

CONTRACT, UTILITY, AND THE EVALUATION OF INSTITUTIONS

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When I first began to study moral and political philosophy nearly 30 years ago, these subjects were, in the English-speaking world at least, more or less depressed areas. That these subjects have undergone a renaissance, at least in the United States, has often been noted. This renewal has been demonstrated to me by the fact that most European intellectuals I meet today are now familiar with the names of Rawls and Nozick.

In my own view, a crucial factor in the renewed interest in political philosophy as an academic discipline was a reopening of dialogue between some philosophers and some economists. It has resulted in large measure from the fact that at least two outstanding economists of our time, namely, F. A. Hayek and James Buchanan, are also extremely important political philosophers.

In an article entitled "Rights, Contract, and Utility in Policy Espousal," Leland Yeager (1985) advances and defends a version of utilitarianism that he uses to launch a very strong critical attack on Buchanan's contractarian political economy.¹ As a person originally trained in philosophy, I find Yeager's critique of Buchanan fascinat-

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The author is vice president of Liberty Fund, Inc. This paper was originally written for discussion at the Second Hayek Symposium on Knowledge, Information, and Competition sponsored by the Walter Eucken Institute and the Center for Education and Research in Free Enterprise of Texas A & M University at Freiburg in Breisgau, West Germany, June 4-7, 1988. The author has benefited from conversations with William B. Allen and John Gray, as well as from comments from James Buchanan and Leland Yeager.

¹Yeager (1985) also attacks various writers in the contemporary natural rights tradition, but I will not be concerned with that aspect of his argument. The critiques of Yeager by Tibor Machan (1987) and Hartmut Kliemt (1987) are of considerable interest, but I have approached the matter somewhat differently and have resisted the temptation to lengthen an already long paper by commenting on their criticisms. Professor Yeager replied to these critics in Yeager (1987).

ing because it seems to reveal a genuine *philosophical* disagreement. As best I can tell, the political disagreements between Yeager and Buchanan are minor. In general, they favor regimes of extensive liberty characterized by private property, free markets, and restricted government activity. But as Yeager describes it, his philosophical disagreement with Buchanan is extreme.

Yeager (1985) maintains for example:

Striving for clarity may justify some harshness: except in brief and untypical passages, Buchanan tries to conceal his employment of and to shirk his responsibility for values that he, like anyone, must be employing when he recommends anything, even when what he recommends is process rather than substance as the criterion for appraising institutions and policies [p. 266].

I assert not that contractarianism is flatly wrong but that it disguises its affinities with utilitarianism by repulsive and unnecessary fictions [p. 267].

The second quotation from Yeager points the way toward the thesis I want to suggest. I shall argue that when carefully considered, Yeager's kind of utilitarianism and Buchanan's contractarianism turn out to be versions of a comparative institutions approach to political philosophy offered from different points of view—Yeager's from that of the observer, Buchanan's from that of the participant. I would even say, uncautiously, that they are equivalent views in that, given the same assumptions about information, they yield the same conclusions. They may often use different information, however, since what I call a difference in point of view marks a considerable epistemological difference about intersubjective judgments of what is good or valuable.² I shall suggest that this fact provides fundamental lessons about the appropriate role of political philosophy and its relation to social science.

In section I, I strive to understand and to clarify Yeager's own version of utilitarianism. In so doing, I hope also to draw attention to the importance of the great differences between Hume and Bentham, even though both are often listed as utilitarians in textbooks. This difference is of much more than merely antiquarian importance. In section II, I examine Yeager's critique of contractarianism, suggesting modification in regard to those points in which I agree with Yeager. Section III builds on the foregoing sections to argue for my

²After completing the writing of this paper, I heard the Fourth Virginia Lecture on Political Economy delivered by Professor Yeager at George Mason University on April 5, 1988. He suggested in that lecture that the two views under consideration are the same. I think that claim goes too far and that the epistemological difference I mention here and discuss below is very important.

principal thesis, and section IV discusses the lessons we are able to draw about the role of political philosophy and the intellectual defense of liberty.

I. Yeager's Utilitarianism

Yeager states explicitly that he is a rule, not an act, utilitarian. He also allies himself with Hume and Hayek but rejects Bentham. Nevertheless, his own exposition leaves me with numerous questions about just what his own utilitarianism asserts. His criticisms of Buchanan are such that we must clearly understand Yeager's own position before we can try to settle the dispute.

To put Yeager's view squarely before the reader, I begin by quoting at length from his most recent (and most careful) statement of his position (Yeager 1987, pp.269-70):

Utilitarianism invokes comparisons among alternative sets of institutions, laws, traditions, patterns and maxims of behavior, and traits of personal character. It approves or disapproves of them according as they tend to support or to subvert the kind of society that affords people relatively good opportunities to succeed in making satisfying lives for themselves. Institutions and practices that facilitate fruitful cooperation among individuals pursuing their own diverse specific ends score ahead of ones that make for destructive clashes. "Social cooperation" . . . is so nearly essential to individuals' success in their own diverse pursuits that it is a nearly ultimate criterion of institutions, ethical rules, and so forth

But social cooperation is only a nearly ultimate criterion. It is instrumental toward something more completely ultimate, something simply taken as desirable because no further argument for its desirability is possible. I can only take stabs at labeling that ultimately desirable "something": it is individuals' success in making good lives for themselves, or fulfillment, or satisfaction, or life appropriate to human potentiality. No single word is an adequate label; but when a single word is required, "happiness" is the traditional choice

The conceivability of these alternatives shows that the utilitarian criterion is not vacuous, while their implausibility strengthens the utilitarian case. Anyone who knows a plausible and appealing alternative to the utilitarian criterion is hereby challenged to state it clearly.

