Toward an Anarchist Constitutional Political Economy

Michael Wiebe

maswiebe@gmail.com

University of Manitoba

Abstract

I locate the theory of market anarchism within the tradition of constitutional political economy. The paradox of government (a government strong enough to enforce rights is also strong enough to violate them) creates the necessity of constitutional constraints on power. I show how market anarchism is the best solution to the paradox of government. Market competition is the strongest form of checks and balances, so market anarchism is the logical conclusion of constitutionally limited government.
1. Introduction: The Paradox of Government

Quis custodiet ipsos custodes? The age-old problem of who guards the guardians is one of the fundamental paradoxes of constitutional political economy. This "paradox of government" has been succinctly described by Weingast (1995, 1): "The fundamental political dilemma of an economic system is this: A government strong enough to protect property rights and enforce contracts is also strong enough to confiscate the wealth of its citizens." In other words, how is it possible to simultaneously empower and constrain government? How can government be sufficiently empowered to subdue predators without being used as an instrument of predation itself?

The traditional answer given by constitutional political economists has been: constitutional constraints. Federalism, separation of powers, and democratic elections all work to distribute political power in such a way as to place limits on how that power can be used. In the terminology of Buchanan (1975), constitutions can enable the protective and productive state, while restraining the redistributive state.

But it is possible that constitutional constraints can fail. If constitutions can be amended, corrupted, or ignored, then restraints on government power are broken. This paper explores the ability of constitutional constraints to limit the power of government. Can constitutions act as genuine constraints? Does constitutional political economy have an answer to the paradox of government?

The remainder of this paper is organized as follows: Section 2 examines the neglected issue of constitutional enforcement, and the necessity of self-enforcing constraints. Section 3 examines three institutional constraints on government power: democracy, federalism, and emigration. While these constraints are imperfect, they each embody a more fundamental principle of constitutionalism: reciprocity, checks and balances, and exit. Section 4 argues that market anarchism represents the most effective implementation of these principles, and hence is the logical conclusion of constitutionalism. Section 5 considers the role of ideology under limited government and market anarchism. Section 6 concludes.
2. Constitutional Enforcement

If constitutional constraints are to be the solution to the paradox of government, they must be enforced. But how is this to be accomplished? After all, there is no third party available to enforce constraints that is external to the government itself. One would think that a serious problem like this would be widely discussed in the literature. Unfortunately, the typical position on constitutional enforcement is that of Brennan and Buchanan (2000 [1980], 13-14):

There is ... one crucial assumption which clearly underlies the whole constitutional construction—that of enforceability. ... We reject the Hobbesian presumption that the sovereign cannot be controlled by constitutional constraints. Historically, governments do seem to have been held in check by constitutional rules. The precise reasons why this has been so need not concern us here. But our whole construction is based on the belief, or faith, that constitutions can work ...

As Farrant (2004) notes, "[c]onstitutional political economy has to date paid far too little attention to constitutional enforcement." (p. 449) This neglect of the question of constitutional enforcement has in turn obscured a fundamental principle of constitutionalism: constitutional constraints must be self-enforcing. Because there is no agency external to government available to enforce constraints, enforcement must either be left to government, or constitutional constraints must be self-enforcing. The first case is incoherent: a constraint that is only binding when one decides to obey it is no constraint at all. Thus the only option for a workable constitutionalism is that constraints are self-enforcing. One upshot is that in evaluating constitutional constraints on government, we must look primarily at the extent to which they are self-enforcing. Merely showing that constraints have the potential for limiting government is not enough; it must also be shown that they are self-enforcing, and thereby are incentive compatible.

Why has constitutional political economy failed to address the problem of constitutional enforcement? One explanation is an overly mechanistic approach to constitutionalism. For example, Buchanan (1975, 95) writes that "Ideally," government would be "some wholly

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2. Sutter (1997) analyzes the ability of judicial review to enforce constitutional constraints. His paper does not ignore the problem of constitutional enforcement, but he does not go far enough. He writes that "Most of the enforcement difficulties identified in this paper can be effectively resolved, at least when Supreme Court decisions can be enforced on the rest of government." (147, emphasis added) But what enforces Supreme Court decisions?
impersonal mechanism, a robot that could do nothing but follow automatized instructions”. On this view, the entire principal/agent problem of constraining government does not even arise, because unlike humans, robots do not respond to incentives! Farrant (2004, 449) notes the tendency to analogize constitutional constraints as physical constraints. If constraints are seen as a mechanistic "enforcement technology," like fences or chains, rather than rules that must be applied by actual people, the entire problem of incentive compatibility is simply assumed away.

