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A Critical Look at *The Calculus of Consent*

DR. WALTER E. BLOCK*

Buchanan and Tullock's *The Calculus of Consent* (1962) is a seminal book which launched the Public Choice school of thought. While this perspective offers many positive elements, the present essay is devoted to a criticism of one of its most important strands: that devoted to constitutional economics. This is the aspect of public choice which deals with the justification of government, the initial agreement setting it up (the Constitution), the rules we are to be governed by if we are to attain justice, and with the provision of so-called "public goods" such as police or fire protection, national defense, etc.

The Public Choice School is perhaps the most distinguished element of what is now being called the "New" Political Economics, an attempt to integrate economics, law and politics, or perhaps reintegrate, in view of the fact that the interface between these fields dates as least as far back as Montchretien (1651).

The present paper attempts to cast aspersions on the contribution of Buchanan and Tullock to the New Political Economics by showing disanalogies, not analogies, between the market's dollar vote and the political ballot box vote, between so-called "public" goods and real private goods, between the rationality of the private sector and the irrationality of the "public," between government and the marketplace; as well, it attempts to establish a bifurcation, not a similarity as per the Public Choicers, between rationality, costs and collective action as they pertain to private and state activity. Further, this paper explores the significance of this critique of the Calculus of Consent to legal reasoning concerning antitrust law.

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INTRODUCTION

James Buchanan and Gordon Tullock ("Buchanan and Tullock") are widely known as the originators of the Public Choice School of Economics, Politics and Law. No argument from the present author on that. However, Buchanan and Tullock in particular, as well as their many, many colleagues are also popularly thought to be advocates of the free enterprise, free markets, private property rights, and other aspects of the libertarian philosophy. The present paper is intended as a remedy against that false claim. It focuses, mainly, on Buchanan and Tullock,¹ credited by most as being the "bible" of Public Choice. The paper is organized as follows. In section I we consider the downward sloping economic demand curve; section II is devoted to a discussion of the limitations on individual rationality; section III discusses the organization of human activity; the burden of section IV is to analyze the costs approach to collective action; section V addresses pure private goods; in section VI we take a jaundiced look at Buchanan and Tullock's views on equalization; section VII looks askance at the Public Choice analysis of anti trust law. We conclude in section VIII.

I. DOWNWARD SLOPING ECONOMIC DEMAND CURVE

In economics, there is no debate worth having about the truth or falsity of downward sloping demand. To be sure, there are different explanations of this phenomenon; some see it as empirical matter,² others as an issue of logic.³ There is also a division as to whether demand curves slope in a downward direction because of purposeful behavior⁴ or accident and probability.⁵ But with regard to the basic element of demand analysis there is no controversy.

Things are very different with regard to political demand curves. Applying their notions of rationality as transitivity,⁶ Buchanan and Tullock (1962) take the position that: "If the hypotheses are valid, the representative individual should, when confronted with relevant alternatives, choose more 'public goods'

1. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (Liberty Fund, Inc. 1999) (1962).

2. See George J. Stigler, *The Development of Utility Theory I*, 58 J. OF POL. ECON. 307 (Aug. 1950); George J. Stigler, *The Development of Utility Theory II*, 58 J. OF POL. ECON. 373 (Oct. 1950).

3. See MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE* (Ludwig Von Mises Institute 2004) (1962); LUDWIG VON MISES, *HUMAN ACTION: A TREATISE ON ECONOMICS* (Yale University Press 1963).

4. See Israel M. Kirzner, *Rational Action and Economic Theory: Rejoinder*, 71 J. OF POL. ECON. 84 (Feb. 1963).

5. See Gary S. Becker, *Rational Action and Economic Theory: A Reply to I. Kirzner*, 71 J. OF POL. ECON. 82 (Feb. 1963).

6. For an alternative perspective on this, see Walter Block, *Government & Market: A Critique of Professor James Buchanan's "What Should Economists Do?"*, 3 CORP. OWNERSHIP & CONTROL 81 (Fall 2005); Walter Block & Thomas J. DiLorenzo, *Is Voluntary Government Possible? A Critique of Constitutional Economics*, 156 J. OF INST. & THEORETICAL ECON. 567 (2000); Walter Block & Thomas J. DiLorenzo, *The Calculus of Consent Revisited*, 1 J. OF PUB. FIN. & MGMT. 305 (2001); Murray N. Rothbard, *Toward a Reconstruction of Utility and Welfare Economics* (Ludwig von Mises Institute 2002) (1956), available at <http://mises.org/rothbard/toward.pdf>.