Utilitarianism as Moral Philosophy

We should first be quite clear that Yeager's theory as stated here is normative. It is a theory of moral and political philosophy and must be understood as such. Moral philosophy and political philosophy

seem, at best, strange and, at worst, silly to many economists because political philosophy is a fundamentally different kind of intellectual inquiry from positive or explanatory science. In classical terminology, moral philosophy is an activity of practical rather than theoretical reason. In modern terminology, this means that moral philosophy does not adopt the standpoint of observer trying to understand why certain actions take place, but rather takes the standpoint of agent trying to decide what to seek or how to act.

This difference leads to several substantial differences between political philosophy and positive science, but there is no reason that such differences have to include (as some seem to suspect) rigor of reasoning or clarity of exposition. A description of why one might philosophize about morality is perhaps in order. It seems to me a simple truth about human beings that they hold and act on beliefs about such things as how they should treat each other.

Most of my readers would be shocked, I think, if in the discussion of this paper, I simply assaulted those who disagreed with me and drove them from the room. We think that such a use of force in ordinary human relations is wrong, or that it is not the sort of thing one should do. Yet we all know that even such obvious commonplaces may be open to doubt. We might begin to wonder, for example, if restraining ourselves from assaulting such bounders as are disagreeing with us is not mere timidity; if more direct action over time might not purge intellectual exchange of much silly and inconsequential dross. In that case, we may be led to ask ourselves if we really have good reason for our practice of restraint. In so doing, we are taking the first step toward moral (and political) philosophy.

But the inquiry will be different from the inquiry of positive science. In empirical science, one has the check on theory provided by observation and experimentation. I am able to test the hypothesis that gasoline is not a flammable fluid and get quite a definite answer. But especially since Kant, much moral philosophy has been written on the supposition that moral principles must be established a priori. I think this fact is what makes much moral philosophy seem strange and even silly. It has the air of theorizing without any check from reality.

I have argued for many years that such an approach to moral philosophy is empty. Moral principles purport to guide our actions, but this in and of itself should put a substantial check on wild moral theorizing. A moral theory which applies principles that fail to make a claim on our actions is empty. To be at all plausible, a moral theory must be linked to the goals people actually hold. Even though the case is not exactly analogous to the way that experimentation and

observation place a rein on scientific theorizing, it is close.³ If a political philosophy tells me it is my duty to support all persons less fortunate than I, and I actually feel no concern for such persons, then its injunction is hollow to me. But much of what is written as moral philosophy does just this. It tries to get people to do what they do not, all things considered, want to do.

Yeager, however, is not at all guilty of such unrealistic moral theorizing. He appeals only to our own critical experience as hardheaded scientific persons. He tries to make it very clear when he is talking normatively and when empirical evidence is relevant to his claims. He makes human happiness the ultimate value of his system and admits that it is a value for which no further reasons can be given beyond asking who would reject it and what he would put in its place (Yeager 1987, p. 270). But naturally, we need not declare ourselves enemies of human happiness in order to examine carefully the exact test that Yeager proposes for guiding our actions in that direction.

Yeager's Rejection of Bentham

Yeager leaves no doubt that he is a utilitarian but is not a Benthamite. He rejects the suggestion usually imputed to Bentham that one should judge each individual action by its likely consequences for the production of pain and pleasure. (I am not at all sure whether this interpretation is fair to Bentham, but that is another story.)

As usually understood, Bentham held the following theses:

1. Pleasure and pain are the only measures of what is good or valuable for an individual.
2. The measure of what is good for a community of individuals is the *sum* of the goods of all the members of the community.
3. The right action to take, including the action of establishing measures of government, is always that which is expected to lead to the greatest possible sum of good in the community of persons affected by it.⁴

To me, it seems undeniable that these three theses form the classical expression of utilitarianism as Bentham introduced it as a moral philosophy.⁵ Later writers from John Stuart Mill onward have changed various elements of the three to advance what seemed to them more plausible versions of what they still called utilitarianism.

³I discuss these points in some detail in King (1982).

⁴Bentham's own words surely support this interpretation. See, for example, Bentham (1948, chap. 1, secs. 1–10).

⁵J. S. Mill claims to have introduced the term "utilitarian" to signify one opinion—that of taking utility as a standard. Naturally, this is too vague to help us as a standard of how the term is to be used now. See Mill (1962, first author's note in chap. 2, p. 257).

Yeager rejects the third thesis in favor of a much greater emphasis on rules and institutions. He says repeatedly that he is a rule utilitarian. As usually understood, a rule utilitarian would substitute the following thesis for (3):

- 3a. The right action to take, including the action of establishing measures of government, is always that one which most nearly accords with that set of rules and institutions which is expected to lead to the greatest possible sum of good for the community of persons affected by the rules and institutions.

Yeager seems to think that this change accomplishes two ends, which I have trouble seeing. First, he seems to think that adopting rule utilitarianism allows him to avoid the usual objections raised against utilitarianism. Second, he seems to think that it puts him in company with Hume and Hayek in adopting a comparative institutions approach to political philosophy. But Yeager's interpretation raises the question of denying not thesis (3) but thesis (2), which holds that the good of a group is the sum of the goods of the individuals making up the group. (For Bentham, of course, we may say here "pleasure" for "good" for that is the effect of thesis (1).)

Yeager complains frequently of what seem to him unfair attacks on utilitarianism that amount to caricature, but the plain fact is that any moral theory which includes thesis (2) is open to just the kind of attack Yeager regrets. Any theory which sets as the standard for a group the sum of the individual goods (whether pleasure, utility, or whatever is taken as good) of the persons composing the group is inherently liable to sacrifice some members of the group for others in the group. To resolve this difficulty, the contrast between act and rule utilitarianism is irrelevant.

