143] he did not advocate judicial monitoring of the economy. "There is no role for the judiciary in the decision relating to the supply and financing of a public good."[144] Buchanan would have no truck with proposals for judicial review as a mechanism for overcoming rent-seeking. "The judicial role should . . . [be] limited strictly to a determination of the constitutionality of legislative action, and this should not . . . include[] any attempt at making a judgment as to the economic efficiency or inefficiency or to the equity or inequity of the legislative choice actually made."[145]

Indeed, much of Buchanan's work is a reaction to what he perceives as the disruption of the original constitutional compact, first by the regulation of the New Deal[146] and, more pow-

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The Case for the "Nobel" Lie, 74 VA. L. REV. 179, 184 (1988).

[139] BUCHANAN, *supra* note 25, at 18.

[140] Marbury v. Madison, 5 U.S. 137 (1 Cranch 1803).

[141] *See, e.g.*, THE FEDERALIST NO. 10, at 131 (James Madison) (B. Wright ed., 1961).

[142] *See, e.g.*, Buchanan, *supra* note 7, at 447-50.

[143] *See, e.g.*, William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 400 (1988) (noting that courts should treat all legislative outcomes as possibly the result of arbitrary processes and examine all legislation for potential violation of rights); *see also* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (arguing that courts should interpret statutes as though legislators actually intended the stated public-regarding purpose, even though the true purpose was to benefit special interests).

[144] Buchanan, *supra* note 7, at 447.

[145] *Id.* at 450.

[146] Buchanan actually locates the original Fall in 1913, when the progressive income tax was constitutionalized. "This amendment was critically

erfully, by the judicial activism of the '60s, that "bizarre decade."[147] "[T]he role that has been assumed by the federal judiciary must be recognized to be grossly violative of the conceptual separation between constitutional contract and its enforcement on the one hand and between the enforcing agent and the productive state on the other."[148] The judiciary itself became a face of Leviathan, "assum[ing] the authority to rewrite the basic constitutional contract, to change 'the law' at [its] own will"[149] and "tak[ing] on legislative roles and effectively displac[ing] representative assemblies in making decisions on 'public good.'"[150] The judiciary's proper role is acting as the arm of the umpire-state, determining "whether or not the rules have been violated, whether or not a rule exists, whether or not a rule applies to this or that case."[151] Judges, Buchanan added, "must come to have respect for limits."[152]

After the Reagan Revolution failed to achieve the type of fundamental constitutional change that Buchanan believed to be urgently necessary,[153] he revised his opinion of judicial review. He called upon the judiciary, if not to change the constitution itself, then to change its interpretation to afford greater protection to property. The judiciary should interpret the constitution's takings clause broadly and in a fashion that would, in essence, incorporate Buchanan's proposals for unanimity and constitutional reform. "Any legislatively orchestrated change that upsets the legitimately-held expectations of citizens should

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important because income tax provided a source of revenue that would grow disproportionately with the growth in national income, either real or nominal." JAMES M. BUCHANAN, *Post-Reagan Political Economy, in* CONSTITUTIONAL ECONOMICS, *supra* note 12, at 1, 8.

[147] *Id.* at 8.

[148] BUCHANAN, *supra* note 10, at 106.

[149] *Id.* at 163.

[150] *Id.*

[151] James M. Buchanan, Contractarian Political Economy and Constitutional Interpretation, Draft of Address Before the American Economics Association 7 (Dec. 1987) (on file with author).

[152] BUCHANAN, *supra* note 10, at 164. It is interesting to note that Buchanan's unhappiness with the political system is limited to the legislative and judicial branches. So far as I am aware, he has not critically examined the executive branch.

