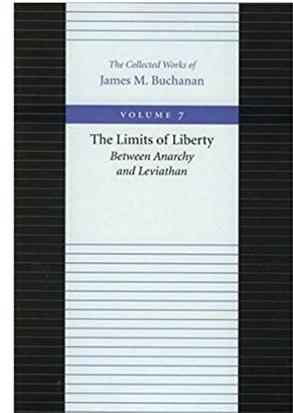




#EconlibReads



## ***The Limits of Liberty***

**James M. Buchanan**

### **Suggested Questions for Discussion**

1. Let's get started with a question stemming from Buchanan's foundation, which he lays out immediately at the beginning (pg. 3). Buchanan writes: "My approach is profoundly individualistic, in an ontological-methodological sense..." Does Buchanan's individualistic approach inherently limit the discussion in this book? Will the issues and conclusions reached only be accessible to those who follow the methodological individualist approach?
2. On page 23, Buchanan hints at what will become his driving motivator in the book: "Economic exchange among persons is facilitated by mutual agreement on defined rights. Individual rights must be well-defined and nonarbitrary, and, in addition, these rights must be recognized and accepted by participants." It is in this second clause, that rights must be accepted and recognized by participants, where Buchanan sees trouble brewing. He makes this point explicitly on page 26 (last full paragraph) where he states: "flaunting traditional codes of conduct [by the counterculture in the 1960s]" lead to calls for law and order, for the formalization of rules. It is through this process that we can go from liberty to Leviathian. But, are there ways for rules to formalize themselves in between the two extremes of ordered anarchy and Leviathian?
3. Buchanan defines cooperative relationships as "necessarily contractual" (pg. 5). Contracts require consent. However, Buchanan himself appears to back off on this point. Later on, when he is talking about exchange and unanimity, he uses the word "acquiesce" to describe how people outside the original two-party

transaction treat the transaction (pg. 50). "Acquiesce" to many means more of begrudging acceptance of the situation rather than consent. Is Buchanan contradicting himself here? Explain.

4. Buchanan tells us a social contract requires unanimous consent, but realistically that cannot be. There will always be those who merely acquiesce rather than explicitly agree. So, then, when we have major social upheavals like in the 1960s, does that imply a re-negotiation of the social contract is underway given widespread disagreement/flaunting of the previously established rules?
  
5. At the beginning of Chapter 2 (pgs 22-23), Buchanan lays out two different scenarios. The first is a simple economic exchange where property rights are known and a person can buy a watermelon from a farmer with ease (pg. 22). He then talks about a different scenario which he says is "different in essential respects." The watermelons are available on the roadside free of charge. But Buchanan then comes across someone trying to exact a monetary price for watermelons (pg. 23). Buchanan writes "Since I do not recognize any right of ownership on the part of the person who has now expropriated the melons, I am reluctant to pay..." Why doesn't Buchanan recognize the property rights of the person trying to sell?
  
6. Chapters 3 and 4 contain some of the meat of Buchanan's discussion. questions/comments. We might start with another potential tension in Buchanan's argument. On pages 49-50, he lays out the free-rider issue of public goods (each person doesn't have the incentive to pay for the good equal to his benefit, so the good ends up being under-provided outside government provision). Buchanan writes: "Here [with public goods] the individual participant does not behave strategically vis-a-vis his fellows; he treats their behavior as part of his environment, and he does not consider that his own action can exert any influence on that of others in the sharing group" (pg. 49). To what extent is this in tension with his statement on page 26: "Both of us recognize the possibility of harmful effects on the other, and we refrain from imposing costs in this manner, even at some personal sacrifice." It seems that on page 49, he is saying we do not consider our actions' effects on one another and on page 26, he says we do. Can we rescue his comments by saying that Buchanan means that, even if we

consider our actions' effects on one another in a public good setting, those actions are unlikely to have any effect unlike in the private good setting?

7. On page 85, Buchanan writes: "As more parties are added to the initial contractual agreement, in which an assignment of rights is settled, the influence of any one person's behavior on that of others becomes less and less. As an element inhibiting individual defections on an initial contract, this influence tends to disappear completely after some critical group size is reached." We've already seen that Buchanan thinks that as the informal rules get violated, there becomes a demand for more codification of the rules, which in turn leads to an increase in Leviathan (or, at least, an increase in the risk of government becoming Leviathan). Combined with this quotation from 85, does it imply that the larger the group bound by a social contract, the larger the government must necessarily be? Could an increasing population and territorial interest lead to less freedom as government takes on larger roles?
  