The logic of the situation stares one in the face. If the standard is to be determined by the magnitude of the sum of $a + b + c$, etc., it matters little whether the values of a , b , and c are 3, 4, 5, or whatever. The *sum* matters. Thus $25 + (-2) + (-3)$ is preferable to $3 + 4 + 5$ as a solution. In that case, b and c *ought* to be sacrificed in order to create the greatest balance of good over evil! A switch to average utility does not alter this basic fact. John Rawls (1971, p. 27) was clearly correct when he wrote that utilitarianism (at least of this kind) does not take the distinction between persons seriously.

If I read correctly, Yeager more or less agrees with what I have said about aggregate utility, but I am unable to accept his view that rule utilitarianism, in and of itself, leads to the rejection of aggregate utility. He asks how one could write operationally meaningful rules for sacrificing individuals for the greater good of "society" (Yeager

1985, p. 273). But such rules are easy to imagine. Consider, for example, such common phenomena as sugar quotas or milk price supports, which are usually justified as serving a social purpose, but naturally at a cost to consumers. The fact that the beneficiaries are quite real individuals only reinforces the point; it does not change the fact that these are actual rules for sacrificing some for others. (Naturally, I am not suggesting that Yeager would endorse these particular rules.)

I have spent perhaps too much time on this point, since presumably few of my readers believe it possible to make the kinds of interpersonal utility comparisons required for aggregate utility measures to be made in any case. But I have done so because employment of thesis (2) has been the most nearly common thread in those writers who have been called utilitarian in the philosophical tradition. Many utilitarians have disagreed with Bentham on thesis (1)—that pleasure is the only good. Even Mill welshe a bit on this. Further, rule utilitarianism was probably the view of Mill and has been adopted by many others. Thus it is perhaps understandable that, for many of us, adherence to some form of thesis (2) has come to stand as the chief mark of utilitarianism.

Nonetheless, Yeager's utilitarianism rejects this thesis—as indeed any plausible moral or political view ought to do—and we must try to understand his view on its own terms. I will try to do so by considering his invocation of Hume, but first we should note that Yeager also parts from Bentham (and Mill) in regard to thesis (1).

Yeager on Happiness

In the material quoted above, Yeager characterizes happiness as that ultimate for which no further argument can be given. But he explains this as “individuals’ success in making good lives for themselves,” “fulfillment” or “satisfaction,” or “life appropriate to human potential.” To be fair, Yeager treats this phenomenon as one which he cannot better describe. On the other hand, he has also insisted that “it is a researchable and discussable empirical judgment that happiness is served by institutions which facilitate voluntary cooperation” (Yeager 1985, p. 278). I think it is clear then that we must press somewhat more on this question of Yeager's ultimate criterion if we are to understand his view.

Yeager's idea of happiness is much more complex than that of Bentham and Mill, even with all of Mill's complications. Their view is stated straightforwardly in Mill's essay *Utilitarianism*. By happiness, Betham and Mill mean “pleasure, and the absence of pain; by unhappiness, pain, and the privation of pleasure” (Mill 1962, p. 257).

This reminds us of how Yeager's version of utilitarianism has almost none of the carefully interlocking, almost mechanistic features of classical Benthamite utilitarianism. Doubtless, this makes it a stronger theory, but it also makes it more difficult to understand.

Yeager's view apparently is that we can, through observation of actions and critical evaluation of testimony, determine whether people are leading happy or satisfying lives. I have a great deal of sympathy with his approach. It is much more realistic than Benthamite attempts to arrive at criteria for a happy life. Rather, we look to see whether people tend to stay voluntarily in the places where they live, whether they support the government, and such. We also listen to what they say, but correct it for when they are making good sense. As we will see in examining his critique of Buchanan, Yeager is a firm critic of the idea that what people choose is good for them. He does not mean that they should have things imposed on them as a result of this, but he does insist that they may make mistakes about what is good for them which an observer may notice even if they fail to realize it themselves (Yeager 1985, p. 265). Admittedly, I am speculating a bit, but I think Yeager is trying to break out of the mechanistic mold characteristic of Bentham and of the a priori rationalistic mode characteristic of Kant to take once again Aristotle's advice not to require greater precision than the subject of human beings can admit (Aristotle 1941, p. 936).

He may be suggesting that we examine people as we know them and judge whether alternative kinds of institutions make them happy or satisfy them. If I interpret Yeager correctly, then both his failure to say more about happiness—since he intends to give no criterion for it—and his move to discussion of social cooperation become understandable, since he views social cooperation as the primary prerequisite to happiness.

Yeager's Relation to Hume

In explaining how his version of utilitarianism embodies a "comparative institutions or good society approach," Yeager often quotes Hayek and identifies him as a utilitarian in the tradition of David Hume. Hayek's own relationship to utilitarianism is a complex question, made especially so by the difficulty (for me at least) of knowing how to fit the evolutionary aspects of his thought together with his discussions of utilitarianism and other doctrines of moral philosophy. But we need not examine Hayek's own doctrines here in order to continue our examination of Yeager. I think, however, that it would help to look briefly at Hume's view in order better to understand Yeager's comparative institutions approach.

As Hayek (1976, p. 18) has clearly pointed out, the term “utility” as it was used by writers before Bentham meant only “usefulness.” Indeed, this usage in Hume’s time is adequately confirmed by consulting Dr. Johnson’s *Dictionary*. As Hayek’s discussion shows, the equation of utility with pleasure or happiness as it occurs in Bentham or Mill would have made no sense to Hume. When Hume says, for example, that the entire merit of rules of property results from their utility, he means no more than that they are useful for attaining the purposes of each person affected by them. He quite explicitly says that the usefulness involved is that of whoever is touched by the institution (Hume 1975, p. 218). In Hume, there is certainly a crucial concept of public utility, but I would argue that it is the idea of usefulness to each member of the public. It certainly never has the meaning of summing the interests of the individuals. Hume’s discussion simply has no place for such an idea. He discusses property, for example, in such a way as to show the importance of such arrangements to everyone, whatever his place in regard to amount of wealth possessed (Hume 1975, pp. 183-92).