[153] "I assess the Reagan presidency as one of failed opportunity to secure the structural changes that might have been within the realms of the politically possible." BUCHANAN, *supra* note 146, at 1.

be interpreted as a change in the constitutional structure, and, as such, should be prevented by the courts."[154]

The judiciary, it appears, is barred from activism in respect to change, but should act to fix the world, in the lepidopterist's sense; that is, to preserve the status quo. The argument seems to be, as Horwitz states in respect to its nineteenth-century version, "that one ha[s] a property right to an unchanging world."[155] The idea that the judiciary may only act to resist change, and not to implement it, places the status quo[156] at the heart of Buchanan's view of state and law: "The function of the judiciary is protection of that which is . . . ."[157]

C. CHANGING THE RULES

If we are to move out of the jungle, the agency of change will not be the judiciary. Buchanan, despite his bias for the status quo, calls for a change more profound than the mere reinstitution of judicial review of economic regulation. He seeks change that will strengthen the bonds of property. "[W]e are now seeking to reimpose constitutional limits on government over and beyond those exercised through democratic electoral constraints."[158] Only a constitution — an *ex ante* promise to be bound — can protect the polity against the collective irrationality of inevitably self-seeking individuals. A constitution is the exit from the prisoner's dilemma; mere voting is too weak to constrain government.[159] "*[C]onstitutional constraints* on governmental behavior can be effective, even if direct electoral controls are not."[160]

While Buchanan sometimes claims merely to uphold the framers' version of "bounds on the exercise of majoritarian democracy,"[161] ultimately he argues that the framers' constitution must be changed since it has not prevented the rise of the

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[154] Buchanan, *supra* note 151, at 12.

[155] HORWITZ, *supra* note 1, at 151.

[156] *See supra* text accompanying notes 65-67.

[157] Buchanan, *supra* note 151, at 13.

[158] BUCHANAN, *supra* note 23, at 20.

[159] James M. Buchanan & H. Geoffrey Brennan, *Monopoly in Money and Inflation*, *in* CONSTITUTIONAL ECONOMICS, *supra* note 12, at 53-54.

[160] *Id.* at 55.

[161] BUCHANAN, *supra* note 12, at 36.

regulatory state. He regrets this necessity, for if "stable and tolerable rules exist, a community may be better off not to attempt change."[162] But stricter limits must be imposed: "We must come to agree that democratic societies, as they now operate, will self-destruct . . . unless the rules of the political game are changed."[163]

Buchanan's prescription is constitutional reform. Fixed substantive rules restricting legislatures to the creation of general benefits would diminish the returns available from rent-seeking behavior. Among the constitutional changes Buchanan was disappointed not to have seen during the Reagan and Bush presidencies were a balanced-budget amendment and limits on monetary authority (presumably the Federal Reserve Bank).[164] Such changes are a means by which "the revenue-grabbing proclivities of governments might be disciplined by . . . constraints imposed on tax bases and rates."[165] The balanced-budget amendment is a life-or-death matter: "My diagnosis of American society is . . . that we are living during a period of erosion of the 'social capital' that provides the basic framework for our culture, our economy, and our polity . . . ."[166]

But how can we know what changes to the rules will improve them? To understand Buchanan's extraordinary answer, we must examine his notion of what validates rules *ex post* the constitutional moment; that is, when the original contractors are long gone and those who were never party to the contract are nonetheless charged with adherence to it. Buchanan expects adherence to the rules laid down: "[J]ust conduct is, at least presumptively, conduct obedient to prevailing rules."[167] What makes existing rules legitimate post-contract is simply that each generation follows them. "A rule is legitimate, and violations of it constitute unjust behavior, when the rule is the object of voluntary consent among participants in the rule-governed order."[168] This consent amounts to a new promise.

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[162] BRENNAN & BUCHANAN, *supra* note 16, at 11.

[163] *Id.* at 150.

[164] BUCHANAN, *supra* note 146, at 4.

[165] JAMES M. BUCHANAN, *From Private Preferences to Public Philosophy: The Development of Public Choice*, *in* CONSTITUTIONAL ECONOMICS, *supra* note 12, at 29, 42.

[166] BUCHANAN, *Moral Community*, *supra* note 50, at 108.

[167] BRENNAN & BUCHANAN, *supra* note 16, at 100.