3. Constitutional Constraints on Government

Constitutional constraints on government power are necessary to resolve the paradox of government. In this section I analyze three forms of institutional constraints on government power: democracy, federalism and separation of powers, and emigration. However, these constraints are not sufficient: they are imperfect and do not provide a reasonable guarantee that government power will be used only for the protection of rights.

The first institutional constraint is democracy. The idea here is simple: through elections, allow voters to exercise control over politicians. If politicians disobey or ignore voters' wants, they will be thrown out. Politicians that give voters what they want will stay in office. The core idea is to establish reciprocity between rulers and subjects, and thereby make the rulers accountable to the interests of their subjects.

There are, however, well known problems that weaken the effectiveness of electoral constraints. First is the problem of rational ignorance: because they have virtually no chance of affecting the outcome of an election, voters do not have the incentive to acquire information about politicians or policies. For the same reason, voters have little incentive to hold rational beliefs about policy: they are rationally irrational. There is also the logic of special interests. Politicians will concentrate benefits on the well-organized and well-informed by dispersing costs on the poorly-organized and poorly-informed. The interests of politicians and the masses are not aligned. Finally, democratic elections do not protect the interests of the minority, and indeed may enable the majority to actively exploit the minority. For all these reasons we should not expect voters to be able to monitor their rulers closely enough to hold them accountable.³

³ Buchanan (1981, 443) also attacks the effectiveness of electoral constraints. He labels as the "Electoral Fallacy" the naive belief that democratic electoral constraints are sufficient to restrain government.
A second form of institutional constraint on government power lies in the idea of checks and balances: organizing the structure of government in such a way as to balance interests against each other so that no branch of government can use its power unchecked. In Madison's phrase, "Ambition must be made to counteract ambition." And as Barnett (1998, 253) writes: "The essence of this strategy is to create an oligopoly or a "shared" monopoly of power. This scheme preserves a monopoly of power but purports to divide this power among a number of groups, each having limited jurisdiction over the others. ... The object of such schemes is to create checks and balances." Whereas a one-man dictatorship is completely unconstrained, checks and balances provide constraints on government power.

The principle of checks and balances can be implemented in the form of federalism, where power is divided between the central government and sub-governments (e.g., between the federal government and the states), or through the separation of powers, where government power is separated into legislative, executive, and judicial branches. Under federalism, the ideal scenario is that federal forums test state actions and state forums test federal actions; there is a reciprocal relationship between the federal and state governments (Wagner 1993, 50). But in practice this relationship is hierarchical; the federal government can simply overrule the states and act as a judge in its own case (Voigt 1997, 43).

The separation of powers can also break down, because the different branches have an incentive to collude and cooperatively expand their power. As Long (2008, 141) writes:

> Despite the best intentions of those who framed the U.S. Constitution’s checks-and-balances system, there has been sufficient convergence of interests among the three branches that, occasional squabbles over details notwithstanding, each branch has been complicit with the others in expanding the power of the central government.

And as Barnett (1998, 254) writes:

> Eventually, entrepreneurs of power—master politicians, judges, executives, or outsiders called "special interest groups"—figure out ways to teach those who share the monopoly that each has an interest in cooperating with the others in using force against those who are outside the monopoly. This process may take some time, but gradually what is originally conceived of as "checks and balances" eventually becomes a scheme more aptly described as "you don't step on my toes and I won't step on yours" or "you scratch my back, I'll scratch yours."
While governments that contain checks and balances are no doubt better than governments that do not, the fact remains that these constraints on government power are imperfect and can break down. Thus, although federalism and separation of powers are a step in the right direction, we should not expect them to effectively constrain government power.

