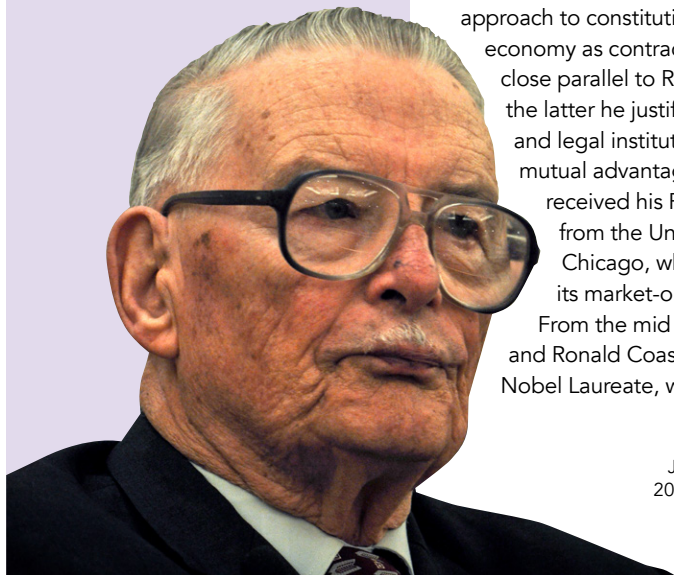


Re-evaluating Buchanan's conception of law and law-making

Nobel laureate James Buchanan might not be as well-known to a broader public as other 20th century economists such as Milton Friedman or Maynard Keynes. But in extending the economic behavioural model to democratic politics Buchanan was pivotal. Being an anti-elitist foe of populism, before its ascent he appealed to the democratic electorate to vote for constraining democratic politics by constitutional rules. Canadian academic Daniele Bertolini of Ryerson University critically assesses Buchanan's conception of law-making and the relationship between institutional procedures and individual liberty – and finds it wanting.



James Buchanan, the 20th century American political economist.

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The American political economist James Buchanan is perhaps best known for his works on public choice theory and constitutional political economy. He was awarded the Nobel prize for economics in 1986 “for his development of the contractual and constitutional bases for the theory of economic and political decision-making”.

As laid out in his seminal work with Gordon Tullock in 1962, “The Calculus of Consent: Logical Foundations of Constitutional Democracy”, public choice theory scrutinises the relationship between the choice of political/legal rules at the constitutional level and the choices within these rules by voters, bureaucrats and politicians under the standard economic model of self-interested behaviour.

Arguing that politics and economics are both fundamentally about the process of exchange, Buchanan sees his own approach to constitutional political economy as contractarian and in close parallel to Rawls, since like the latter he justifies political and legal institutions in terms of mutual advantage. Buchanan received his PhD in economics from the University of Chicago, which is known for its market-oriented approach. From the mid 1950s Buchanan and Ronald Coase, another later Nobel Laureate, were together

at the University of Virginia laying the foundations of the law and economics movement. In those years Buchanan established the Thomas Jefferson Center for Studies in Political Economy which would become the cradle of “Public Choice”.

A new generation of academics is re-evaluating Buchanan's work. Among them is Daniele Bertolini, Assistant Professor of Law and Business at Ryerson University in Canada. In a recent paper Dr Bertolini presents a critique of Buchanan's conception of law-making and concludes that Buchanan ultimately fails to understand the complex relationship between the law-making process and individual liberty within the constitutional order.

HISTORICAL BACKGROUND

Buchanan proposes a social contract theory of the constitutional order which reinterprets the ideas of the 17th century English philosopher Thomas Hobbes in modern economic terms. Hobbes argued that individuals relinquish their autonomy to the absolute power of the state in exchange for the state protecting them from living in a “lawless state of nature”. In his work “Leviathan” Hobbes famously described such a life as “solitary, poor, nasty, brutish, and short”.

Hobbes' fellow enlightenment thinker John Locke took a more favourable view of human nature and believed that individuals are equals with innate rights which predate the social contract. He favoured a constitutional government with limited power, on the grounds that absolute power threatens individual liberties.

Dr Bertolini argues that, by rejecting Locke's concepts of natural law and natural rights, Buchanan understands the social contract in a way that forces him to take sides with the unconstrained political authority conception of Hobbes. Buchanan conceptualises the social contract as the unanimous agreement of all members of the community, which is the necessary and sufficient source of legitimate constitutional law. In this way, Buchanan endows the collectivity of all citizens with unconstrained law-making power, and the social contract becomes the legitimising source of a substantively unconstrained law-making mechanism.