8. Is taxation analogous to theft? That is the question Buchanan is wrestling with on pages 56-57. Buchanan comes down on the side of "no": "If, as we have postulated, individual rights are defined as rights to do things with respect to some initial set of endowments or goods, \*along with\* membership in a collectivity that is empowered to act by less-than-unanimity rules, and, further, \*if\* these rights should be mutually accepted, it becomes inconsistent and self-contradictory for a person to claim that his "rights" are violated in the mere working out of the collective decision rules that are constitutionally authorized" (pg. 57, emphasis in original). Going back to Question 3, Buchanan's statement does follow from his contractarian foundations. But many people who otherwise love Buchanan vehemently disagree with his conclusion. So, does his conclusion hold for non-contractarian reasoning?
  
9. On pages 88-90, Buchanan discusses what he sees as two different roles of the state: the Protective state (constitutional stage) and the Productive state (post-constitutional stage). Is this a useful distinction for thinking about the state?
  
10. Buchanan discusses how slavery can arise from a contractarian "as-if" story emerging from the anarchic jungle (pgs. 77-78). Specifically, he writes: "A contract of slavery would, as other contracts, define individual rights, and, to the

extent that this assignment is mutually accepted, mutual gains may be secured from the consequent reduction in defense and predation effort" (pg. 78). This comment stands in interesting contrast to his quote on page 14 on the spectrum of personhood where "[a]t one extreme, that of pure and complete slavery, the human being has no rights whatsoever." Buchanan thinks that it is conceptually possible that a person/people would be willing to give up their "personhood" in exchange for a reduction of defense and predation effort. While it is conceptually \*possible\*, how \*probable\* do *you* think this is? Is it even possible?

11. On page 77, just before the section break, Buchanan writes of the constitutional contract: "The two persons accept limits to their own freedom of action, to their own liberty. The first leap out of the anarchistic jungle has been taken." The implication here seems to be that there is an inherent trade-off between liberty and society. For us to live in a society, we must be willing to accept certain limitations to our freedoms (remember that he defines freedom as a sliding scale of how much power we have to do what we want). On a personal level, this is likely true. But overall in society, is it? Under certain constitutional arrangements, can we get access to greater liberty and freedom if we sign these social contracts?
12. Based on Chapter 4, what would you say is Buchanan's theory of law, its origins, scope, and authority?
13. Buchanan begins Chapter 5 highlighting the ethical and moral concerns about contractarianism. He highlights the timeliness problem and the issue of binding someone by a contract they never signed (pg. 96). Buchanan addresses these issues by doing a little "as-if" comparative analysis: "Individuals must ask themselves how their own positions compare with those they might have expected to secure in a renegotiated contractual settlement. If they accept that their defined positions fall within the limits, they are more likely to comply with existing rules, even in the acknowledged absence of historical participation" (pg. 97-98). To those of you who do not support contractarianism, is Buchanan's analysis here sufficient to rescue the legitimacy of the contract? To those of you who support contractarianism, does Buchanan's analysis here cheapen contractarianism?

14. On page 106, Buchanan asks a very important question: "If imposed and nonvoluntary changes in the structure of legal rights are to be made, who is doing the imposing?" This question, as we see on the next page, is very important. If rights are defined by government, then individuals do not have any rights per se. In the contractarian world, the only contract the individual agrees to is to surrender to the sovereign. Many liberals are afraid of social contract theorizing given how it's often co-opted by socialists and other illiberals to justify vast expansions of government. Are we, as liberals, wrong to reject social contract theory, ceding a powerful statement like Buchanan's to illiberal reformers?
15. On pages 113-114, Buchanan makes a distinction between the state adjudicating rights and the state creating (or defining) rights. He states: "In the process [of adjudication], the state, through its judicial arms and agencies, must make what appears to be quite arbitrary decisions of the either/or variety, decisions that are then imposed unwillingly on the losing parties to the dispute, and decisions which are subsequently enforced by the state. It is from observation of this sort of activity that the state is often described as defining rights, as making basic law. But there is a vital difference between adjudicating emergent conflicts among parties when ambiguities arise and in defining rights ab initio ["from the beginning"] or in initiating explicit changes in rights when there is no conflict to be observed" (pgs. 113-114). Is this role of the state, as an adjudicator rather than a definer of rights, a step toward protecting liberty in Buchanan's eyes?
16. Buchanan ends chapter 5 with a very strong statement on the role of government in society. On page 114, Buchanan writes: "Adjudication by the state is designed to prevent the introduction of physical force by the parties." This statement follows in the tradition of Adam Smith and other writers who cede to the government the unique power to violate liberty (in other words, the government can "mess with your stuff"). Violence by individuals to solve property right conflicts is frowned upon. Violence by the state (ie, enforcing the adjudicated decision) is necessary. Do you agree with this interpretation of Buchanan? To what extent do you think such a monopoly on violence is desirable for the state to have?

