

CONSTITUTIONAL ECONOMICS AND THE CALCULUS OF CONSENT

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James Buchanan and Gordon Tullock are widely credited with creating the Public Choice School.¹ Its main elements include constitutional political economy, an analysis of different voting-rights regimes, and the insight that human beings do not suddenly sprout angel's wings when they become government bureaucrats (hence, there is *government failure* as well as *market failure*). The latter is devoted to an investigation of the premises upon which a legitimate government is predicated, and to an understanding of human and property rights in a constitutional democratic order. In this paper, public choice constitutional economics shall be subjected to critique.

DEFINING HUMAN AND PROPERTY RIGHTS

From their constitutional framework, Buchanan and Tullock attempt to define human and property rights. In their view, a constitution is a voluntary agreement, much like a contract, to which all citizens give their consent. Thus, they claim that “constitutional decisions themselves . . . are necessarily collective.”²

What does this mean, though? How could this sentiment be translated? It appears that Buchanan and Tullock mean to assert that there are no rules “engraved upon stone tablets,” no “God-given” rules, in

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¹James M. Buchanan and Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan, 1962).

²Buchanan and Tullock, *Calculus of Consent*, p. 6.

effect, which tell us how to live. Rather, individuals must come together to hammer out a collective agreement addressing the rules under which we must get along. At first glance, this sounds eminently sensible. After all, it is very much in keeping with Buchanan and Tullock's gratuitous attack on "revelation."³

However, there is a grave logical difficulty in this way of proceeding. On one hand, Buchanan and Tullock want to derive human and property rights from their constitutional framework. On the other, they want to assert that this is done on a consensual basis. But how can people give their consent to a contract before it is clear that they have rights in the first place?⁴

Buchanan and Tullock find it "useful to 'jump over' the minimal collectivization of activity involved in the initial definition of human and property rights,"⁵ but this is the essence of their problem. They

³Buchanan and Tullock, *Calculus of Consent*, p. 4.

⁴For an elaboration of this point, see Thomas J. DiLorenzo and Walter Block, "Is Voluntary Government Possible? A Critique of Constitutional Economics," *Journal of Institutional and Theoretical Economics* 156, no. 4 (December 2000).

Libertarian philosophy, which is the foundation for our critique, starts with an explication of rights and builds a structure from there. For a libertarian discussion of rights based on the "argumentation ethic," see Hans Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Boston: Kluwer Academic Publishers, 1993). For the more general case of the libertarian philosophy, see Murray N. Rothbard, *For a New Liberty* (New York: MacMillan, 1978); Murray N. Rothbard, *The Ethics of Liberty* (Atlantic Highlands, N.J.: Humanities Press, 1982); Hans Hoppe, *A Theory of Socialism and Capitalism* (Boston: Dordrecht, 1989); Bruce L. Benson, "Enforcement of Private Property Rights in Primitive Societies: Law Without Government," *Journal of Libertarian Studies* 9, no. 1 (Winter 1989); Bruce L. Benson, "The Spontaneous Evolution of Commercial Law," *Southern Economic Journal* 55 (1989); Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco: Pacific Research Institute for Public Policy, 1990); David Friedman, *The Machinery of Freedom: Guide to a Radical Capitalism*, 2nd ed. (LaSalle, Ill.: Open Court, 1989); Tibor Machan, "Law, Justice, and Natural Rights," *Western Ontario Law Review* 14 (1975); Tibor Machan, *Individuals and their Rights* (LaSalle, Ill.: Open Court, 1989); Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974); and Walter Block, "Libertarianism vs. Libertinism," *Journal of Libertarian Studies* 11, no. 1 (1994).

⁵Buchanan and Tullock, *Calculus of Consent*, p. 46.

cannot just “jump over” it and hope to retain any semblance of rationality for their public choice theory. To their credit, Buchanan and Tullock recognize that there is a problem here. They concede that

it is difficult even to discuss the problems of individual constitutional choice until the range of individual power of disposition over human and nonhuman resources is defined. Unless this preliminary step is taken, we do not really know what individuals we are discussing.⁶

Also, reasonably, they maintain that an analysis of this preliminary step “would carry us too far afield.”⁷ After all, there is a division of labor in all pursuits, scholarly ones included. However, in this case, such an argument simply will not do. If public choice is truly to be a constitutional theory, they must show how this initial step is consonant with the constitution. However, they make no such attempt. Instead, they content themselves with noting that “for our purposes, *any* delineation of property embodying separable or group shares provides a suitable basis.”⁸ By taking this stance, they preclude themselves from even trying to incorporate constitutionalism into the basic premises of their doctrine.