[168] *Id.* Buchanan does not expressly indicate if the consent requires

"[R]ules may be considered to be given tacit consent simply by virtue of their history or regular observance — even if there is no effective option to not playing and participation is involuntary in that sense."[169]

Rules can change, however, if those bound by them decide they are unjust. Unjust rules are rules that do not comport with meta-rules, the "abstract rules that apply to the choice among rules."[170] In turn, Buchanan explains that "justice among meta-rules is a matter of justice within meta-meta-rules, and so on."[171] What differentiates meta-rules from ordinary rules is that the framers agreed upon the meta-rules in the original contract, from behind the veil of ignorance.[172] Meta-rules are, by definition, consensual and thus just. The result leaves "individuals . . . no interests to defend. Any reason that any one of them has for preferring one set of rules over another will be a reason for all others to prefer that set of rules as well."[173] Again, we see the centrality of a neutral original position and recognize that Buchanan's inability to coherently postulate such a position undermines his theory.

To explain why change is not a threat to those who benefit from the status quo, Buchanan resorts to a kind of sleight-of-hand. Why should people unanimously choose to make constitutional change? Buchanan answers that changing rules will not harm their current interests, so they have nothing to lose.[174] Change in rules is prospective and modifies the future, not the existing distribution. Thus, the amenders are uncertain about the consequence of change for themselves and are behind a "veil of ignorance." This reasoning leads to a kind of Zeno's Paradox: no change ever harms anyone's current interest, because it will always take place in the future.[175]

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unanimity or not.

[169] *Id.* at 104.

[170] *Id.* at 105.

[171] *Id.* at 107. In short, it's turtles all the way *up*.

[172] *Id.* at 106.

[173] *Id.*

[174] *Id.* at 138-40.

[175] I may be misreading this section and the point is more subtle than it appears. If so, I can only apologize.

D. ABANDONING SELF-INTEREST

There is a major internal problem with Buchanan's prescription for thorough-going constitutional reform. Clearly, "something other than ordinary politics will be required to generate fiscal and monetary discipline . . . ."[176] Although Buchanan attempts to explain why the amenders would not think themselves likely to suffer thereby, he offers no affirmative explanation why anyone would participate in such reform. Indeed, "[t]o the extent that 'investment' in institutional analysis, design, argument, dialogue, discussion, and persuasion is costly in a personal sense, the individual of the orthodox model [*Homo economicus*] will forego such investment in favor of more immediate gratification of privately directed desires."[177]

Buchanan's plan for constitutional change seems stymied by the very force that he insists necessitates change, the rational self-interest of individuals. In 1974, Buchanan appeared to believe that a rational basis could be found for individual promotion of constitutional change,[178] but he has since abandoned that position. This withdrawal was due to the realization that some people clearly benefit from the constitutional arrangement that exists and have no interest in change. *Homo economicus*, whom Buchanan was "crucial" in introducing to political theory,[179] must now go to the wall: "To hold out hope for reform in the basic rules describing the sociopolitical game, we must introduce elements that violate the self-interest postulate."[180] Indeed, says Buchanan, "[t]hose of us who have helped generate the widespread notion that self-interest is an important political motivation would be extremely irresponsible if we acquiesce in the inference that reform and reconstruction are not possible."[181]

Reform is possible if we assume that people will and should act on the basis of ethical precepts that might even run counter to their self-interest. "[B]ecoming informed about, and partici-

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[176] BRENNAN & BUCHANAN, *supra* note 16, at 150.

[177] *Id.* at 145-46.

[178] BUCHANAN, *supra* note 10, at 80-81.

[179] Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 6 n.13 (1991).

[180] BRENNAN & BUCHANAN, *supra* note 16, at 146.

[181] James M. Buchanan, *Quest for a Tempered Utopia*, WALL ST. J., Nov. 14, 1986, at A30.

pating in the discussion of, constitutional rules must reflect the presence of some ethical precept that transcends rational interest for the individual."[182] These ethical precepts are shared norms of what is good or right, norms that motivate action, regardless of individual self-interest. "[P]ersons must be alleged to place positive private value on 'public good' for the whole community of persons, over and beyond the value placed on their own individualized or partitioned shares."[183] They will seek those changes that the public interest requires. Buchanan's constitutional revolution now relies on the notion, earlier rejected, that there is indeed a "general 'public interest,'" or "general interests of all voters," or an "interest . . . interpreted by a majority of the voters in the electorate"[184] and that this will, not expressed by ordinary politics, can only be captured by a constitution.