The third institutional constraint on government power is exit: permitting citizens to leave the government's jurisdiction. The ability to reduce their government's tax base gives citizens an important mechanism for holding their government accountable. One implementation of the power of exit is free emigration. Citizens can vote with their feet and emigrate to a different country if their government does not serve their interests.

As a check on government power, however, free emigration is quite limited. This is because of the high costs of emigration: changing jobs, abandoning friends and community, learning a new language, or adapting to a new culture all mean that exercising the power of exit can be very costly. Accordingly, governments can be fairly oppressive before the benefits of emigration outweigh the costs. Barnett (1998, 255) gives the example of "the millions of Jews who remained in Nazi Germany and surrounding countries when they still had the opportunity to escape."

A more potent implementation of the power of exit is secession. If individuals, associations, and regions could renounce the government's jurisdiction and set up their own arrangements, the government rulers would be much more limited in their exercise of power. Governments that refused to respect citizens' rights would face the very real threat of losing their jurisdiction. A right of secession would thus provide very strong incentives for governments to respect their citizens' rights.

However, the right to secede is probably too strong of a check on government power. As Barnett (1998, 255) notes, "Unfortunately, perhaps because of its potential effectiveness, a right of secession has only been weakly incorporated into modern schemes." While secession is a very strong constraint on government power, it is for the same reason unlikely to be adopted by any government.

Democracy, federalism, and emigration are three of the most well-known institutional mechanisms designed to constrain government power. While they have largely failed in this task, each embodies a fundamental principle necessary for constraining the power of government: reciprocity, checks and balances, and the power of exit. In the next section, I argue that the
system of market anarchism is the best instantiation of these three principles, and hence market anarchism is the logical conclusion of limited government.

4. Market Anarchism as Constitutionally Limited Government

The simplest way to understand the theory of market anarchism is to start with the minimal state—where government is limited to police, courts, and national defense—and then imagine what would happen if these functions were turned over to the free market. The legal system would not be provided by a monopoly organization, but by decentralized competing firms. Protection agencies funded by willing customers would protect property rights, and private courts would adjudicate disputes and produce laws.\(^4\)

How does market anarchism solve the paradox of government? The answer is that market anarchism is based on the incentive structure of market competition and the profit and loss system. The "constitution of anarchy," then, consists in the institutions of the free market, and the primary constitutional constraint on power is market competition.\(^5\) As Long (2008, 141) puts it: "Far from eschewing checks and balances, market anarchists take market competition, with its associated incentives, to instantiate a checks-and-balances system, and to do so far more reliably than could a governmental system." Thus market anarchism brings about all the familiar benefits of market competition: producers must sell a product that consumers are willing to purchase; unsatisfied customers can take their business elsewhere; and firms that satisfy customers earn profits while firms that do not incur losses. Protection agencies would have strong incentives to serve their customers, and this is a powerful constraint on their ability to use force. A monopoly government, in contrast, is insulated from market competition, and so faces incentive and information problems in providing consumers with efficient and inexpensive service.

It is easy to see how market anarchism implements the principles of reciprocity, checks and balances, and the power of exit. To begin with, because protection agencies would solicit voluntary payments rather than extracting funding through coercion, and because consumers

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5. Long (2008, 139-140) writes: "when we speak of constitutional restraints we are presumably not talking merely of restrictions written into a legal document. Such paper prohibitions are neither necessary (look at Britain) nor sufficient (look at Soviet Russia) for actually operative restraints. What matters is a nation’s “constitution” in the original sense of the actual institutions, practices, and incentive structures that are in place."
could easily switch agencies⁶, there would be a genuinely reciprocal relationship between consumer and producer. As Barnett (1998, 260) writes:

"Deprived of the power to collect revenues and to coercively impose their services upon consumers, law enforcement and adjudicative agencies dependent upon contracts rather than taxation for revenue would have to be comparatively more responsive to the needs and desires of their consumers than agencies with the right to confiscate their revenues."

And as Mises argued, it is precisely the free market, not democracy, that empowers the ordinary person:

In the capitalistic society, men become rich … by serving consumers in large numbers. … The capitalistic market economy is a democracy in which every penny constitutes a vote. The wealth of the successful businessman is the result of a consumer plebiscite. Wealth, once acquired, can be preserved only by those who keep on earning it anew by satisfying the wishes of consumers. The capitalistic social order, therefore, is an economic democracy in the strictest sense of the word. In the last analysis, all decisions are dependent on the will of the people as consumers. (Mises, 1978, p.178)

Thus market competition implements the principles of reciprocity and exit⁷ to make protection agencies more accountable to consumers, and in so doing provides a much stronger constraint on power than does democracy or emigration under a government system.