To call Hume a utilitarian is simply to invite confusion if to do so assimilates his view to those of Bentham and Mill. But since Hume does depend upon the usefulness of institutional structures and rules, it may be to his mode of argument that Yeager intends to return.

Summary

If I have understood it correctly, Yeager’s view (whether or not we are to call it utilitarian) is that the ultimate criterion in evaluating institutions and rules is the happiness or satisfaction of those who live under them. This means that any given person finds himself living in a culture and subject to a government, neither of which he had anything to do with creating. To evaluate this structure, he must ask himself how human beings fare under this set of institutions as opposed to other realizable possibilities. But, to emphasize again, I assume that by harking back to Hume, Yeager intends to judge in terms of all those who are affected by the institution or rule in question. This sets up a very difficult problem, but working it out will be the task of actual argument using Yeager’s theory.⁶

⁶In the lecture mentioned in *supra* note 2, Yeager offered a criterion drawn from Hayek and Harsanyi which says that his kind of utilitarian seeks to maximize the chances of any person chosen at random. He referred to this possibility in his original 1985 article (p. 280), but I have omitted that passage to avoid further complication. Various versions of this move fall prey either to what I say about maximization or what I say below in regard to Buchanan on the veil of ignorance.

Answering this kind of question would take a great deal of empirical and historical research. It also requires difficult judgments about human happiness, but in the end Yeager thinks that is as far as one can go. He asks with some confidence if anyone can suggest another principle. Thus, considerable weight is placed on his criticism of other views. It is, therefore, to his criticism of James Buchanan's contractarianism we must now turn.

Let me emphasize, however, that I have identified Yeager's comparative institutional view as the whole of his utilitarianism. He also says his view can even evaluate traits of character. I leave that claim aside for now and focus on his political philosophy of comparative institutions.

II. Yeager's Critique of Buchanan

Yeager is squarely in the utilitarian tradition, or at least the Benthamite tradition, in one respect. His argument for his own position depends importantly on showing the implausibility of competing positions. It depends on showing that, to the degree they are plausible, they presuppose his own position. In fact, I found a striking similarity between Yeager's argument and that of Bentham (1948, pp. 4-7) in this regard.

Like Bentham, Yeager is an enthusiastic and withering critic. Indeed, his discussion of Buchanan is more like a machine-gun attack than a careful dissection with a scalpel. He quotes and cites so many short passages and offers so many criticisms that it took a great deal of time for me just to look up each passage and read it in context.

Naturally, such an attack is difficult to summarize and evaluate. Yeager does not present a careful statement of his understanding of Buchanan's position but relies on the following three quotations drawn from Buchanan's works in the 1970s to state the basic drift of Buchanan's view:

To the contractarian that law is legitimate, and just, which might have emerged from a genuine social contract in which he might have participated. That law is illegitimate, and unjust, which finds no such contractual basis [Buchanan 1977, p. 127].

My point is mainly that of emphasizing the use of process, as opposed to end-state results. . . . For Rawls, as for contractarians generally, that which emerges from contractual agreement is just [Buchanan 1977, p. 61].

That is "good" which "tends to emerge" from the free choices of the individuals who are involved. It is impossible for an external observer to lay down criteria for "goodness" independent of the process through which results or outcomes are attained. The evaluation

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is applied to the means of attaining outcomes, not to outcomes as such [Buchanan 1975, p. 6].

Yeager's critical points can, I believe, be reduced to six, one of which contains several subpoints. In so doing, I have omitted much, but I believe I have captured all the primary charges he makes against Buchanan's contractarianism. I think, however, that it will help the discussion if I first sketch my understanding of Buchanan's contractarian philosophy.⁷

Buchanan's Contractarianism

Buchanan's first principle in political philosophy is the individualist principle of consent, which finds its best-known expression in the Declaration of Independence. This principle holds that legitimate or just government derives its legitimate authority from the consent of the governed. (This principle, a cornerstone of modern political theory, divides it fundamentally from the ancient view that some men are by nature rightfully the rulers of others.)

Buchanan's political philosophy is addressed to individuals finding themselves, as we all do, subject to the power of governments that have developed over time and that we personally have neither consented to nor formed by contract. He holds that each such person should judge the government to which he is subject just and legitimate if he finds that its structure is such that *it could have been* established by a genuine contract in which he participated.

In reaching this decision, the individual takes into account not only his own aims and goals in life but also the fact of the necessity of agreeing with others with different and conflicting aims. (If he wonders why he should do this, he is invited to read his Hobbes.) The exact structure of this hypothetical situation of contract is the most difficult problem of contractarian philosophy, but Buchanan has usually treated it as a constitutional convention, and not as the terribly abstract predicament philosophers such as Rawls have described. This is because Buchanan does not intend to deduce any principles of justice from his contractual situation. Rather, he proposes it as a frame of mind or process from which citizens may address each other in concrete political discussion about the structure of their government.

Thus, Buchanan is committed to the view that differing kinds of constitutions could emerge from the contractual situation, depending

⁷I have drawn this sketch from many years of reading Buchanan, but it is not practical to cite a source for each claim. I have reviewed the various sources cited by Yeager, but two new pieces by Buchanan have recently come to my desk, illustrating the difficulty of being sure one has read everything by him that one should in attempting such a short summary.

on the values of the persons involved. But this is not to deny that some general facts will govern contractual situations of the kind he describes. The need to agree (learned from Hobbes), the recognition that other people's values may differ markedly from our own, the recognition that voluntary agreement must be mutually beneficial, and the great ignorance of the future under which all human beings labor will always constrain the individuals choosing a constitution. In his Nobel lecture, Buchanan also allowed for a veil of ignorance sufficiently thick that the gap between general and particular interests is bridged (Buchanan 1987, pp. 1433-36).