In spite of Buchanan's claimed focus on process, we are thrust back into the world of outcomes and end-results. Buchanan is willing to destabilize his structure due to dissatisfaction with the current situation, in other words, an outcome. Having given up the two fundamental postulates of public choice — the self-interested individual and politics as market process, not search for good results — Buchanan may be said to have moved to a position of republicanism, or politics as the self-conscious and collective effort of a community of other-regarding individuals to find and promote the common good.[185] He implies as much himself: "It is time to again dream attainable dreams, and to recover the faith that dreams can become realities. It is time to start replacing dystopia with a tempered utopia."[186]

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[182] JAMES M. BUCHANAN, *The Ethics of Constitutional Order*, *in* ESSAYS ON THE POLITICAL ECONOMY, *supra* note 25, at 29.

[183] BRENNAN & BUCHANAN, *supra* note 16, at 147.

[184] Buchanan & Brennan, *supra* note 159, at 53-54. Buchanan employs a variety of terms to describe public will; this hedging indicates some discomfort with the concept.

[185] The man Buchanan identifies as a key intellectual mentor, University of Chicago economist Frank H. Knight, *see* BUCHANAN, *Better than Plowing*, *supra* note 80, at 67, ran aground on a similar dilemma, the inability to locate the place of value in a world of fact. For a brief account of this aspect of Knight's career, see EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY; SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 43 (1973).

[186] Buchanan, *supra* note 181. The other leading contractarian theorist to have rejected Posnerian law and economics, Richard A. Epstein, has avoided

CONCLUSION

At first blush, such a terminus to such a journey is surprising. But, on reflection, it was predictable given the unexpressed and unquestioned assumptions that were always implicit in Buchanan's preference for the market over the state and for unanimity over majoritarianism. The most fundamental assumption is that uncompensated redistribution is wrong.[187] This central assumption of classic liberalism lies at the heart of Buchanan's opposition to majoritarianism.[188] Although Buchanan recognizes that unsavory circumstances produced the "natural distribution"[189] he nonetheless exalts that distribution. Buchanan never questions the assumption that any subsequent non-unanimous redistribution is unjustifiable. Yet, without a reasoned justification for the initial distribution, the argument for excluding redistribution from the scope of permissible non-unanimous state action is merely conclusory, or worse, a pretext for preserving the status quo.

Buchanan might respond that the impermissibility of redistribution is not based on an outcome-based allegiance to the status quo. Instead, like the permissibility of coercion, it rests on the process-based notion that there is a difference between coercion to achieve results the marketplace *might* have produced, i.e., those entailing gains for all, and coercion to achieve results like redistribution that would *never* be achievable in the market. These are the two categories, mutually exclusive, within which state coercion is utilized. Only the former, according to Buchanan, is the legitimate and intended use of the coercive instrument the original contractors created. Redistribution is impermissible because it cannot be achieved volitionally.

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the route of constitutional change. He argues that the constitution does not require amending in order to prevent rent-seeking, only different interpretation by the judiciary. Epstein, unlike Buchanan, does not jettison fundamental assumptions but instead insists that judges do so. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS (1985).

[187] BUCHANAN & TULLOCK, *supra* note 29, at 189-99.

[188] *Id.* at 190. "[T]he essence of the collective-choice process under majority voting rules is the fact that the minority of voters are forced to accede to actions which they cannot prevent and for which they cannot claim compensation for damages resulting." *Id.* at 189-90.

[189] *See supra* text accompanying notes 53-61.

But this reasoning is based upon yet another profoundly embedded assumption — that the market, unlike the state, is non-coercive. The contractarian places the market at the center of human affairs because it is the product of the aggregation of individual wills. Every individual has the ability to make choices in the marketplace.[190] While unequal bargaining power may exist, it is not disabling. In the market, the actor retains her independence and ability to choose,[191] while as political actor, either citizen or subject, others' choices may force her to action or non-action.

