

# Social Contractarianism

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It is a curious accident of history that libertarianism has been principally defined by its greatest enemies, rather than its friends. In academic philosophy at least, this was accomplished by G.A. Cohen in his attacks on Robert Nozick's *Anarchy, State, and Utopia* (1974), which culminated in his *Self-Ownership, Freedom, and Equality* (1995). Cohen identified the central elements of libertarianism as the self-ownership thesis, which is crucial for justifying strong private property rights and, subsequently, substantial limitations on state power to interfere with those rights. This definition was continued by the so-called "left-libertarians" who followed him (Steiner 1994; Vallentyne & Steiner 2000; Vallentyne et al. 2005; Otsuka 2005).<sup>1</sup> These thinkers combine a commitment to self-ownership and rights with a Marxist and egalitarian views about property. On this view, libertarianism is held to be fundamentally a doctrine about property rights and self-ownership. This is, I will argue, a serious mistake that has hobbled libertarianism theory and practice in important ways, specifically by entrenching two dominant antinomies in libertarian theory.

Libertarianism is and should be, I will argue, a doctrine about individual freedom and rights and the proper emphasis of libertarian theory should be on voluntary interaction and

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<sup>1</sup> Interestingly, this characterization of libertarianism also accords with the version defended by Murray Rothbard (1977; 2003), who played an important role in developing the modern political libertarian movement.

beneficial cooperation not, in the first instance, on property rights. This may seem like a distinction without a difference, but the focus on one Lockean strain of thought (natural rights), while ignoring another (contractarianism), highlights one important aspect of libertarianism at the expense of the other. To reorient libertarianism on firmer theoretical and practical ground, I will argue, libertarians should embrace their contractarian roots.

Contractarianism provides libertarian theory with a foundation in the rational choice of individuals. By understanding libertarianism contractually, it becomes clear that libertarianism is indeed a form of liberalism, perhaps the most coherent and consistent form of liberalism.<sup>2</sup> It is not my intention to argue either that all contractarians must be libertarians or that all libertarians should be contractarians. Instead, I argue that the connection between contractarianism and libertarianism is a natural and fruitful one. The contractarian approach can provide a coherent and plausible explanation of the libertarian emphasis on strong individual rights, voluntary association, and a limited state. Further, the contractarian approach can help to adjudicate between two core disputes in libertarian theory: 1) rights-based vs. consequences-based libertarianism and 2) anarchist vs. non-anarchist libertarianism.

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<sup>2</sup> Freeman (2001) argues that libertarianism is an “illiberal” doctrine, though he does not specifically consider the type of contractual libertarianism I am proposing here. In contrast, Jason Brennan (2007) and John Tomasi (2012), among others, defend libertarianism as a liberal view. Gerald Gaus (2000), although he does not cite the Freeman piece, helps to articulate this dispute by pointing out that the austerity of the liberal doctrine has led to liberalism as a political ideology adopting political allies on the left and right to make the doctrine palatable and, in turn, creating different “flavors” of liberalism.

## **1. Libertarianism**

It is difficult to define libertarianism in a way that reflects its use in both political theory and practice. Doing so, however, is crucial in order to remain true to both the unity and diversity in libertarian thought. If a thousand flowers are blooming, it is a mistake to draw the boundaries of the garden too narrowly. That said, we need a way to distinguish between the flowers and the weeds and although libertarianism has many forms, there is distinct family resemblance despite its variety. Libertarianism is a covering term for a broad mix of theories that value strong individual rights that substantially constrain the scope of public or collective action. Importantly, on this taxonomic approach, libertarianism does not require any particular conclusion about a variety of important topics. Important disagreements about the foundations of libertarian theory (e.g., intuitionistic, consequentialist, contractarian), its methodological starting point (e.g., economic, philosophical, political), and its political implications (e.g., anarchist, limited government, safety net).

These can be combined in a variety of ways. For instance, Murray Rothbard (1977; 2003) used an intuitionistic foundation and an economic method to develop his odd combination of strong natural rights and Austrian economic theory into a defense of anarchism. Taking a slightly different approach, Michael Huemer (2013) develop a defense of anarchism based the incompatibility of the state with basic, intuitionistic, moral principles. These theories differ in important respects, despite the fact that they both employ a form of intuitionism to argue that anarchism is the only justifiable social system. David Friedman (1989) uses a different foundation (consequentialism) and method (economic) to also arrive at anarchism. His father, Milton Friedman (2002), used the same foundation and approach, but instead defended a minimal state.