If the individual concludes that the government under which he lives involves a constitution (whether explicit or implicit) that could have emerged from a contractual situation to which he was a party, then he must view that government as legitimate even when its actions may, at times, displease or harm him. He may use the postconstitutional avenues of political process to seek change or reform. If there are structural elements of the government in whose power he finds himself that he thinks could not have emerged from a contractual situation of the kind described, then he may want to seek constitutional change.

In either case, the starting point is always the status quo with its "implied social contract," that is, its actual distribution of rights and burdens. In Buchanan's view, there simply is no other place to start. Only proposals to change the status quo that can obtain voluntary consent are worth advancing. Sweeping claims of the injustice of the status quo and plans to redistribute to make it "just" have no hope to be accepted voluntarily and are not part of the contractarian frame of mind, which is based on mutual gain from voluntary exchange. Such claims are calls, purely and simply, for revolution—for using force to impose a new order. There may be times when such steps are the best ones to take, but history's record of that kind of revolution is not a happy one.

This sketch is necessarily compressed, but I hope it fairly reflects the chief positions of Buchanan's political philosophy to which Yeager objects.

Yeager's Items of Critique

The following are primary charges against Buchanan.

1. Yeager (1985, p. 265) says that the whole idea of contractarianism seems odd to him at first because it resembles the idea that whatever people freely choose is, in fact, good for them. He points to the well-known fact that we all believe that persons, including ourselves, often choose what in fact is bad for us, but he is careful to caution

that he does not mean to say this fact would justify imposing choices on others. Frankly, I find this criticism of little weight. Buchanan needs only to maintain that no one else has legitimate authority over others; they must give their own consent. Whether in the view of others (or in his own view later) he judged his own interest badly does not really matter. In the end, I suspect Buchanan would be satisfied to admit that individuals are imperfect judges of their own good, but would insist they are better judges of it than anyone else. On this point, Yeager seems to agree as well, so I see no significant criticism of contractarianism involved.

2. Yeager goes on to object that voluntary agreement is not itself the criterion of what to agree to. He thinks Buchanan creates just such a confusion when he asserts that what emerges from his contractual situation is just. He does not see why results of agreement should be viewed as beyond criticism.

In this case, we again have the confusion introduced by difference of point of view between observer and participant. Buchanan is quite correct from the viewpoint of participant. In his view, the just constitution is that which emerges from a contractual situation in which one was himself a participant. In the negotiation of the contract, one has been guided by one's own aims in life, as well as by the constraints discussed above. Thus one has not taken agreement itself as the criterion of that to which one will agree, but having on other multifaceted grounds agreed, one sees the outcome as just.

As external observer, Yeager sees only the agreement and is tempted to think agreement has itself become the only criterion of agreement. But this is not the experience of the participant and is not how the contract is determined. Once this further information is provided to the observer, this objection loses its point.

3. In the passage quoted in my introduction, which Yeager himself calls harsh, he charges that Buchanan shirks his responsibility for values he must be employing. This criticism follows Yeager's endorsement of Scott Gordon's charge that Buchanan is trying to derive his "ought" from premises which contain only "is" (Yeager 1985, pp. 265-66).

There are places in Buchanan's early work where one may wonder if he has kept the positive and normative parts of his theories clearly distinct, but in his later work, I simply can find no basis for this charge. His Nobel lecture is, for example, admirably clear in this respect.

I assume that Yeager and Gordon are interpreting Buchanan as saying the fact of agreement makes rules just and thereby deriving "ought" from "is." If, however, Buchanan accepts, as I think he does,

the principle of consent or individualism as a normative first principle, he has made no confusion of “ought” and “is,” nor has he failed to take responsibility for any values. The principle of consent involves a normative claim about justice and legitimacy of government. It implies other individualist value claims. I do not believe that Buchanan has shirked his responsibility for these or has hidden his commitment to individualism. But placing a high value on letting other persons judge for themselves does not commit one to approving what they may judge *from one’s own value perspective*. I cannot see how taking this line consistently can be judged as shirking responsibility for one’s values.

4. Yeager criticizes Buchanan’s rejection of the so-called truth judgment approach to political philosophy as opposed to the process view of contractarianism. Buchanan’s position on this point is, in Yeager’s view, unfairly critical of the kind of position Yeager himself holds.

Having contrasted the role of politician with that of judge or jury, Buchanan (in a passage quoted by Yeager) states:

Most reform advocates consider themselves to be engaged in a persuasion effort which, if successful, will produce a coalition that will command sufficient political power to enforce its will. And the reform advocates of this stripe express no moral inhibitions about imposing their preferred outcomes on all of their fellows, independently of expressed agreement or consent. In part, this demonstrated willingness to impose nonvoluntary changes on the existing pattern of entitlements in social order finds its own moral support in some “truth judgment” conception of politics generally. To the extent that the existence of “truth” in politics is accepted, the intellectual problem is one of discover and definition. Once “truth” is found, there is no moral argument to be raised against its implementation. Consent is meaningless in this context. Opposition can be variously characterized as stemming from ignorance, folly, or the exercise of selfish interest. In any case, the views of those who actively oppose the truth-carrying zealots are not treated as worthy of respect. And any requirement to compromise with such views arises only because the reformists might otherwise lack the power to impose “truth” unilaterally [Buchanan 1977, pp. 143-44].