VOLUNTARY GOVERNMENT: A LOGICAL CONTRADICTION

We come now to a truly puzzling bit of writing on the part of our authors. In their view,

Voluntary action may emerge which will include all members of the social group. Here the action may be institutionally indistinguishable from political action. Governmental institutions may be employed to effect purely voluntary cooperative action. The characteristic feature would be the absence of any of the coercive or compulsive power of the government. An example might be the organization of a village fire department.⁹

Below, we shall refer to this as statement A.

It would be difficult to imagine a more confused statement than this. Consider the following: even if the group is small and relatively

⁶Buchanan and Tullock, *Calculus of Consent*, pp. 46–47.

⁷Buchanan and Tullock, *Calculus of Consent*, p. 345 n. 3.

⁸Buchanan and Tullock, *Calculus of Consent*, p. 345 n. 3, emphasis added.

⁹Buchanan and Tullock, *Calculus of Consent*, p. 49.

homogeneous, it is just barely conceivable that “voluntary action may emerge which will include all members of the social group.” But given the difficulty of even a dozen friends coming to an agreement as to which movie to attend, and which restaurant to patronize afterward (or should it be beforehand?), it is *extremely* unlikely that a “social group” of a size to warrant such a description would garner unanimous assent for *anything*.

But suppose it did. It would *still* not be the case that “the action may be institutionally indistinguishable from political action.” On the contrary, it would be entirely distinguishable. For voluntary action is that which is agreed to by *all* participants; political action is that which is *not*.

If a government institution were employed, by its very nature it would not be to effect purely voluntary cooperative action. On the contrary, it would be the embodiment of a contract that did not include at least one member of the society. If it included them all, why call this governmental? On the contrary, it would be purely private.

Consider now the fire department which each and every soul in the village agreed to support. This would indeed be characterized by “the absence of any of the coercive or compulsive power of the government.” In that case, why, for the love of logic, call it “government”? Suppose that the entire town had agreed to play bingo, or to go on a picnic? Would this make such an activity a statist one? Hardly. Why, then, consider a voluntary fire brigade, organized on identical principles, an element of the government?

Now consider the Buchanan and Tullock statement that we shall label *B*:

The choice between voluntary action, individual or cooperative, and political action, which must be collective, rests on the relative costs of organizing decisions, on the relative *costs of social interdependence*.¹⁰

Consider the following two-by-two matrix:

	Voluntary-Market	Coercive-Political
Private	(1)	(2)
Collective	(3)	(4)

¹⁰Buchanan and Tullock, *Calculus of Consent*, p. 48, emphasis in original.

From statement *B*, we learn that there are three possible states of affairs: (1) depicts the case where two individuals trade; this is the market; (3) indicates voluntary cooperative effort on the part of a large number of people; examples include private charity, the kibbutz, and the commune; and (4) is the government which, at the very least, must raise taxes from some people who are willing to pay only because of physical sanctions; if all were willing to pay, then (4) would collapse into (3). We are also given to understand that one of the boxes is empty, namely, (2), because Buchanan and Tullock tell us that “political action . . . must be collective.” The key to this matrix is that institutions can be distinguished both on the basis of how many people take part (one or two on the one hand, many on the other) and the issue of whether there is full agreement among all participants.

But statement *A*, in contrast, directly contradicts the distinction between the two columns. Here, Buchanan and Tullock seem to think that there is no difference between (3) and (4), at least in the case of the voluntary village fire company. Alas, they cannot have it both ways. Either *A* or *B* is correct, but not both together. As our previous remarks have indicated, *A* is problematic on numerous grounds.

There are numerous private institutions like the volunteer fire brigade.¹¹ Among them are such collective, but private and voluntary, organizations as the church, the golf club, the family circle, the Boy Scouts, and the bowling league. They are all cooperative ventures, run collectively, not through for-profit markets, that no one is forced to join. They are not funded through taxes.¹² Why call them political, or part of the public sector, as do Buchanan and Tullock? On this ground, logical consistency would imply that the Boy Scouts are actually a governmental organization, surely a *reductio ad absurdum* of the whole scheme.