Market competition is perhaps the quintessential example of checks and balances. Competition between firms for profits leads them to cut prices and innovate, all in the effort to satisfy consumers. Firms check each other by producing a better product at a lower cost, and free entry into the market ensures that potential competition is a permanent threat. Barnett (1998, 273) writes: "In contrast with a coercive monopoly, actual or potential competition provides genuine checks and balances that can effectively constrain enforcement abuse. ... [I]n a competitive legal

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6. Long (2008, 146): "A government can’t lose “customers” (taxpayers) unless they take the drastic step of moving to a new country; by contrast, switching protection agencies would be as easy as switching long distance service."

7. Barnett (1998, 273): "By having the choice to shift one's legal affiliation without having to incur the substantial costs of expatriation means that things do not have to get nearly so bad before people are willing to switch. The increased threat of potential secession or exit that results from lowering its cost, can greatly constrain the potential for enforcement abuse."
order, an individual excluded from or oppressed by one legal system can appeal to another. An individual shut out of a monocentric legal system cannot. The discipline imposed by market competition and profit and loss ensures that protection agencies are accountable to their customers.

On the other hand, "[s]eparation of powers, like federalism and elective democracy, merely simulates market competition, within a fundamentally monopolistic context." (Long 2008, 141) Under market anarchism, checks and balances are multiplied, as there can be potentially thousands of protection agencies, all of which check and balance each other. But under government, the different branches of government have a much easier time colluding. Compared to market competition, the checks and balances provided by federalism and separation of powers appear very flimsy indeed.

Except for the weak constraint of democracy, all constitutional constraints on government are internal. That is, they work by organizing the internal structure of government so that the different branches can check and limit each other. In contrast, under market anarchism each protection agency can be externally constrained by other agencies. As Long (2008, 137) explains:

"Market anarchists reject the concept of monopoly government, insisting that every legal institution must be subject to correction from without. It follows, of course, that any agency doing the correcting must also be subject to correction, and so on. This doesn’t lead to an infinite regress, however, because while any legal institution is subject to correction from other legal institutions, those in turn are subject to correction from the first one; legal institutions check and balance each other."

"Anarchy thus represents the extension, not the negation, of constitutionalism." (Long 2008, 141) The market anarchist criticism of limited government is not a rejection of constitutionalism; rather, it claims that limited government does not go far enough in implementing the principles of constitutionalism. The constitutional constraints on power provided by market competition are much more effective than those resulting from democracy, federalism, and emigration. Hence market anarchism represents the logical conclusion of constitutionalism. The principles underlying constitutionally limited government—reciprocity, checks and balances, exit—are most effectively realized in the system of market anarchism. If our goal is to establish constitutional constraints on power, we are logically impelled to accept market anarchism as the most appropriate means. Truly effective constraints on power require breaking the government monopoly and relying on the system of checks and balances inherent in market competition.
I suggest therefore that the theory of market anarchism should be seen as part of the tradition of constitutional political economy. James Buchanan (1990, 1) defined this tradition as "a research program that directs inquiry to the working properties of rules, and institutions within which individuals interact, and the process through which these rules and institutions are chosen or come into being." It seems to me that the theory of market anarchism can fit neatly into this research program: analysis of the rules and institutions that emerge under market anarchism falls precisely under the domain of constitutional political economy.  

5. The Importance of Ideology Under Limited Government and Market Anarchism

Tyler Cowen has presented a sort of impossibility theorem in objection to market anarchism. (Cowen 1992; see also Cowen and Sutter 1999) Cowen argues that law is a network industry; firms must be able to coordinate their legal codes to prevent inter-agency warfare. But, Cowen argues, if protection agencies can cooperate to exclude outlaw agencies, they can also collude to form a cartel and restrict entry into the network. On the other hand, if protection agencies cannot cooperate to exclude outlaw agencies, then they cannot coordinate their legal codes to prevent inter-agency disputes. Either we have Hobbesian Leviathan or Hobbesian anarchy.