Other libertarians have employed consequentialist, intuitionist, and contractarian foundations to generate a defense of some form of a social safety net or welfare state. Many

of the the philosophers in this group were influenced by John Tomasi’s (2012) defense of a form of Rawlsian libertarianism. His approach created more space for markets and individual rights, while at the same time defending a more expansive role for “social justice” in political life. The exact role the government should paly in achieving social justice, however, is a matter of dispute. Jason Brennan, for instance, has argued that even if one accepts the Rawlsian conception of social justice, the market is a much better mechanism for achieving social justice than the state (2007). Brennan (2016) has also bucked the trend among liberal and libertarian thinker by vigorously arguing against democracy. Other libertarians, such as Charles Murray (2016) and Matt Zwolinski (2015), follow Philippe Van Parijs (1998) in endorsing a universal basic income or basic income guarantee. Other libertarians have argued that anything like a welfare state is indefensible (Schmidtz & Goodin 1998; Gaus 1998).

<b>Theorist</b>	<b>Foundation</b>	<b>Method</b>	<b>Political Implications</b>
Ayn Rand	Intuitionistic (Natural Law)	Philosophical	Minimal State
Murray Rothbard	Intuitionistic (Natural Law)	Economic	Anarchism
Robert Nozick	Intuitionistic	Philosophical	Minimal State
Michael Huemer	Intuitionistic	Philosophical	Anarchism
Milton Friedman	Consequentialist	Economic	Minimal State
David Friedman	Consequentialist	Economic	Anarchism
James Buchanan	Contractarian	Economic	Minimal State
Loren Lomasky	Contractarian	Philosophical	Minimal State
John Tomasi	Contractarian	Political	Safety Net

F.A. Hayek	Consequentialist	Economic/Political	Safety Net
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Table 1—The Diversity of Libertarianisms

These differences indicated considerable diversity within libertarianism (see Table 1). So much so, that one might reasonably ask whether there is any commonality between all of these disparate views. It is hard to see, for instance, how Michael Huemer’s intuitionistic anarchism is related to Matt Zwolinski’s defense of an expanded social safety net. The common elements, however, are:

- 1) a commitment to normative and methodological individualism,
- 2) a general skepticism of political power as well as a faith in market solutions, and
- 3) a strong presumption against coercion.

Marxist and nationalist forms of collectivism reject individualism, while traditional forms of conservatism and social democracy are both skeptical of markets, as well as generally comfortable with an expansive role for government power. All versions of liberalism, however, share a commitment to these three elements in some sense.<sup>3</sup> Libertarianism is distinctive in that each of these elements is pushed to the extreme; how far, and why, will

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<sup>3</sup> It is not clear that “left-libertarians” like Michael Otsuka and Peter Vallentyne would necessarily share all three of these elements. Although there is a commitment to individual rights in their theories, they do not seem to share the skepticism of government power and the faith in markets that is so common in other libertarians. There is more to be said about the distinctiveness of “left-libertarianism” and it is not my intention to write them out of libertarian theory. That said, their philosophical influence is out of all proportion to their numbers (perhaps as few as five) and they have, as of yet, had no impact on contemporary political practice, with the notable exception being van Parijs’s support and popularization of the universal basic income.

determine the shape of the particular libertarian theory. The more faith in markets and the greater the presumption against coercion, the more likely one will be drawn to anarchism. A concern with coercion can also push against anarchism, however. If one believes that coercion at the hands of one's fellows is just as worrying as coercion by the government, a minimal government may seem more likely to defend than to endanger rights (Nozick 1974; Buchanan 2000; Buchanan 2001). While there are important strands of communitarian and non-individualistic strands of liberalism, for instance in the work of John Dewey, T.H. Green, and Bernard Bosanquet (Gaus 1983), there is no version of libertarianism that rejects individualism.