A CONCEPTUAL CLASSIFICATION

In this section, the authors present the nub of their public choice justification for the state. How will it be rationally determined if a

¹¹Michael Novak, in *The Spirit of Democratic Capitalism* (New York: Simon and Schuster, 1978), calls them “mediating institutions.”

¹²They may be given tax *exemptions*, but this is not to be interpreted as a tax subsidy or benefit given to them by the government. The only way to rationalize such an interpretation would be to posit that the government really owns the entire GDP, and whatever is untaxed—that is, whatever wealth it leaves to us, the creators, is really a “gift” from government to us.

given task should be assigned to the public or private sector? The same way in which decisions are made in the market: cost minimization. If it costs more to do a job collectively, it is reasonable to assign it to free enterprise. If it costs more to do the work individually, through markets, it is reasonable to assign it to socialism.¹³ In this analysis, they are squarely back in the land of *B*.

There are, again, only three possible categories: voluntary individual action, voluntary cooperative action, and collective political action. The fourth possibility, voluntary political action, once more becomes the null set. So much for having “government institutions employed to effect purely voluntary co-operative action.”¹⁴

How do we know this? Because, in their scheme, there are only three cost considerations. The first is described as follows: “For any activity, the expected minimum present value of total costs expected to be imposed by collective decision-making shall be designated by the letter *g*.”¹⁵ As for the second, “We designate by the letter *a* the expected costs resulting from the purely individualistic behavior of private persons.” With regard to the third, “The expected costs of an activity embodying private contractual arrangements designed to reduce [to internalize] externalities will be designated by the letter *b*.”¹⁶

For our purposes, *a* stands for purely individualistic behavior, e.g., markets, where cooperation is only implicit. Explicitly, people are not cooperating; they are competing through markets. In contrast, *b* denotes cooperative or collective voluntary action: the mediating institutions we have encountered before. And *g*, of course, indicates government operation, organized through democratic elections,¹⁷ where the unwilling minority is coerced into going along with the decision arrived at in this manner.

These three categories yield six different cases, depending upon the relative costs of each. They are as follows:

¹³Of course, Buchanan and Tullock never use the “S” word, but this should not be allowed to obfuscate the essence of their theory.

¹⁴Buchanan and Tullock, *Calculus of Consent*, p. 49.

¹⁵Buchanan and Tullock, *Calculus of Consent*, pp. 49–50.

¹⁶Buchanan and Tullock, *Calculus of Consent*, p. 50.

¹⁷What of the case where there is but one dictator, not a dictatorship of the majority? This, too, fits our *g* model. Buchanan and Tullock, however, give it short shrift, first because they are concerned with voting, and second because they think that this implies consent (hence, the title of the canonical book for public choice).

1. $a < b < g$
2. $a < g < b$
3. $b < a < g$
4. $b < g < a$
5. $g < a < b$
6. $g < b < a$

Edifying as a discussion of each case would be, there is no need to analyze them all. For our purposes, it matters not a whit whether $a < b$ or $b < a$. Both a and b are part of free enterprise, and are equally legitimate elements of capitalism. It does not matter whether several working women with small children form a baby-sitting cooperative (b), or whether one of them goes into business for herself and charges a price for this service to the others (a). Which of these is less expensive in the relevant sense, and thus which will be used, is outside the concerns of this paper. Our sole interest is in the cases where Buchanan and Tullock claim that g is cheaper—that is, more efficient—than either a or b , and that government intervention into the marketplace is, therefore, justified. This being the case, Buchanan and Tullock’s six-part discussion can easily be abbreviated. Categories 1 and 3 drop out because, in these cases, Buchanan and Tullock allow that g is “more expensive” than either a or b . Moreover, parts of 2 and 4 fall by the wayside since they depict situations where g is inferior to one or the other of a and b . As a result of these considerations, we derive the following:

2. $g < b$
4. $g < a$
- 5,6. $g < c$

where c denotes capitalism—that is, either a or b . With this condensation, we can discuss the specifics of their argument.