Now it is easy to see why Yeager criticizes this passage, for he himself holds a “truth judgment” view and yet has specifically denied that he is willing to see his truths imposed on others because he thinks that is no way to bring about the happy lives he seeks to promote. There seems to be some right on both sides here. Buchanan’s statement that once truth is found, there is no moral argument to be raised against its implementation is too sweeping. It does not account for Yeager’s view, according to which part of the discov-

ered trust is that truths about political and moral matters should not simply be imposed on people. If there is substantial difference between Yeager and Buchanan, Buchanan will have to argue against Yeager in some other way.

But there is, nonetheless, considerable truth in what Buchanan says in the quoted passage. While Yeager and a few others may be exceptions, the majority of political philosophers do write as though one could impose whatever is just if one has or can get the power to do so. Buchanan's view is attractive because it erects a structural barrier against this possibility.⁸

5. Perhaps Yeager's chief complaint against contractarianism is its supposed employment of what he calls "repulsive and unnecessary fictions" (Yeager 1985, p. 267). I shall discuss in turn four cases he mentions.

First, Yeager holds that Buchanan treats an implicit social contract as if it had actual force, thereby legitimating a *status quo* that otherwise is not a product of consent and should be rejected by Buchanan's own principles.

There may be reason to question whether this issue is treated clearly in *The Calculus of Consent*, but in Buchanan's later writings and especially in the essay, "The Use and Abuse of Contract," cited and quoted by Yeager, I can see no room for misunderstanding this point (Buchanan 1977, pp. 142–46).

As I explained above, the concept of implicit contract is nothing more than a way of referring to the kind of contract that is implied by the institutions of the status quo. But Buchanan introduces this notion only as a way of comparing it to other possible contracts. It has no legitimacy because of consent; its legitimacy is only as a starting point. One may disagree with Buchanan on this matter, but I fail to see that he uses a fiction which is either unclear or repulsive. What he has said, if I have understood him, is fairly clear and straightforward. As such it may reasonably be debated.

Second, Yeager also objects to the use of the word "conceptual" by contractarians. He says "it is no mere joke to say that 'conceptually' is an adverb stuck into contractarians' sentences to immunize them from challenge on the grounds of their not being true" (Yeager 1985, p. 271). But when I examine Buchanan's writings, I find "conceptual" used in the contexts cited by Yeager only as a way of making clear the fact that claims are being made about what would be true under

⁸Yeager also suggests that Buchanan is pushed too far toward epistemological relativism by his desire to avoid authoritarianism, but to consider that question would require an excursus into epistemology which is beyond the scope of this paper.

hypothetical contract that one could accept. It is true that Buchanan makes use of hypothetical reasoning, but his clarity about doing so seems to guard against its abuse. Nor is it reasonable to ask anyone to write or think about subjects relating to human actions without the use of hypotheticals. Human action is goal directed and as such, by its very nature, must ask what would happen *if*.

Third, Yeager is bothered that Buchanan, after introducing the distinction between the constitutional and postconstitutional stage, points out that at the postconstitutional stage, one may not always be happy with the way things work out, but one has no complaint because one agreed to the rules. In such a case, if one commits a crime and is fairly convicted and punished, one may reasonably be said to have agreed to be punished.⁹ While this case employs an obvious figure of speech, it conveys a deep truth, and it is difficult to see why such thinking involves fiction.

Buchanan also speaks of “apparent” coercion and “apparent” redistribution in a similar context. Yeager has a point in saying Buchanan, in such instances, is perhaps misleading since the coercion and redistribution are real enough, just as is the punishment. But the case is the same in all three instances. Buchanan wants to call attention to the legitimacy of these uses of force even on oneself because one has agreed to the rules. If the figures of speech are not terribly felicitous, they hardly seem calculated to mislead when read in context.

Fourth, Yeager criticizes contractarianism’s use of the concept of a “veil of ignorance” to remove from those in the contractual situation certain information about themselves and their situations. He does not attribute use of such a concept to Buchanan, but refers instead to the works of Rawls, who introduces this concept into the contractarian vocabulary.

Rawls requires that the persons in the hypothetical contractual situation must negotiate behind a veil of ignorance. By this, he means that they must be assumed to be ignorant of their own places in society, their own talents and intelligence, their own wealth and income prospects, and even their own generation. Rawls (1971, p. 136) says this requirement is introduced to “nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage.”

Yeager does not attribute the veil of ignorance concept to Buchanan, who has more frequently spoken of a “veil of uncertainty.” Buchanan’s “veil” refers to the uncertainty about future circumstances that is the common lot of mankind, but which naturally would

⁹On this topic, see also King (1980).

have an important influence on choices such as those imagined in the hypothetical contractual situation where a constitution to last an indefinitely long span of time is to be chosen. In his Nobel lecture, Buchanan said “behind a sufficiently thick veil of uncertainty, ignorance, or both, contractual agreement on rules that allow for some in-period fiscal transfers seems to be possible” (Buchanan 1987, p. 1436). Since the insertion of “sufficiently thick” leaves this statement somewhat ambiguous, I will leave open what Buchanan does say and proceed boldly to prescribe what he *ought* to say.

Simply put, the veil of ignorance vitiates the whole plausibility of the contractarian approach. Yeager is quite right to criticize it. The veil of uncertainty is simply a way of calling attention to the natural limits of human beings. It is inescapable. The veil of ignorance is a matter of choice. Buchanan indicates this when he implies that we may make it thicker or thinner at will. Rawls says that the veil is intended to structure what the outcome of the contractual situation will be. Buchanan seems to imply that such a device is necessary to make room for the kind of transfers he desires. I think that Buchanan will destroy much of the appeal of his own theory if he moves from the necessary and proper limitations of uncertainty to use of any kind of Rawlsian veil of ignorance.