Libertarianism, then, is a family of views defined by a commitment to strong individualism, a presumption against coercion, and skepticism about government power combined with a belief in the efficacy of markets. This conception differs from the common understanding of libertarianism in political philosophy as a doctrine committed to strong self-ownership rights that justify strong property rights (Vallentyne et al. 2005; Otsuka 2005). Neither doctrines seem to be a necessary or sufficient condition for libertarianism, however, if we think that libertarianism is primarily concerned with liberty rather than property. In addition, most notable libertarians (e.g., Milton Friedman, F.A. Hayek, Richard Epstein, etc.) do not share the view of libertarianism attributed to them by the philosophical libertarians. They do, however, fit into the general definition of libertarianism presented here. Besides being more extensionally adequate, this more ecumenical account of libertarianism does not beg any important philosophical or political questions that typically animate libertarians.

## **2. The Idea of the Social Contract**

The idea of a social contract is an ancient one, going back at least to the sophists and Epicurus in classical Greece (Thrasher 2013). The social contract approach of Epicurus and Lucretius was lost during the middle ages, however, and only reappears in the Early Modern

period with the writing of Hugo Grotius and Thomas Hobbes.<sup>4</sup> Inspired by Hobbes, the social contract theorists of the early modern period were primarily concerned with providing a justification for political obligation by consent (Gough 1957, chap.6). But, in so doing, they also articulated a skepticism about political and moral coercion more generally. These views became increasingly radical in the work of Hobbes (Gauthier 1979b), Spinoza (Israel 2001; Nadler 2011), and Locke (Simmons 1993). The very fact that the obligation to obey political rules, on pain of coercive enforcement, requires rational justification introduces a strong presumption against coercion. During this period, this idea alone was a radical break with tradition. This presumption against coercion is shared by libertarianism. Another feature of contractarianism that overlaps with libertarianism is the commitment to normative and methodological individualism. To see the connection between these elements of both theories, however, we need to look more closely at contractarianism in general, before looking at the unique advantage of contractarianism as a foundational justification for libertarianism.

In its modern form, social contract theory is a way of modeling the reasons individuals in a society have for endorsing and complying with social rules (Thrasher & Gaus 2017a).<sup>5</sup> Defined this way, the social contract is a justificatory rather than explanatory tool. As many have noted, the state of nature and contractual consent are not accurate descriptions

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<sup>4</sup> The ideas of Epicurus, as collected in Lucretius's epic poem *De Rerum Natura*, were lost for centuries before being found by the enterprising papal secretary Poggio Bracciolini in an obscure German abbey in 1417. This improbable story is told with verve by Stephen Greenblatt (2012).

<sup>5</sup> T.M. Scanlon's formulation of contractualism is slightly different since he is concerned with whether individuals have a reason to *reject* rather than to endorse various social principles (Scanlon 1982; Scanlon 1998).

of the historical of political organization. This criticism, however, misunderstands the basic idea behind social contract theory: to model how a genuinely voluntary and mutually beneficial society would be structured (Gauthier 1979a; Thrasher 2015). If rational individuals have reason to endorse and comply with the rules in a contractual society, we can then use the contractual test to evaluate the rules and institutions of our own society. As Gauthier describes the contractual approach, “the theory itself concerns the rationale of relationships among persons, and between society and its members, rather than the cause of those relationships” (1977, p.135). The social contract acts as a tool to evaluate existing and possible social rules and institutions.

Various social and legal norms that govern our collective life. If we agree with Buchanan (2000, p.xv) that “precepts for living together are not going to be handed down from on high,” and that even if they were, we would presumably interpret them in multiple and inconsistent ways, we need some way of evaluating those norms. Gauthier (2013, p.617) describes the situation we face:

The recognition that norms are not found in or fixed by nature, and that social norms do not reveal an invariant order, opens the door to the possibility of norms different from those in place, and thereby introduces the need for a justification of existing norms not previously envisaged— why these norms, these requirements and expectations, rather than others? There are of course a host of proposed answers to this question— including an appeal to the gods. But I find no gods, and the answer that I shall defend rests on the individual evaluations with which I began, and introduces only one fiction—the social contract. We shall need that fiction to distinguish the norms that should be accepted, whether or not they in fact are.

Like the fiction of the invisible hand, the social contract points to a larger truth. The only way to guarantee that social life will be genuinely beneficial to everyone involved is show that the rules of social life would command voluntary assent. Although voluntariness in the form of unanimous consent may seem like an impossibly high standard to meet, Buchanan and Tullock (1999) argued in the *Calculus of Consent* that by focusing on institutional orders of norms and constitutional structures we can have unanimous reason to endorse institutions that are themselves non-unanimous (Thrasher & Gaus 2017b). Taking something like this approach allows us to endorse higher order structures and institutions unanimously that then justify non-unanimous lower-level institutions.