The identification of coercion with the state and volition with the market requires acceptance of two propositions — that economic power may usefully be conceived of as the power of individuals and that economic power and the state are distinct from each other. The first proposition is simply untenable, unless one wishes to argue that the corporation is literally an individual.[192] Legal Realists like Morris Cohen[193] and Robert Hale discredited the second notion well before the New Deal.[194] Indeed, it was as early as 1909 that Roscoe Pound launched his proto-Realist attack on the *Lochner*[195] court for

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[190] To the extent that voluntary exchange among persons is valued positively while coercion is valued negatively, there emerges the implication that substitution of the former for the latter is desired, presuming, of course, that such substitution is technologically feasible and is not prohibitively costly in resources. This implication provides the normative thrust for the proclivity of the public-choice economist to favor market-like arrangements where these seem feasible, and to favor decentralization of political authority in appropriate situations.

BUCHANAN, *supra* note 25, at 17.

[191] Buchanan only views unequal bargaining power as coercive in cases of extreme duress. BRENNAN & BUCHANAN, *supra* note 16, at 102.

[192] Even Buchanan could not make this argument since corporate governance has not been subject to a unanimity rule since the last decade of the nineteenth century, at the very latest. *See, e.g.*, Morton Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 202 (1985).

[193] Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

[194] Robert Hale, *Coercion and Distribution in a Supposedly-Non-Coercive State*, 38 POL. SCI. REV. 470 (1923). For further discussion of both Hale and Cohen, see HORWITZ, *supra* note 1, at 163-64.

[195] Lochner v. New York, 198 U.S. 45 (1905).

its formulation of "an academic theory of equality [of market actors] in the face of practical conditions of inequality."[196]

The Realists recognized, as Buchanan would later, that the state protects property rights not only by abstaining from interference with the owner, but also by coercing the non-interference of non-owners.[197] But the Realists carried the logic of the statement inexorably forward to conclude that state protection of property rights affects and effects market outcomes. Just as the post-constitutional state created by property-holding contractors is structured by the owners' attempts to protect their holdings, so the market is structured by prior distributions, those made possible by state recognition of entitlements.

Even if the state's sole function were to protect private property, and it undertook no further activities, the market would not be separate from the state. State recognition of legal entitlements would shape the market. Buchanan impliedly concedes this point when he recognizes that the market cannot proceed without the state and makes that recognition the basis of his discussion of the creation of the constitutional compact.[198] This link between the state and the market is a point the Realists made again and again:

> The owner of every dollar has, by virtue of his law-created right of ownership, a certain amount of influence over the channels into which industry shall flow . . . . The channels of industry are governed by the 'democratic voting' [citation omitted] of those who vote with their dollars . . . . It must be obvious that the individuals with the most dollars exercise the most control over the channels,[199]

said Robert Hale. Morris Cohen took Hale's logic a step farther: if the state is implicated with the market by virtue of the protection of private property, then private property is implicated with the state. "Property," said Cohen, "[is] sovereign power compelling service and obedience."[200] The clear line between property and sovereignty, between state and market, a line dear

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[196] Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 454 (1909).

[197] *Id.* at 471.

[198] *See supra* text accompanying notes 58-61, 72-74.

[199] Hale, *supra* note 194, at 490-91.

[200] Cohen, *supra* note 193, at 12.

to the formalist proposition of the separation of public and private law, does not exist.

The Realists recognized that the categorical separation of a coercive state and a volitional marketplace was not a neutral assumption but rather part of what another Realist, Thurman Arnold, identified as the "folklore of capitalism."[201] That separation was based upon the exclusion of context, a requirement that may serve as an informal definition of formalism. Only by decontextualizing the market, by isolating it from its past and its future, could formalists conclude that market outcomes are necessarily neutral and apolitical. We are accustomed to assuming that this sort of legal formalism disappeared with the New Deal and the acceptance of Keynesianism. But, as Robert Gordon has shown, every kind of legal thinking remains available in every era.[202] Formalism too has its present-day advocates, of whom, it appears, Buchanan is one.

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[201] "[P]rinciples of law and economics . . . were considered as inescapable truths, as natural laws, as principles of justice, and as the only method of an ordered society. This is a characteristic of all vital folklore or religion." THURMAN ARNOLD, THE FOLKLORE OF CAPITALISM 46 (1937).

[202] *See* Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1980).