If Buchanan inserts a veil of ignorance to allow certain transfers, he, in effect, begs the question of the justice of those transfers. He is committed to saying that just rules are the result of agreement. But how can he know prior to agreement how to construct his veil of ignorance. Since a veil of ignorance is not a requirement of nature, as is a veil of uncertainty, we could disagree on how thick it is to be. How are we to decide, save by considerations of justice, that people are not to be allowed to use certain knowledge they have? Rawls clearly is motivated by achieving certain outcomes, and, given the passage quoted above, Buchanan seems possibly to be motivated by achieving them. To take this step seems to me to beg the question and to drop his own oft-repeated insistence on process instead of outcome.

The veil of ignorance is a device to avoid the effects of the status quo. As we have seen, Buchanan argues long and well for the importance of starting with the status quo. The effects of this excellent argument are vitiated if he employs the voluntary veil of ignorance. Moreover, to employ a veil of ignorance would sorely injure one of the most attractive features of Buchanan’s position—namely, its clear link to concrete individuals. The first passage Yeager quoted from Buchanan refers to “a genuine social contract in which he might have participated.” This passage gives a clear link to the aims and goals

of actual people as does Buchanan's continued use of the Wicksellian principle of unanimity as an ideal. But to insert a veil of ignorance breaks the relation of the agreement with real people. Even that sternest enforcer of contracts, Thomas Hobbes, might have had second thoughts about a contract made when (somehow) one had been made to forget all the more important facts about oneself. By striking at the relation of real people to the hypothetical contractual situation, the veil of ignorance strikes at the heart of Buchanan's system.

It may be (and I hope is) the case that Buchanan wishes to include under "ignorance" really nothing more than the natural infirmities of the human condition I group under the heading of uncertainty. If so, we could argue over how extensive that ignorance or uncertainty is, but no basic problem between us results. In any case, nothing about the limits of future knowledge keeps us from knowing our current position and a set of probabilities about future positions based on that position and facts about our society.

Someone will surely object that to allow persons in the contractual situation knowledge of their positions carries the injustice of the status quo over into the contractual situation. But this is the point Buchanan has made so well in discussing the necessity of starting with the status quo. To start elsewhere requires force (i.e., revolution), not political philosophy. If we aim to have peace and to proceed by peaceful means, only the status quo is available as a starting point.

It is also worth noting that the injustices of the status quo are often grossly overestimated, at least in discussion in the United States. No one is wise enough to sort out all the lines of past history. I hear a man say he was born unjustly poor because his great grandfather was a slave, but I am unimpressed. My great great grandfather was a slaveholder, but I still did manual labor to earn money for college because my family's circumstances were extremely modest, to say the least. Even if your grandfather had made a fortune, he might have spent it on women and horses or he might have disinherited your line as a bunch of rotters. Such speculations have little to do with justice.

For Buchanan's theory, in line with his emphasis on mutually beneficial exchange, justice should be about removing barriers to the use of the assets you have, not trying to rectify an unreachable past. Such tasks take divine wisdom and should be left to those who have it. For mere humans, it is far better to follow Buchanan's wisdom and start with the status quo. But in that case, Yeager is correct: Buchanan should avoid the veil of ignorance like the plague. He should rest content with whatever transfers, if any, emerge from an agreement to which real people can be party.

I want to emphasize that the restrictions based on natural uncertainty and on the need for all to agree provide the required protection against attempts by participants to rig the contract in favor of particular interests. These factors provide the necessary bridge between individual and general interests. They are unavoidable and require no supplement from an intentionally imagined veil of ignorance.

At long last, our consideration of Yeager's critique of Buchanan is complete. While it seems to me that Buchanan's theory is left alive and well, nothing we have learned in considering the critique of Buchanan seems to me to undermine Yeager's own approach to political philosophy. I turn now, therefore, to the task of understanding the relationship between them.

III. Institutional Comparison and Evaluative Points of View

In light of our consideration of Yeager's view and Buchanan's contractarianism, I think we can now see that these two views are much more similar than Yeager's critique would have led us to believe. But, of course, that is exactly what Yeager has insisted from the beginning. It was perhaps his use of the term "utilitarian" that made his claim seem farfetched.

When we look at the two actual theories (at least as I have interpreted them), we see that they are both versions of a comparison of institutions approach. This removes them both from the usual Kantian a priori or Benthamite maximization views. Furthermore, their starting points are very similar. They intend to speak to real individuals who find themselves subject to political institutions not of their own choosing and who wish to raise the question of their legitimacy. Both theorists also want to bring to bear on institutional comparisons the lessons of economics, history, and ordinary knowledge of human nature.

Obviously, the great difference between these positions lies in the method they advocate for carrying out institutional evaluations. Buchanan looks to agreement while Yeager seeks to judge what is good for all concerned, but he will only try to persuade them of it, not force it on them. If we look closely, I believe that we have here only a disagreement on the best epistemological approach to what are essentially the same phenomena. Both theories require us to gain knowledge of values of others. Buchanan hopes to find this knowledge revealed in agreement. Yeager hopes to find it by observation of what people do and say.

This difference is why I characterized the two theories as adopting different points of view toward the phenomena with which they are concerned. Buchanan's view is that of participant. As potential participant in contractual bargaining, he leaves it to the other participants to determine their own goals, but he must be concerned with what other people's goals are in order effectively to bargain, for in the end agreement must be reached.

Yeager thinks he can discover, as outside observer, what will make people happy, but he believes that what he discovers is an expression of their own goals and inclinations—not a pattern he will impose on them.

By citing this difference of "point of view," I intend only to draw attention to what I think are important epistemological differences between Yeager and Buchanan concerning judgments of value. Yeager proposes to make judgments of what people value, and thus what will make them happy by external observation of which their testimony is only a small part of the evidence. Buchanan, on the other hand, rejects this procedure in favor of simply relying on people's testimony (what they will agree to). I suspect that this difference probably results from deep philosophical differences concerning truth and knowledge, but those need not concern us here. If political philosophy must wait for such questions to be resolved before it can proceed, then political philosophy is hopeless.