Contractarian theory, pursued this way, aims to bring the mutually beneficial power of market exchange to social governance. But simply substituting the market for social norms and political organization will not usually be enough. As Gauthier (1986, p.85) notes, “before Smith’s invisible hand can do its beneficent work, Hobbes’s war of every man against every man must first be exorcized.” Markets require a foundation in basic norms of trust and the assurance that one’s rights are secure. This requires, at least initially, credible enforcement and governance mechanisms (Ostrom 1990; North et al. 2009; North 2010; Acemoglu & Robinson 2012). This governance can be achieved in any number of ways, however, not all of which require explicit political institutions. The making and enforcing of social norms does not always require the existence of a leviathan state (Ostrom 1990). Because of this, contractarianism is not committed to statism in the customary sense. The test of mutual benefit is just as relevant to informal governance institutions and social norms as it is formal political institutions (Thrasher 2014). Indeed, the long-term project of the libertarian contractarian should be to investigate how forms of genuine self-government can realize, in modern societies, the contractarian goals of voluntariness and mutual benefit.

From this rough sketch of contractarianism, it should be clear that there are broad similarities between the interests and approaches of the libertarian and the contract theorist. I have not shown, however, that contractarianism leads directly to libertarianism.<sup>6</sup> While I think there is certainly a libertarian tilt to contractarianism, there is no deduction from one to the other. That said, there are good reasons for libertarians to also be contractarians and good reasons to defend libertarianism along contractarian lines. In the next two sections, I will argue that the contractarian approach helps to solve two perennial problems in libertarian theory. The first is the foundational problem of whether to base libertarian conclusions on some deontological basis (e.g., natural rights) or to adopt a consequentialist justification. The second is how to square a strong presumption against coercion with any system of collective choice and governance, that is, how to adjudicate between the anarchist and minimal government strands in libertarian thought. Contractarianism provides an elegant solution to both of these problems. Or so I will argue.

### **3. Rights and Consequences**

Although there are many paths to libertarianism, most of these paths begin at one of two starting points. We can think of these as *rights-based* and *consequences-based* justifications for libertarianism. Neither of these are strictly mutually exclusive, instead they tend to differ in what they prioritize. Rights-based theories, like those of Robert Nozick (1974) or Murray Rothbard (2003), are not blind to consequences. Rothbard, especially, is at great pains to show that libertarianism will be more economically beneficial than alternative approaches.

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<sup>6</sup> This difference is an important one between the approach here and Jan Narveson's (1989) defense of a libertarian version of contractarianism *The Libertarian Idea*. That work is admirable in many ways, but he argues that there is a direct route from contractarianism to libertarianism, something I have not attempted here.

Even so, Rothbard argues that libertarianism is ultimately justified because it is the only system that can respect the extensive rights of individuals.

Nozick begins *Anarchy, State, and Utopia* (1974, p.ix) with an invocation of rights, claiming that “individuals have rights and there are things no person or group may do to them (without violating their rights).” He then spends the rest of book rigorously following the implications of those rights. Along the way, however, he does little to justify the conception of rights he has invoked, leading commentators like Thomas Nagel (1975) to declare that Nozick had defended a “libertarianism without foundations.” But, of course, Nagel is wrong. Nozick does provide a foundation for his theory precisely in the conception of rights that he begins with. Nozick (1974, p.33) argues that rights “reflect the fact of our separate existences” and that the respect for rights is necessary in order to acknowledge the value of each person’s life. One may ask for a *further* foundation for rights, but to claim that rights are incapable of foundations is merely to reject all rights-based theories on principle. Nozick’s rights-based theory, like Rothbard’s, is intuitionistic in the sense that they both argue there is a strong intuitive reason to believe in certain foundational rights. We may think that this intuitive base of rights is not compelling, but this is to argue with the foundations of rights-based theories, not to reject them for lacking foundations.