17. How impersonal can government be? Buchanan opens Chapter 6 discussing an alarm clock as an analogy for being governed (pgs. 118-121). He states that, even for Crusoe, he must build something that is "external to the participants...[something] which may be programmed in advance, which may be counted on to detect and punish violations of the agreement, and to do so impersonally and impartially" (pg. 121). This outline of Buchananian jurisprudence suggests again the importance of rules on the government (constitutional constraints). In that case, is the idea of a "government of the people, by the people, for the people" desirable? Would such a government end up being \*internal\* to the participants and allow for defections?
18. Chapter 6 deals with the paradox of government- that in order to protect liberty we must give some up. We impose rules and restrictions on ourselves in order to better enhance our well-being. But there is a lot of ambiguity in this framework. For a lot of aspects of government, it's a grey, fuzzy line between the productive and protective state. It is in these ambiguities where the biggest threats from Leviathan can come from, according to Buchanan. Courts help bring clarity to these grey areas, but is that sufficient to keep Leviathan in check?
19. On page 150, Buchan states "Life in society, as we know it, would probably be intolerable if formal rules should be required for each and every area where interpersonal conflict might arise." This quote recalls Adam Smith's discussion of the "loose, vague, and indeterminate" rules that make up much of our virtues versus the "precise and accurate" rules that make up justice (pgs. 174-176 of TMS, Liberty Fund edition) as well as his discussion of casuistry (pg. 329-end of book). In both cases, the authors are concerned that laying down precise rules undermines civil society's cohesion. Which leads us to Buchanan's major concerns: if there is a lot of disruption of the informal rules, and pressure begins to formalize them, then society can become intolerable (and later on, Buchanan talks about the "liberty tax" which means that those of us who value liberty are likely paying the highest cost from this increase in casuistry). Is there, then, a paradox of liberalism? Can toleration lead to increased confusion of the informal rules, which in turn leads to loss of liberty as rules become formalized?
20. Chapter 7 seems mainly about how Buchanan sees the Rule of Law. On page 151, he writes: "This [the logical conclusion that if a significant minority fails to

observe the law, it becomes more and more in each person's interest to violate the law] suggests that one of the most important ethical precepts may well be that of obedience to and respect for formalized law, as such." But, as Buchanan states earlier, and we have discussed, excessive formalization of the law can itself undermine these ethical precepts. It is, indeed, quite the conundrum. These chapters highlight the meat of Buchanan's analysis, how liberalism is trying to steer a course between the Scylla of government and the Charybdis of Hobbesian anarchy. So, then,...How do we think about the rule of law?

21. On the final pages of Chapter 7 (pgs 162-164), Buchanan discusses the differences between treating the law solely as a public good and the law as public capital. In this manner, he is dispensing with the "timeliness" problem we discussed earlier. His conclusion that the individual faces a choice, and while he might prefer a more or less restrictive legal system, he only has the inherited one of the status quo and thus changes could end up costing more than one gets back, indicates Buchanan is a liberal-conservative along the lines of Smith, Hume, Hayek, etc. What would you say are the implications of Buchanan's reasonings here for liberal legal reform?
22. Buchanan asks a question on page 167 at the end of his introductory section: "Why are men apparently unwilling to punish those among themselves who violate the terms of the implicit existing contract, the law that defines individual rights?" He gives an answer later on page 168: "The imposition of penalties on living beings, whether or not those beings have violated law, causes pain, utility loss, to the normal person who must, directly or indirectly, choose these penalties. "Punishing others" is a "bad" in economic terms, an activity that is, in itself, undesirable, an activity that normal persons will escape if possible or, failing this, will pay to reduce." It seems that Buchanan is highlighting a tension within the human breast: a desire for vengeance in the face of an injustice (violation of the law) and an inherent distaste for punishment. What do you think of Buchanan's answer to his question? Does the existence of totalitarian states undermine his argument?
23. Throughout Chapter 8, Buchanan repeats that punishment for law violations must occur at the constitutional stage as opposed to the post constitutional stage. But he makes an important point on page 184 (emphasis added): "It is one thing for