I suggest that these theories will yield similar results given the same information about the individuals who are affected by the institutions under consideration. I do not suggest that they will always obtain the same information given their different epistemological approaches. Let me offer some reasons to make this claim clearer.

In addition to similarities already mentioned, there are several points at which similar roles are played in the theories by devices that differ because of the different points of view assumed:

1. Yeager's emphasis on the value of social cooperation, which he says is, next to the ultimate principle of happiness, analogous to Buchanan's continued emphasis on the model of voluntary, mutually beneficial exchange. Both sharply reject the competing maximization model.
2. Buchanan's first principle of consent as the basis of legitimate authority is analogous to Yeager's concern with the happiness of each person affected and is a direct result of his rejection of the aggregate version of the happiness principle. Both theories will, then, have to show full regard to the values of every individual. They are both theories of individualism.

3. In the contractarian view, the need to agree requires a necessary attention to the goals of each, which is analogous to the concern with the goals of each required in Yeager's judgments of happiness. While it may seem important that Yeager's view requires that the observer applying the theory place an equal value on the happiness of all those he surveys, I do not think it matters to the answers the theories yield. Buchanan's participant may place as much or as little value on the values of others as he will, but he must in the end show proper deference to those values because he has read Hobbes and knows of the overriding need to agree.¹⁰ These differences about concern for others may affect the likelihood of getting others to accept the respective theories, but of that I will say more shortly.
4. Finally, both theories must marshal the same kinds of evidence about the workings of institutions in order to carry out their evaluations. In the end, the root relationships are between the actual workings of institutions and the life-goals of individual human beings.

In light of these four considerations, I can find nothing to lead these theories to diverge in the actual evaluation of institutions, save for differences in information about the goals of individuals that may result from their different epistemological approaches in this area or from the natural failings of human investigators.

In spite of the agreement I suggest, these do remain different theories, and they will serve somewhat different rhetorical purposes. But I see no need further to decide between them as political philosophies. Rather, I suggest that each should try its hand at arguing its position and determine which is found more convincing. While it often pains a priori moralists and moral geometers, human life is enormously complex. It may simply be that some people find Yeager's general concern for the values of all more convincing, while others prefer Buchanan's approach, which emphasizes long-run self-interest as a completely acceptable stance in the contractual situation. I certainly found such division among the students to whom I taught moral and political philosophy for many years.

Thus, it seems to me that no further decision between these theories is required. I must confess to taking some personal comfort in this conclusion, since my respect for each theorist is so great that I am pained by the thought of having to disagree with either in the

¹⁰On Hobbes and the need to agree, see King (1982, pp. 32–34).

fundamental way Yeager's article first made me think I might have to do.

IV. The Role of Political Philosophy

The examination of the two theories seems of some significance in its own right, but I believe it also teaches important lessons about the most promising approach to political philosophy. I want to explain these briefly.

The comparative institutions approach of the theories we have considered provides a model of the path I believe we should now take in political philosophy. Both theories address themselves to real men and women with real concerns of human life. They try to bring to bear on these concerns the best information we have been able to develop about how human institutions actually work.

This approach is far removed from the legacies of Kant and Bentham (so different and yet so similar). It issues in no formula or simple tests for how to act. It yields no neat geometrical proofs about human affairs. Rather, it recognizes the frailty of the human ability to know. It does, however, confront the messy, complex problems of trying to live together. It may fairly be said to represent a return to the state of political philosophy at the time of Hume and Smith, before the disastrous detours that lead, on one hand, from Rousseau, Kant, and Hegel to Marx and, on the other, from Bentham and Mill to Fabian socialism. Having written some of the most important moral treatises ever penned, David Hume turned to history and political economy. His example is one that political philosophers should again take seriously. What we know of human affairs from history and economics should be primary data for the political philosopher.¹¹

I do not intend to suggest that better history and economics will solve all our political problems. Far from that, the need for an appropriate normative framework into which to fit the knowledge gained from social science is a most pressing need. It is this need that I believe the kind of comparative institutions approach represented in the work of Buchanan and Yeager can supply.

In a country with a political structure of extreme freedom and justice, the role of the comparative institutions political philosopher might be primarily negative. He would need only to try to defeat the

¹¹I want to note again that this paper concerns political philosophy. I believe that one can develop for moral philosophy a "comparative lives" analogue of the comparative institutions approach stated here. Such a development would need to draw on literature, the great religious sources, and the arts, as well as on history and economics. The presentation and defense of such a framework is a task for another occasion.

constructionist and utopian schemes that would doubtless be regularly advanced by lovers of power. In a totally unfree and unjust country, the comparative institutions political philosopher might drop philosophy altogether and become a real revolutionary. His kind of philosophy stops where direct and coercive use of power to impose a new pattern begins, but in many countries one sees little hope for improvement through philosophy. Such improvement requires at least some conditions of liberty.

In the middling condition of the United States and Western Europe, the comparative institutions political philosopher will find much need for his negative role. There are plenty of utopian and constructionist schemes to be attacked. But he will also find the positive role of providing a normative framework within which discussion and negotiation may help to move the society toward freer and more just conditions. Given the circumstances we presently face because of deficit financing of massive government transfers, Buchanan is surely right when he calls for the kind of fundamental consideration characteristic of constitutional reform. Such undertakings require a normative framework in order to bring to bear on human action the information gained from social science.

A political philosophy of comparative institutions is particularly well suited for those of us who share an overriding devotion to individual liberty and may help move that concern onto the public agenda of our time. Too often we are ignored both politically and in the moral views of our fellow citizens, even though the *facts* seem clearly on our side. I think the comparative institutions approach can provide the framework to make better use of those facts.

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