when the 'price' of these is lowered, other relevant things remaining the same."⁷

But there are serious disanalogies between the market dollar vote and the political ballot box. In the former case, if a person uses it randomly, or stupidly, he is penalized. If I spend my \$100 to purchase a hat I don't want, instead of a coat that I really need, it is I who suffer, and I suffer alone. In sharp contrast, if someone indulges in haphazard, or frivolous ballot box voting, he pays no price at all. Suppose I purposefully use my franchise in behalf of the inefficient and incompetent mayor, or against the referendum that makes sense. I may do this out of sheer perversity, if only because there are no opportunity costs that rein me in. I do not thereby lose out, barring the truly exceptional case where my one vote determines the outcome.

The point is, there is no self-interested *reason* in the public sphere to vote so as to minimize costs.⁸ This is of course a compelling explanation in the private sector, but not here. In politics, the only motivation toward "doing what is right" is benevolence. And we all know what Adam Smith said about this particular incentive: "It is not from benevolence that the butcher and the baker . . ."⁹

Even if there *were* a downward sloping political demand curve, it would occur by sheer accident. There would be no (logical) compulsion for it to exist, as in the case of the demand curve for ordinary goods and services. In the market, if budget constraints force someone to do without one unit of supply of a good, he will forego the least important use made possible by that unit. If, for example, he has five buckets of water, and must part with one, he will typically omit washing his car, not drinking to quench his thirst. Where is the analogy in politics? Where is the mechanism that tends to ensure that when the public sector must be pruned down, that the least valuable expenditure will be curtailed?¹⁰

7. BUCHANAN & TULLOCK, *supra* note 1, at 35.

8. BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* (2007).

9. Adam Smith, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (R.H. Campbell et al. eds., Oxford University Press 1976) (1776); see also RALPH HARRIS & ARTHUR SELDON, *NOT FROM BENEVOLENCE: 20 YEARS OF ECONOMIC DISSENT* (1977).

10. In the usual case, there is not even the pretense that this occurs. Instead, a reduction of 5%, say, will be spread out over all margins, in an effort to be "fair." Rational allocation of resources is not an issue that usually even arises. Or even worse: typically, when park services, museums or libraries are forced to deal with lowered budgets, the first thing they cut out is bathroom facilities; they do this in order to undermine the cuts. This is sometimes called the "Washington Monument" effect, or syndrome, phenomenon, since this popular tourist attraction is at the top of list of services to be discontinued in the case of a strike. See, e.g., Michael Williams, *Washington Monument Syndrome*, MICHAEL WILLIAMS—MASTER OF NONE (Feb. 4, 2004, 2:43 PM), <http://www.mwilliams.info/archive/2004/02/washington-monument-syndrome.php>; T. M. Lutas, *Defeating the Washington Monument Syndrome*, CHICAGO BOYZ (May 8, 2008, 7:22 AM), <http://chicagoboyz.net/archives/5763.html>; Julianne Pepitone, *Postal Chief Warns of Service Cuts: Economic Downturn Has Caused a Steep Decline in Mail Volume*, *Postmaster Says*, CNNMONEY.COM (Jan. 28, 2009, 8:05 PM), http://money.cnn.com/2009/01/28/news/economy/postal_service/; Jennifer Steinhauer, *Closing of Rest Stops Stir Anger in Arizona*, N.Y. TIMES, Mar. 5, 2010, at A1, available at <http://www.nytimes.com/2010/03/05/us/05reststop.html>. Thanks to Jeremie Rostan and Tom DiLorenzo for these cites.

All this is on the assumption that people will invest the time and effort to acquaint themselves with their true interests.¹¹ But Public Choice theory itself provides us with the case for rational voter ignorance. How, then, can Buchanan and Tullock blithely assume that the voter in a democratic election will acquaint himself with the issues, and then act on this informational investment?