DISCUSSION

Buchanan and Tullock reach their first jarring note in their treatment of the contention that $a > 0$.¹⁸ In their view,

The color of the automobile that your colleague drives certainly influences your own utility to some extent. Spillover effects are clearly present, but you will probably

¹⁸This statement in and of itself is entirely unobjectionable. It is their discussion of it that is problematic.

prefer to allow your colleague free individual choice as regards this class of decisions.¹⁹

The problem here is not so much with the specific notion that $a > 0$; after all, as long as $a < g$, even though $a > 0$, even Buchanan and Tullock do not argue for the intervention of g . Rather, the difficulty is with their entire manner of proceeding. They argue that they²⁰ can determine the costs of things which do not emanate from market transactions. However, we cannot determine the strength of g and c in the absence of markets, and neither can they. Indeed, no one can; it is an utter impossibility, given that costs are opportunities foregone, and that only the economic actors themselves are in a position to appraise the costs of what they had to give up in order to attain any value.

Car color is perhaps the easiest case that Buchanan and Tullock can manufacture for themselves. But even here, their seemingly innocuous remarks are by no means as unassailable as they seem to believe. Suppose a band of hippies move into a high-class neighborhood, and bring with them an automobile colored in the style of a Jackson Pollock painting, that is, with a mishmash of different hues, pigments, shades, and tints. Is it credible to think that none of their stiff-upper-lip neighbors will take umbrage? Hardly. But we need not resort to fanciful examples of car color. We know for a fact that this is precisely how people feel about exterior house paint, as illustrated by the fact that numerous condominium development and restrictive covenant contracts stipulate that all parties to the agreement shall use a certain hue.

This is the case of the red underwear all over again.²¹ People care about all such things—and probably many more than we can even imagine. If Buchanan and Tullock cannot come up with even one example of a pure private good with no spillovers or externalities, to that extent their entire theory is undermined.

Of course, much of the reason why there are uninternalized externalities in automobile color is due to a lack of private property

¹⁹Buchanan and Tullock, *Calculus of Consent*, p. 52.

²⁰Or someone else, e.g., a disinterested bureaucrat, it does not matter.

²¹“If an individual chooses to wear red underwear, presumably no other member of the social group suffers a cost. To any given individual, therefore, the organization of this activity privately involves no external costs.” Buchanan and Tullock, *Calculus of Consent*, p. 45. For more on this, see Walter Block, “Another look at *The Calculus of Consent*,” forthcoming.

rights in roads, highways, streets, and sidewalks.²² Were these transportation arteries privatized, people would be able to express their likes and dislikes through markets, and the problem would not even arise. That is, if the Jackson Pollock car appalled enough people, many road owners would forbid it from their property. Presumably, it would be used on thoroughfares where people did not mind it so much or even liked it.

Would this work perfectly? Not a bit of it. No institution known to man and tailored to his use can accurately be described in such a manner. But at least it would function voluntarily. No one would be

²²For defenses of the notion that institutional arrangements along these lines are feasible no matter how counter-intuitive they sound at the outset, see Walter Block, “Free Market Transportation: Denationalizing the Roads,” *Journal of Libertarian Studies* 3, no. 2 (Summer 1979); Walter Block, “Congestion and Road Pricing,” *Journal of Libertarian Studies* 4, no. 3 (Fall 1980); Walter Block, “Public Goods and Externalities: The Case of Roads,” *Journal of Libertarian Studies* 7, no. 1 (Spring 1983); Walter Block, “Theories of Highway Safety,” *Transportation Research Record* 912 (1983); Walter Block, “Road Socialism,” *International Journal of Value-Based Management* 9 (1996); Matthew Block and Walter Block, “Roads, Bridges, Sunlight, and Private Property Rights: Reply to Gordon Tullock,” *Journal des Economistes et des Etudes Humaines* 7, nos. 2/3 (June–Sept. 1996); Michelle Cadin and Walter Block, “Privatize the Public Highway System,” *The Freeman* 47, no. 2 (February 1997); Gerald Gunderson, “Privatization and the 19th Century Turnpike,” *Cato Journal* 9, no. 1 (Spring/Summer 1989); Dan Klein, “The Voluntary Provision of Public Goods? The Turnpike Companies of Early America,” *Economic Inquiry* (1990); Dan Klein, J. Majewski, and C. Baer, “Economy, Community, and the Law: The Turnpike Movement in New York, 1797–1845,” *Journal of Economic History* 53, no. 3 (March 1993); Dan Klein, J. Majewski, and C. Baer, “From Trunk to Branch: Toll Roads in New York, 1800–1860,” *Essays in Economic and Business History* (1993); Dan Klein and G.J. Fielding, “Private Toll Roads: Learning from the Nineteenth Century,” *Transportation Quarterly* (July 1992); Dan Klein and G.J. Fielding, “How to Franchise Highways,” *Journal of Transport Economics and Policy* (May 1993); Dan Klein and G.J. Fielding, “High Occupancy/Toll Lanes: Phasing in Congestion Pricing a Lane at a Time,” *Reason Foundation Policy Study* 170 (Nov. 1993); Gabriel Roth, *A Self-Financing Road System* (London: Institute of Economic Affairs, 1966); Gabriel Roth, *Paving for Roads: The Economics of Traffic Congestion* (Middlesex, England: Penguin, 1967); Gabriel Roth, *The Private Provision of Public Services in Developing Countries* (Oxford: Oxford University Press, 1987); Rothbard, *For A New Liberty*; and William C. Woodridge, *Uncle Sam the Monopoly Man* (New Rochelle, N.Y.: Arlington House, 1970).