the analyst to suggest that community decisions about punishment *should* be made at the constitutional level, and that these decisions *should* be sophisticated in the strategic sense. It is quite another thing to suggest that the community decisions on punishment *will* be made in this fashion, either in terms of the levels of decision or in terms of the informational-analytical content." This is a point that Buchanan repeatedly emphasized throughout his career and eventually won him a Nobel Prize; it is politics without romance. What *should* happen and what *will* happen are two different things. Generally speaking, it seems to me that when punishment is determined at the constitutional level (for example, mandatory minimums), it tends to be deeply unpopular. Does this imply that much of punishment will be decided post constitutional, and potentially be too lenient? Does Buchanan undersell justice? On page 170, he talks about how there is a disutility to punishment for normal people. But in Footnote 4, he states: "In observing retribution or "justice done," individuals may actually secure benefits or utility gains." He goes on to state (and I agree) that this will not modify the analysis much. But in this analysis, it suggests to me that Buchanan undersells an important role of the Protective State, that of minimizing violence in society. The violation of justice often invokes strong feelings and those call for retribution. Perhaps, then, the dilemma is not so much about punishment, but reigning in retributive tendencies since the enforcer is part of the community as well.

24. Chapter 9, "The Threat of Leviathan", comes off as fairly pessimistic to me. For example, on page 198, Buchanan discusses at length that those who operate the machinery of government are not indifferent to the size and scope of government. He also states earlier (pg. 191) that "[e]xperience indicates, however, that the procedural limits incorporated in constitutional structures historically have not been very effective in curbing the appetites of majority coalitions." While these points are true, are they grounds for pessimism for reigning in Leviathan? On page 188, Buchanan brings up a point that seems both radical and conservative: "If men should cease and desist from their talk about and their search for evil men and commence to look instead at the institutions manned by ordinary people, wide avenues for genuine social reform might appear." This point is radical because it is so far outside the normal bounds of reform conversation, where some evil or selfish group has seized power and it is only a matter of removing said people from power. This point is conservative because it means inviting small changes in society rather than massive "man of

system" schemes. Buchanan thinks that this radical-conservative take is a means of controlling Leviathan. But is Leviathan chained only by self-governance?

25. Buchanan's discussion of "political income" on page 198 (last paragraph and footnote 10) is interesting. For example, he writes in footnote 10: "At sufficiently high official salaries, persons may be attracted to politics who place relatively low values on the "political income" components." A potential danger from this line of reasoning is such a person, who cares less about political income than monetary income, might be more willing to sell his vote. But a salary too low might mean you attract the kind of "men of system" who love the political income. How should the salaries of officials be determined?
  
26. The quote by Frank Knight at the beginning of the chapter (pg. 209) and Buchanan's question on page 210 ("What sort of social order can man create for himself at this stage in his history?") both emphasize the social aspect of society. Any sort of revolution is inherently social, not individual, in nature. Buchanan is skeptical of the tendency for evolution to improve society (pg 211). Society is, after all, human action. So how do we, as liberals, both support societal change but prevent ourselves from becoming men of system?
  
27. Though he does not use this phrasing in *Limits of Liberty*, Buchanan often refers to democracy as "government by discussion" (see, for example, his 1954 Journal of Political Economy article "Social Choice, Democracy, and Free Markets," which can be found in Vol. 1 of the Liberty Fund's Collected Works of James Buchanan). On page 224, Buchanan writes: "A necessary step in the process of genuine constitutional revolution is a consensual redefinition of individual rights and claims." Given the definition of democracy as government by discussion, and the necessity for consent at the contractual stage, it seems that these initial steps out of the anarchic jungle are democratic. So, then, if a revolution happens without some sort of consensual redefinition (however that would look like), is it not a legitimate constitutional revolution? Is this Buchanan's concern about the social turmoil in the 60s and 70s?