Caplan and Stringham (2003) respond to Cowen's objection, arguing that Cowen conflates coordination games and prisoners' dilemmas. Whereas coordinating legal codes is a coordination game, colluding and forming a cartel is a prisoners' dilemma. Since coordination games are easier to solve than prisoners' dilemmas, there is a "sweet spot" where protection agencies can cooperate to coordinate legal codes, but they cannot collude to form a cartel. Thus, between Hobbesian Leviathan and Hobbesian anarchy there lies a middle ground of stable market anarchism.

In their response, Cowen and Sutter (2005) accept the existence of a sweet spot, but argue that it is fragile and unstable. A legal network requires more cooperation than a simple coordination game, and this sets up the possibility of protection agencies using their market power to create barriers to entry and leading to the evolution of a government.

8. I am assuming that the arguments for market anarchism are successful, and that the objections raised by, e.g., Nozick and Cowen, fail. The task of this paper is to show how market anarchism can fit into the tradition of constitutional political economy. In future work I plan to examine directly the arguments for and against market anarchism.
Stringham and Hummel (2010) argue that preferences and ideology can play an important role in the feasibility of market anarchism. Even if we accept Cowen's argument that the protection agencies in the network would use coercion against competitors, a change in preferences towards libertarianism would create an ideological constraint against coercion. In other words, public support for libertarianism would make the market anarchism sweet spot both stable and feasible.

I want to draw attention to a symmetry between market anarchists and minimal statists. Market anarchists realize that incentives may not be enough, and that preferences and ideology may be necessary to establish a market anarchist society that is both stable and libertarian. But the same is true of minimal statists. Advocates of limited government from Buchanan to Hayek have argued that constitutional constraints on government are fragile and can break down. If government is to remain limited, there must be widespread public support. Thus Buchanan (1981, 439) claims that limited government requires the "widespread adoption of a genuine 'constitutional attitude,' a proclivity or tendency to examine issues from a constitutional perspective, as opposed to the pragmatic, short-run, utilitarian perspective that seems to characterize ... day-to-day political discussion and action." Hayek (1960, 206) writes that the rule of law "will be effective only in so far as the legislator feels bound by it. In a democracy this means that it will not prevail unless it forms part of the moral tradition of the community, a common ideal shared and unquestioningly accepted by the majority." And as Madison wrote in The Federalist 51, "A dependence on the people is, no doubt, the primary control on the government". Without public support, government power is unconstrained, and will be used to violate rather than protect property rights.9

Thus both market anarchists and advocates of limited government recognize the necessary role of ideology in maintaining their respective systems. Public support is necessary for the stability of both systems. It is probably accurate to say that no social order is robust to ideology: unless enough people support the institutions that they live under, that society will be unstable. The conclusion here is that it is wrong to infer from market anarchism's dependence on ideology the superiority of limited government. On the contrary, limited government too requires the support of public opinion for constitutional constraints to be effective. Seeing as both systems depend on

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9. See also Wenzel (2010, 56-57): "Informal constraints—a willingness to be bound ... maintain a central importance for constitutionalism. If a critical mass of individuals refuses to be bound, if it rejects constitutionalism generally or the constitution specifically, if it does not accept the deferral of current power for long run stability, the entire constitutional undertaking will fail."
ideology, the task for future research is to determine the extent of such dependence. In other words, investigate the robustness of each system to ideology: analyze how each system fares under best-case, moderate-case, and worst-case ideological conditions.10

6. Conclusion

The paradox of government is that a government strong enough to protect property rights is also strong enough to violate them. Constitutional constraints on government power are designed to overcome this dilemma, but they are at best an imperfect solution. Without public support for limited government, constitutional constraints break down and government power is unbounded. I claim that market anarchism is the logical conclusion of constitutionally limited government. Because the checks and balances inherent in market competition are the strongest constraint on power, market anarchism is the best solution to the paradox of government. Accordingly, the theory of market anarchism should be seen as part of the tradition of constitutional political economy.

10. See Taylor and Crampton (2009) for an example of this type of work.
References