forced, as in the g alternative, to act against his will with his own property. If Buchanan and Tullock want to utilize their method, it is incumbent upon them to discern a non-arbitrary measure of the “cost” of coercion. Not only has this never been done, it has never even been attempted.

A hint of this can be seen in how the private enterprise system deals with the challenge of the home painted in a manner that is offensive to neighbors. In order to protect themselves from this type of negative externality, individuals can engage in restrictive covenants with one another or buy into condominium developments that govern not only how the exterior walls can be painted, but even, in some cases, the curtains, fences, or backyard furniture which may be used.

As for the challenge of the red underwear owner, an entirely different analysis is in order. The problem here is to demonstrate that this is not only harmful, but that it constitutes a rights violation. For there is an alternative theory to the one put forth by Buchanan and Tullock. It is libertarianism, the notion that all acts are allowed, provided only that they are undertaken with a person’s legitimately owned property, and are engaged in a manner which does not violate the rights of other people.²³ Since no one can demonstrate that the person with red underwear²⁴ violates another person’s rights, no legal action is legitimate.

HIGHER EDUCATION

What is the main exhibit in Buchanan and Tullock’s case for the government being more cost effective than the market ($a < g$)? Amazingly enough, it is higher education. They argue:

The organization of higher education, especially professional training, may provide a helpful example. Due to the institutional restrictions on the full freedom of contract in capital values of human beings, the arrangements that might arise to insure the removal or reduction of certain

²³See, in this regard, Rothbard, *The Ethics of Liberty*; Nozick, *Anarchy, State, and Utopia*; Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985); Hoppe, *A Theory of Socialism and Capitalism*; and Hans Hoppe, *The Economics and Ethics of Private Property: Studies in Political Economy and Philosophy* (Boston: Kluwer Academic Publishers, 1993).

²⁴Except for the person who has contractually obligated him to wear non-red underwear, which he refuses to do.

externalities in higher education may be quite difficult to secure. Although students may recognize that they will be the primary beneficiaries of further professional training and that investment in such be financially sound, their inability to “mortgage” their own earning power may prevent them from having ready access to loan markets. Of course, collective or state action may be taken which will remove or reduce the private externalities involved here.²⁵

But this is no “market failure.” Rather, the government has failed to do its self-proclaimed job as guarantor of contracts. That is, the state has announced itself as unwilling to enforce student loan contracts where human capital is used as collateral. To be more specific, fears of slavery and the hysteria surrounding the Fourteenth Amendment to the Constitution—on the part of the government—have caused this so-called “market” failure.

Let us squarely face reality. The moral problem with nineteenth-century slavery was that it was coercive. Totally innocent persons were dragged from home and hearth, kicking and screaming, and sent thousands of miles away to do forced labor. Replace this coercive element with voluntary agreement, and, although the shell would remain the same, this “curious institution” would be radically altered. Our society, thanks to analysis of the sort offered by Buchanan and Tullock, has failed to realize that there is all the difference in the world between slavery, which arises from coercion, and voluntary servitude, which emanates from consensual adult agreement. It is as if opposition to Nazi death camps requires opposition to hotels as well.