THE ARGUMENT

Dr Bertolini examines Buchanan's conception of law-making, with a focus on the institutional features he proposes to promote individual liberty. He argues that Buchanan's assumptions concerning the sources of law and the law-making process limit the theoretical strength of his constitutional framework and undermine the effectiveness of the legal and institutional measures he proposes to protect individual liberty against political intrusion.

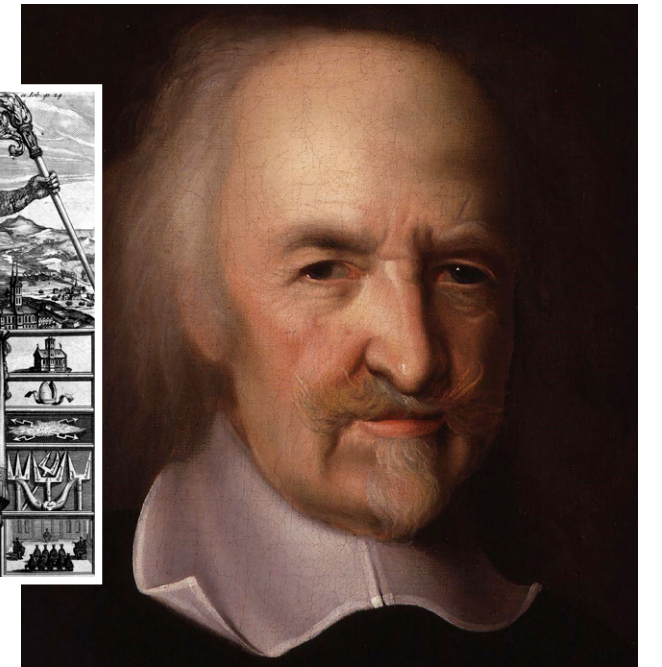
Dr Bertolini's critique centres on his belief that Buchanan's conception of law-making affords merely formal (procedural) constraints on the law-making activity conducted by politicians and ultimately fails “to provide a satisfactory normative account of the complex relationship between the law-making process and individual liberty within the constitutional order”.

Dr Bertolini raises four specific criticisms in support of his thesis:

1. That Buchanan is unable to justify the foundations of the legal order;
2. That he fails to appreciate the distinction between constitutional principles and constitutional rules;
3. That his commitment to legal generality (that laws apply to everyone equally) is an ineffectual institutional promoter of liberty;
4. And that his approach to law-making leaves no room for the emergence of legal rules through the evolutionary judicial process.



Leviathan and its author Thomas Hobbes.



Buchanan understands the social contract to mean that political powers have exclusive authority to make the law.

FOUNDATION OF LEGAL ORDER

In some important respects, Buchanan's conception of law-making resembles that of the influential 20th century Austrian legal philosopher Hans Kelsen, who argued that questions of law are questions of fact. Any substantive content is law as long as it is, as a matter of fact, enacted according to the basic

procedures of law-making, irrespective of whether substantive moral principles are violated. In addition, Kelsen assumed the existence of a fundamental norm that confers validity to these basic law-making procedures.

Dr Bertolini argues that, by assuming a fundamental norm that requires unanimity by all citizens, Buchanan unintendedly endorses a variant of Kelsenian legal positivism. In Dr Bertolini's words: “Kelsen's assumption of the existence of a basic norm conferring validity to the legal order is as difficult to justify as Buchanan's assumption of an original contract preceding all social institutions. This way, Buchanan's legal formalism is unable to provide a solid jurisprudential ground upon which effective institutional promoters of liberty can be established.”

Crucially, by assuming that the unanimity principle is the only limitation to the social contract, Buchanan ultimately fails to effectively constrain the law-making authority of political law-makers at the post-constitutional stage of the political process.



A bronze bust of Hans Kelsen.

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As our approach to law-making changes, so do our attitudes to previous political thinkers, like Buchanan.