Consequences-based theories typically hold that rights-based theories lack foundations or are implausible. Whereas rights-based theories claim the advantage of having a strong intuitive base, consequences-based theories can claim the advantage of being closely connected to standard conceptions of rationality in decision theory and economics (Friedman 1989). In the same way that we evaluate and choose actions most likely to benefit us when we choose rationally as individuals, we should also make our moral and political decisions on the basis of what we expect to produce the best consequences. Regardless of whether we ask “what should *I* do?” or “what should *we* do?” the answer is the same: do what is likely to

generate the best consequences. To do otherwise, argues the consequences-based theorist, would be act in a paradigmatically irrational way on the individual as well as at the collective level. What we should do and, in turn, what our rights are, depends crucially on what actions and rules are likely to generate the best results.

In moral philosophy, consequences-based views are often criticized for being too demanding, that is, for requiring that individuals dedicate all of their time, money, and energy to achieving the best consequences and for adopting an impersonal and abstract notion of the good (Nozick 1974; Williams 1973; Williams 1981). This is not the most compelling argument against consequences-based justifications for libertarianism, however, since the libertarian is already committed to a system of institutions and rights that carve out a significant role for individual freedom and values. Insofar as the libertarian uses a consequences-based justification, they will tend to do so in a way that preserves most traditional libertarian conclusions. Many consequences-based libertarians also claim that freedom contributes to the overall value in the world. As David Friedman argues, “the value to individuals of being able to run their own lives is typically greater than the value to anyone else of being able to control them—or in other words, that increases in liberty tend to increase total utility” (1989, chap.42). If liberty is inherently beneficial, it is no surprise that the consequentialist will also be a libertarian.

An additional practical political benefit of the consequences-based approach is that it may be able to appeal to a wider range of people than a rights-based approach. There may be significant disagreement about the nature and justification of rights, but everyone can presumably see the positive benefits that liberty has in world. This argument is initially very appealing. There is a strong correlation, for instance, between measures of economic freedom, the protection of rights, and human happiness (Bavetta et al. 2016; Bavetta & Navarra 2012; Deaton 2013). The problem, however, is that general agreement about the

importance of these various values is lacking. Egalitarians, for instance, may value material equality above everything else, including overall happiness. Communitarians or traditionalists may value stability and social order over growth and the creative destruction that comes with it. While the effects of freedom may be clear in one sense, the way people values those effects will differ. It is an open question, then, whether the consequence-based approach will be more generally appealing than the rights-based approach.

Some have argued that the tension between these two approaches is necessary and even beneficial. Each approach highlights a different, though equally important, strand in liberal and libertarian thought. As Randy Barnett (2004, p.6), argues:

The creative tension between moral rights and consequentialist analysis reflects a tension that is central to the classical liberal core of the modern libertarian project. ...Liberalism always lay betwixt and between these two great concerns, a position that has led some critics of liberalism to complain of its internal dialectic, inherent tensions, or fundamental contradictions.

There is no doubt that part of the appeal of liberalism generally and libertarianism in particular is its attempt to respect the separateness and dignity of individuals, while also protecting the conditions for individuals to lead meaningful and fulfilling lives. The question is whether these two strands are irreconcilable and contingently connected or whether there is some deeper unity in the rights-based and consequences-based approaches to libertarianism.

I propose that contractarianism can unify these two strands of libertarian thought, incorporating the benefits of each without their drawbacks. Contractarianism, as we saw in the last section, justifies social rules and rights by showing that rational individuals, from their own points of view, have reason to endorse and comply with those rules. As Rawls

argued, in contractarian theory, “the question of justification is settled by working out a problem of deliberation... This connects the theory of justice with the theory of rational choice” (1999, p.16). Like consequences-based theories, then, contractarianism is an application of rationality to the choice of social rules and rights. Unlike consequences-based theories, however, there is no privileged point of view from which those consequences are evaluated. In consequences-based theories the values and interest of everyone in society are aggregated into some representative set of values or, in the case of many forms of utilitarianism, a representation of the average person. As Jan Narveson notes (1989, p.153), in the case of some social policies, the average will be the appropriate evaluative point of view, but this is not true across the board. It is a special, rather than general case. In many cases, the average person will not be the relevant point of view from which to evaluate social rules. For instance, in the case of rules relating to minority groups. Further, this aggregation of points of views and values does not, as Rawls (1999, p.163) put it, “take seriously the distinction between persons” and, does not, as Gauthier (1986, pp.244–245) argues, “take seriously the individuality of persons.” The problem is that by not taking seriously the individuality and differences between persons, there is no clear reason that individuals will have reason to endorse or comply with the requirements of the consequences-based theory. Unless they happened to inhabit the privileged point of view of that theory, it is hard to know why individuals should be motivated by the conclusions of consequences-based theories. Contract based theories avoid this by appealing to the reasons of each person from their own point of view and values.