Moreover, Buchanan and Tullock’s argument also surprises us in retrospect because of Milton Friedman’s opposition to it. After all, broadly speaking, we would not expect Friedman to be different from Buchanan and Tullock on any significant issue of economics or politics. Yet, in Friedman’s view, if there is a case for state action in education based on the externalities argument, it is precisely in the opposite direction from the one staked out by Buchanan and Tullock. That is, he argues that elementary education, not graduate school, is the arena in which this problem arises. Says Friedman:

The social gain presumably is greatest for the lowest levels of schooling, where there is the nearest approach to unanimity about content, and declines continuously as the level of schooling arises. . . . For higher schooling, the

²⁵Buchanan and Tullock, *Calculus of Consent*, p. 54.

case for nationalization on grounds either of neighborhood effects or technical monopoly is even weaker.²⁶

When highly intelligent people start with roughly the same premises, reason in much the same manner, and yet arrive at diametrically opposite conclusions, something very basic must be wrong. The difficulty, we suggest, is with the failure to adhere to the tenets of subjectivism: to realize that “one man’s meat is another’s poison.” By definition, there is no market in external effects. This means that anyone can say anything about the direction of causation in this regard, and not find oneself refuted by the evidence. Buchanan and Tullock see externalities particularly in higher education, not in elementary education. Friedman makes the diametrically opposite case. We suggest that this is less than fully surprising because there are no independent criteria upon which such judgments can be based.

A similar situation has occurred in an analogous area. Because of the supposed “wage gap” between females and males, feminists argue in favor of imposing wages on the market on the basis of “objective” considerations (skill, effort, responsibility, and working conditions).²⁷ One of the many problems with this notion is that diverse rating agencies, equally devoted to this feminist cause, have derived incompatible results from similar data.²⁸

Buchanan and Tullock’s analysis of higher education externalities is just as arbitrary. There are no objective criteria—such as could

²⁶Milton Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962), pp. 88, 98.

²⁷For this argument, see Vivian Gornick, *Essays in Feminism* (New York: Harper and Row, 1978); Jesse Bernard, *Academic Women* (University Park: Pennsylvania State University Press, 1962); Morley Gunderson, *The Female-Male Earnings Gap* (Toronto: Ontario Ministry of Labor, 1982); and Roberta E. Robb, “Earnings Differentials Between Males and Females,” *Canadian Journal of Economics* 11, no. 2 (May 1978).

For a critique of this argument, see Michael Levin, “Comparable Worth: The Feminist Road to Socialism,” *Commentary* (September 1984); Michael Levin, *Feminism and Freedom* (New York: Transaction Books, 1987); Walter Block and Walter Williams, “Male-Female Earnings Differentials: A Critical Reappraisal,” *Journal of Labor Research* 2, no. 2 (1981); and Thomas Sowell, “Weber and Bakke and the Presuppositions of Affirmative Action,” in *Discrimination, Affirmative Action, and Equal Opportunity*, ed. Walter Block and Michael Walker (Vancouver: Fraser Institute, 1982).

²⁸Richard E. Burr, “Rank Injustice: The Arbitrary Record of Comparable Worth,” *Policy Review* (Fall 1986), pp. 73–74.

be supplied by markets—so world-renowned scholars who start from the same basic premises reach different conclusions.²⁹

ZONING LEGISLATION

Buchanan and Tullock sharply distinguish between, on the one hand, assembling the land parcels needed to create a large new enterprise, such as a suburban shopping center, and, on the other hand, the operation of an “already developed residential area.”³⁰ In the former case, they aver, the market works just fine.³¹ But in the latter, our old friend “market imperfections” again rides to the fore. Specifically, the problems involve “neighborhood atmosphere, view, absence of noise, etc.”³²

The typical conclusion at this point would be a call for municipal zoning in order to overcome the externalities. But Buchanan and Tullock are much too sophisticated to be taken in by such a simplistic ploy. Instead, they wax eloquent about “covenants, corporate ownership,” and the “interest of a large realtor to purchase many single land units in the area” as a way of internalizing these externalities.³³

Although they do not fall into this elementary trap, neither do they entirely escape it. In their view, it is all an empirical question. On the one hand,

²⁹Hoppe, in *The Economics and Ethics of Private Property*, p. 5, makes the same point in a different, but related, context. He states, “The examples given by different authors of alleged public goods vary widely. Authors often classify the same good or service differently, leaving almost no classification of a particular good undisputed, which clearly foreshadows the illusory character of the whole distinction.”