PRINCIPLES AND RULES

Dr Bertolini argues that Buchanan fails to appreciate the relevance of the distinction between constitutional principles and constitutional rules. He explains: "Buchanan distinguishes between choice of rules (which must be agreed unanimously) and choice made within those rules (which are made by politicians under majority rule). In this way he assumes that constitutional rules are apt to provide clear, well-defined constraints on the post-constitutional exercise of legislative power."

In practice, however, constitutional principles are not so clear-cut and demand considerable interpretation by those with delegated responsibility for subsequently enacting constitutional rules. Dr Bertolini adds: "This suggests that when principles are chosen, a post constitutional actor (e.g., Parliament) chooses the substantive rule without the consent of the individuals affected by the choice."

LEGAL GENERALITY

Buchanan proposes that the generality of law, which is equally applicable to all members of society, protects individual liberty from coercive government intrusion into the private sphere. In addition, it prevents governments from

making laws that apply selectively to specific people or groups.

However, Buchanan's commitment to legal generality fails as an effective institutional promoter of liberty. As Dr Bertolini explains: "Generality requires the lawmaker to provide equal legal treatment to all persons who belong to the same category. However, categorizing people involves ethical judgements (clarifying 'in what respect' people must be equal) that Buchanan's ethical subjectivism does not permit."

This further reinforces the argument that "Buchanan's constitutional framework is procedural in nature and cannot provide

Buchanan fails to capture the institutional heterogeneity of the law-making processes.

useful indications on the choice of the elements on the basis of which people can be treated equally."

EVOLUTIONARY JUDICIAL PROCESS

Dr Bertolini raises concerns about Buchanan's implicit assumption that law is a fixed and "indivisible public good that can only be created through collective decision-making processes". Such a sovereign-centred approach to law-making leaves no room for the emergence of legal rules through the evolutionary judicial process. Dr Bertolini

explains: "Buchanan's formalist and rigid account of the constitutional order fails to capture the institutional heterogeneity of the law-making processes. He neglects the role that judges and spontaneous orders can play in effectively promoting individual liberty."

By focusing solely on protecting liberty through a constitutional order that has been unanimously approved, Buchanan fails to acknowledge the role of alternative safeguards for liberty. More specifically, Buchanan fails to "fully appreciate the comparative advantages of decentralized, evolutionary, legal orders in affording protection of liberty". He also fails to see that "the protection

of liberty can come sometimes from judges or from a good articulation of private legal orders, that is law made by private parties". For

instance, political powers to initiate restrictions of liberty by means of centralised law-making are limited to the extent that private individuals must go to court to initiate a decentralised "common law-making" process.

IN CONCLUSION

Dr Bertolini's robust critique of Buchanan's approach to law-making is a timely contribution to the re-evaluation of the work of this highly influential – and increasingly controversial – political thinker and Nobel prize winner.



Behind the Research

Dr Daniele Bertolini

E: daniele.bertolini@ryerson.ca **T:** +1 416-979-5000 **ext:** 3606
W: <https://www.ryerson.ca/tedrogersschool/bm/programs/law-business/daniele-bertolini/>

Research Objectives

Dr Bertolini interrogates Buchanan's conception of law and lawmaking.

Detail

Daniele Bertolini
Assistant Professor
Law and Business Department
Ted Roger School of Management - Ryerson University
Mailing Address:
350 Victoria Street,
Toronto, Ontario,
Canada
M5B 2K3

Bio

Daniele Bertolini is an Assistant Professor at the Law & Business Department, Ted Rogers School of Management, Ryerson University. He joined the Ted Rogers School of Management in August 2015. His research agenda focuses on issues concerning the comparative institutional analysis of alternative law-making processes.

Ryerson
University

References

Bertolini, D. (2019). Constitutionalizing 'Leviathan': a critique of Buchanan's conception of lawmaking. *Homo Oeconomicus: Journal of Behavioral and Institutional Economics*, Volume 36 (1), Pages 41-69.
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Personal Response

How big a threat does Buchanan's thinking pose to the protection of individual liberties in Western democracies in the 21st century?

Despite its genuine commitment to the ideal of liberty, Buchanan's thought fails to appreciate the complexity of the relationship between law-making and freedom in contemporary constitutional orders and misses the goal of identifying effective institutional promoters of liberty. From a broader perspective, I think that Buchanan's conception of the legal-political order reflects the increasing difficulties of classical liberalism to explain the fragilities of current constitutional democracies and to understand the growing legitimacy crisis of political democratic institutions around the world.