Similarly, the contract approach is able to both defend a strong conception of individual rights, while also providing a foundation for those rights in the social contract. The contractual approach creates a multi-level theory of justification for rights. In the initial contract, fundamental rights are justified. The justification of the system of rights is

contractual, but the rights themselves function in everyday life as “side-constraints” on action in Nozick’s sense (1974, p.33). It is not necessary or appropriate to make reference to the ultimate justification of those right in everyday life, though it is essential to the contractarian approach that such a justification could ultimately be given (Gauthier 1991). In this way, contractarianism acts as a rights-based theory, which is justified by an individualistic, consequences-based method. As such, it should capture the benefits of both approaches, while avoiding the traditional problems associated with each. Of course, contractarianism has its own problems, mostly to do with the reconciling agreement and diversity as well as how to individuate and distribute rights. These problems, however, are more central to the core concerns of liberal and libertarian interests than the problems with rights-based and consequences-based theories more generally. Because of this, working through the problems of contractarian forms of libertarianism would, I suspect, prove to be more fruitful overall than continuing to debate the relative merits of rights vs. consequences.

#### **4. Anarchism and Self-Government**

In addition to the debate over rights vs. consequences, the other great libertarian divide is between those who think that libertarianism is only compatible with anarchism and those who do not. Again, this dispute is inherent in liberalism and is thrust to the surface by the radicalism of libertarianism. It is a fundamental paradox between the need for stable order in a society and the desire for personal freedom. Or, as James Buchanan (2000, pp.xv–xvii), describes it, the “paradox of being governed:”

Men want freedom from constraints, while at the same time they recognize the necessity of order. This paradox of being governed becomes more intense as the politicized share in life increases, as the state takes on more power over personal

affairs [ . . . ] ‘Ordered anarchy’ remains the objective, but ‘ordered’ by whom? Neither the state nor the savage is noble, and this reality must be squarely faced.

If Buchanan is right and “neither the state nor the savage is noble,” how is the libertarian to proceed? Traditionally there have been two solutions to the paradox of being governed within the libertarian tradition, the first is anarchism and the second is constitutionally constrained limited government. Contractarianism, I will argue, is a way to accept the basic appeal of anarchism, while recognizing that governance institutions are valuable and necessary. In this way, contractarianism offers the libertarian the best of both worlds of anarchism and limited government.

Before showing the benefits of contractarianism, it is necessary to acknowledge the appeal of anarchism. As noted above, libertarians are skeptical of government power and believe that coercion is difficult to justify. The more skeptical one is of governmental power and the ability to justify coercion, the more one will be led to anarchism, which is the rejection of all possible means of justifying political coercion. The strongest form of anarchism is what we can call “philosophical anarchism.” This is the view that government can never be justified. Proponents include Robert Paul Wolff (1970), Murray Rothbard (1977; 2003), and, more recently, Michael Huemer (2013). Their general argument requires several assumptions about the nature of government these include:

1. Governments require/claim authority
2. Authority requires an obligation for individuals to obey the government
3. Obligations to obey severally limit the freedom to act (and/or autonomy)
4. These limitations interfere with the sphere of legitimate freedom (rights)

These assumptions alone do not on their own rule out the possibility of government. An additional premise is required that no justification can be given for the authority to create said obligations. The full argument then can be reconstructed as:

1. Governments require/claim authority
2. Authority requires an obligation for individuals to obey the government
3. Obligations to obey severally limit the freedom to act (and/or autonomy)
4. These limitations interfere with the sphere of legitimate freedom (rights)
5. There is no possible justification for government authority
6. ∴ Governments have no authority to issue obligations that must be obeyed

The conclusion (6) is the main claim of the philosophical anarchist. The anarchist is claiming that government is *impossible* since there is no way to justify its claim to authority.

Notice what premises are doing the work in this argument. Premise 5 is plausible because premises 1-4 are so powerful. Government authority, under this formulation, is a context free and perhaps unlimited ability to create obligations. It is true that most if not all governments have *claimed* this authority, but it is equally true that claiming is one thing and possessing another. Is it really true that governments have this kind of authority? Also, do they really need authority of this form to count as governments? Max Weber (2004) defined the state as having a monopoly on the legitimate use of violence in a given territory, but this “definition” is in many ways aspirational. States cannot allow competitors, but this doesn’t mean that the state needs the authority that the above argument requires. Most states are, as James Buchanan claimed (2001), cases of “ordered anarchy” rather than models of stable control.