³⁰Buchanan and Tullock, *Calculus of Consent*, p. 55.

³¹However, as further evidence of the arbitrariness of this analysis, there are numerous other supposed advocates of the free market—that is, followers of the schools of Public Choice or the University of Chicago Law-and-Economics tradition—who have reached the exact opposite conclusion. See, for example, Werner Z. Hirsch, *Law and Economics: An Introductory Analysis* (New York: Academic Press, 1979), p. 127: “exclusionary zoning is found to have positive implications for the efficient allocation of resources in the presence of local property taxation, particularly if it takes the form of construction permit fees.”

³²Buchanan and Tullock, *Calculus of Consent*, p. 55.

³³Buchanan and Tullock, *Calculus of Consent*, p. 56.

the voluntary action will always be more desirable in the sense that it cannot place any unwanted restrictions on use of property. [But] if collective [read: coercive!] action is expected to be considerably more efficient . . . this advantage of voluntary action [will] be overcome.³⁴

The basic problem with this line of reasoning is that it depends, ultimately, on interpersonal comparisons of utility. Buchanan and Tullock can defend zoning in instances where the value of “unwanted restrictions on use of property” is lower than the difference between private and public action where the latter is “considerably more efficient,” so much so that it is sufficient to “overcome” the presumptive advantage of markets. Yet, what is this but mongering in interpersonal utility comparisons?³⁵

In this specific case, moreover, Buchanan and Tullock’s analytic framework is marred by a failure to realize that there is a reason why city property is spread about among so many people: prior government failure. Take New York City as an example. When it was settled, municipal authorities laid out the present street grid. Parcels were sold off in tiny bits. Now imagine a scenario in which the market is responsible for such a task. There is little doubt that the configuration of ownership would have much more nearly approached the situation implicitly called for by Buchanan and Tullock in their analysis of the proposed suburban shopping center now in the process of being assembled. That is, there likely would never have arisen a situation where literally tens of thousands of separate people would have become owners. Instead, the situation would more likely have resembled the Rockefeller Center area, where one entity controls several square blocks.

Consider their remarks in this regard:

³⁴Buchanan and Tullock, *Calculus of Consent*, p. 56, material in brackets supplied by present authors.

³⁵Interpersonal comparisons of utility are rife within the profession. One can hardly read mainstream economics without being confronted with such fallacies. However, it is more than passingly curious that Buchanan should indulge in this line of argument, considering the fact that he, at least in another context, explicitly disavows them. See James M. Buchanan, *Cost and Choice: An Inquiry into Economic Theory* (Chicago: Markham, 1969); James M. Buchanan and G.F. Thirlby, *L.S.E. Essays on Cost* (New York: New York University Press, 1981); and William Barnett II, “Subjective Cost Revisited,” *Review of Austrian Economics* 3 (1989), pp. 137–38.

It may prove quite difficult to reorganize the developed residential area. The large realtor who desires to purchase multiple units in an area from single-unit owners may encounter prohibitive bargaining costs. The single owner-occupier who desires to may try to exploit his individual bargaining position to the maximum and may, in the extreme case, secure for himself the full amount of the “surplus.” Faced with single owners of this persuasion, the entrepreneur will have little incentive to undertake the organizing costs that will be necessary. In such cases, collective action through zoning may be indicated.³⁶

This quotation encapsulates Buchanan and Tullock’s faulty analysis. Interpersonal comparisons of utility run rampant: Evidently, the utility of the large entrepreneur is to be weighted more heavily than that of the small “exploiting” holdouts. Never do Buchanan and Tullock recognize that such parties may have psychic income goals unrelated to “robbing” the large capitalist, much less that this very goal is as legitimate as any other in the market. They simply do not appreciate the fact that prior government failure is responsible for the “plight” of the land developer; the state has created the problem in the first place, and it is problematic to call for further such action as a solution.³⁷ If anything is clear, it is that further intervention will only bring a whole new host of problems.³⁸ It is far better to call for privatization of roads, thereby addressing the initial cause of the problem, than to call for additional governmental “fixes.”