In any case, this is the typical argument in favor of *philosophical anarchism*. According to this view, no state has the authority to rule and no one has a general obligation to obey. Philosophical anarchist claims that *all* states necessarily violate rights, therefore a legitimate state is *impossible*. We can contrast this view, however, with political anarchism,

which holds that whether the state has authority or not, that is, whether philosophical anarchism is true, there is no reason to have a state and/or good reason to not have one. These two claims are conceptually independent of one another. That is, one can be a philosophical anarchist without being a political anarchist and vice versa. For most actual anarchists, however, the two claims go together.

Importantly, even if we accept that the philosophical anarchist is right, there is conceptual space for a view that is philosophically anarchist (no state has or can have authority), while not being politically anarchist. That is, there may be some good reasons to have a collective choice mechanism in some circumstances, regardless of whether philosophical anarchism is true. The state may lack general authority, but there may still be reasons to endorse and comply with certain states or governance institutions. If even existing states are forms of “ordered anarchy” rather than legitimate monopolies of violence, the question is not whether to have a state or not but rather how, why, and to what extent to order anarchy (Thrasher 2014). James Buchanan held a contractarian and libertarian position of this form (2001). He described himself as a “two-level utopian,” whose ideal was peaceful anarchy between individuals that respect one another’s basic rights on terms of mutual cooperation. Recognizing that peaceful anarchy would not be a stable system, he advocated the next best thing as he saw it: constitutional contractarianism. Contractarianism provides a basis for thinking about government that goes beyond authority and obligation by focusing on mutual benefit as the only plausible justification for governance institutions.

Contractarianism of this form, provides something like a compatibilist alternative to the debate between anarchist and non-anarchist libertarians. Regardless of the truth of philosophical anarchism, governance mechanism and social norms still require justification. The only form of justification consistent with central libertarian beliefs is on the basis of unanimous rational consent. It is neither necessary, nor beneficial to generate consent for

every rule or norm, however. Rather, what needs to be justified is orders or institutions of rules and norms that govern the higher level functioning of the social system. This is the contractarian constitutional analysis of the sort that is developed by Buchanan (Thrasher & Gaus 2017b; Buchanan & Tullock 1999; Buchanan 2000). It, combined with the other general contractarian approach, provides a basis for evaluating existing and proposed political institutions from a point of view that is compatible with anarchism and respects the rational consent of all involved.

### **5. Why Not Contractarianism?**

I have argued, all too briefly, that a contractarian version of libertarianism has the resources to solve two key antinomies in libertarian theory. Certainly, more needs to be said about the exact form that such a version of contractarianism would take and no existing variants combine all of these elements in exactly the ways required. Even so, the possibility of the general approach to solve these problems is there.

The great appeal of libertarianism and of liberalism more generally is its commitment to respecting the choices of individuals to live their lives in ways they see fit. There is always some social goal justified by the will of a god, the people, or a moral/historical imperative that demands obedience and claims the prerogative to direct the energies and actions of men and women. Liberalism, and especially libertarianism, is unique because it posits no social goal and claims no prerogative to decide how and why we should live our lives. The metaphor of a social contract is a radical and evocative image of this basic idea. To organize ourselves while preserving our freedom and equality, we must contract. Agreement is the only basis of a free society. These agreements must be voluntary and reflect our perceived interests. A society built on this model would be as close to a truly voluntary society as we could ever hope. The real benefit of contractarianism for the libertarian, who already embraces the vision of a voluntary society, is that it provides a framework for moving away

from the traditional antinomies of libertarian thought into a progressive program for developing and analyzing the institutions and orders of a free and open society.

### **Further Reading**

Gauthier, D. (1986) *Morals by Agreement*, Oxford: Oxford University Press. (Still the best and most thorough contemporary philosophical treatment of social contract theory)

Buchanan, J. (1975/2000) *The Limits of Liberty: Between Anarchy and Leviathan*, Indianapolis: Liberty Fund. (A version of contractarianism that focuses on rights and institutions in interesting ways and differs from several of Gauthier's conclusions, while sharing many of his basic views.)

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