THE FIFTH AND SIXTH CATEGORIES

In these two cases, Buchanan and Tullock claim that $g < a < b$ or $g < b < a$. In addition to the traditional fire and police protection arguments, dealt with above, they mention traffic lights. Here they erect a huge straw man, and then begin to pummel it:

The expected costs of organizing decisions voluntarily on the location of traffic lights, for example, may be

³⁶Buchanan and Tullock, *Calculus of Consent*, pp. 56–57.

³⁷This is just like saying that although government minimum-wage laws have caused teenage unemployment, instead of getting rid of such laws, the state should institute new programs, such as unemployment insurance, to “solve” the very problem it created in the first place.

³⁸See, e.g., Bernard Siegan, “Non-Zoning in Houston,” *Journal of Law and Economics* 13, no. 1 (April 1970); also Bernard Siegan, *Land Use Without Zoning* (Lexington, Mass.: Heath, 1972).

minimized by no traffic control at all. However, this value may be much in excess of the costs that the individual expects to incur as a result of organizing traffic control collectively. The cost reduction that may be accomplished by collectivization becomes more significant when it is noted that such regulatory activities will normally be delegated to single decision-makers who will be empowered to choose rules for the whole group. Activities in this set involve high external costs if organized privately, but the external costs resulting from adverse collective decisions are not significant.³⁹

Are the only alternatives either state control of traffic lights or no control at all? These are the stark options offered to us by Buchanan and Tullock. Were these our only choices, the decision would be a difficult one indeed, not the easy one imagined by our authors. Yes, no control at all seems a daunting prospect. Imagining no traffic lights at all, or only those agreed upon by, say, all citizens of a town at a large public meeting, boggles the imagination. One can see traffic grinding to a halt, replete with astronomical levels of road fatalities. On the other hand, however, this scenario does not seem too different from what we now enjoy! Highway deaths and traffic congestion are, seemingly, part and parcel of our modern existence. At times, one might almost be ready to risk traffic “anarchy.” How could it be worse than what we now suffer from?

Of course, there is a third alternative, one that never seems to occur to road socialists such as Buchanan and Tullock: the free market. Private ownership of roads leads to private, voluntary agreements between drivers and road owners; such agreements would surely include speed limits, safety features, stop lights, and so on. While it would take us too far afield to discuss the detailed workings of such a system, it should be clear that this constitutes a third option to either government traffic lights or nothing at all. Nor are Buchanan and Tullock in any position to claim that its costs would be higher than *g*, since their failure to discuss it at all implies that they are completely unaware of it as a viable alternative.

IMPLICATIONS

Buchanan and Tullock make a claim that is somewhat outside of the mainstream of neoclassical economic thought:

³⁹Buchanan and Tullock, *Calculus of Consent*, p. 58

[T]he existence of external effects from private behavior is not even a necessary condition for an activity to be collectivized on rational grounds. The activities described by the sixth ordering [$g < b < a$; e.g., police, fire], which are perhaps the most important ones performed by governments, may be characterized by the absence of externalities in the final equilibrium resulting from free individual choice. Contractual arrangements will tend to be worked out on a voluntary basis, which will effectively reduce and may completely remove the externalities. The advantage of collective organization for activities in this group lies wholly in its *greater efficiency*.⁴⁰

Now, it is one thing to assert that state coercion is justified by externalities. Although there are flaws in this argument, as we have seen, at least it has the advantage of a certain amount of precedent within the economics profession. But Buchanan and Tullock go much further than that, claiming that this is not needed, and will not even suffice. Instead, sheer efficiency is what vindicates statist coercion. We pass lightly over the interpersonal comparison of utility objection, although this cries out as a rebuke of their position. We address ourselves to the issue of what it is about government that makes it more efficient than the market. Its only distinctive characteristic, *vis-à-vis* the market, is its monopoly of legal force. But how can this make it more efficient? And even if it were more efficient in the provision of these services, why would the natural advantages of government carry through to endeavors other than police protection?

CONCLUSION

More important than any specific deviation from the principles of private property and free enterprise are the underlying philosophical errors which lead Buchanan and Tullock in this direction in the first place. These are, as we have seen, part and parcel of their “constitutional economics.” One need not reject the Public Choice School in its entirety to extirpate these mistakes; there are too many salutary elements of it for that. But one might well conclude that “constitutional economics” itself needs reconsideration.

⁴⁰Buchanan and Tullock, *Calculus of Consent*, p. 61, emphasis added.

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