To be fair to Buchanan and Tullock, they do turn around and criticize this notion of downward sloping political demand curves. But they do so not for the reasons mentioned above but rather for incorrect ones. First consider their point that "group decisions are the results of individual decisions when the latter are combined through a specific rule of decision-making," and that all members of society "happen to be in full individual equilibrium regarding amounts of public and private goods."¹² In the private marketplace, individual equilibrium refers to a situation where a person is *free* to allocate money precisely as he wishes, but cannot gain from switching a penny from one line of expenditure to another; given his budget constraints, so he is as well off as he can be. He cannot gain, say, from buying fewer beers but more ice cream. But in the political sphere, *no one* is free to allocate money precisely as he wishes. No one individual, with the possible exception of a mayor in a small town, can reallocate resources, for example, between police and firemen. Therefore, the issue of individual equilibrium does not even *arise*, let alone can possibly be fully satisfied. Second, consider the following:

First, 'public goods' can only be defined in terms of individual evaluations. If an individual is observed to vote in favor of a public outlay for municipal policemen, it follows that (assuming normal behavior) he would vote in favor of the municipality hiring more policemen were the wage rate for policemen to be reduced.¹³

There are several reasons why this need not follow. First, why should we posit "normal behavior" in the political sphere when such behavior derives its "normalcy" from the profit-making, loss-avoiding *private sector*? Second, the Buchanan and Tullock analysis assumes that the citizen will vote roughly in the same manner as the proprietor of a business. Why assume such profit-seeking activity on the part of a mere citizen, one who, as we have seen, suffers virtually no personal *loss* if he acts in the exact opposite manner?

Buchanan and Tullock do assume that police manpower "belong to the 'superior' good category."¹⁴ But their conclusion does not follow. Even on the

11. Typically, choices are made along racial, sexual or nationalistic lines, based on the easy assumption that a candidate who looks like you in some relevant way will treat you better than someone who does not. If this were the level of information possessed by people in their private capacities, the economy would have long ago ground to a total halt.

12. BUCHANAN & TULLOCK, *supra* note 1, at 35.

13. *Id.*

14. *Id.* at 35-36.

assumption that the public police are a superior good, this only means that the more money we have at our disposal, the more police protection we desire, but this doesn't explain why anyone would *vote* for such an allocation, since the connection between voting and obtaining is rent asunder by the very political process underlying the entire procedure.

Buchanan and Tullock might reply that people vote in private clubs, presumably in the direction of their true desires. Indeed, the way they cast their ballots is the only independent measure we will ever have of their actual goals. And this is indeed correct. But again the disanalogy between governments and private clubs rises to the fore.¹⁵ In the private club case, there is agreement to take part in the process at the outset; with regard to government, as we have seen, no such assumption is warranted.

II. LIMITATIONS ON INDIVIDUAL RATIONALITY

According to Buchanan and Tullock, "there normally is a one-to-one correspondence between individual action and the results of that action."¹⁶ But in the political process, they concede,

There is an important element of uncertainty present that cannot be left out of account. No longer is there the one-to-one correspondence between individual choice and final action. In the case of any specific decision-making rule for the group, the individual participant has no way of knowing the final outcome, the social choice, at the time he makes his own contribution to this outcome. This particular element of uncertainty in political choice seems initially to restrict or limit quite sharply the usefulness of any theoretical model that is based on the assumption of rational individual behavior.¹⁷

This would appear to be correct, especially since it is not mere uncertainty we must deal with, but an outright break in the connection between choice and outcome. This breeds actual "irresponsibility," given that no penalties are imposed on those who act "irrationally."

Despite these concessions, Buchanan and Tullock are not willing to give up on their model quite so easily. They claim that "this limitation is reduced in significance to some extent when it is recognized that collective choice is a continuous process . . . which . . . suggests that the uncertainty facing the individual participant in political decisions may have been substantially overestimated."¹⁸

But this is hard to see. First of all, collective choice is by no means a

15. See JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 198 n.11 (1942) ("The theory which construes taxes on the analogy of club dues or the purchase of the service, of, say, a doctor only proves how far removed this part of the social sciences is from scientific habits of mind").

16. BUCHANAN & TULLOCK, *supra* note 1, at 37.

17. *Id.*

18. *Id.*

"continuous process." Rather, at the very least, it is a series of unique events. Each election is an historical, non-repeatable occurrence. Secondly, there is not even any guarantee that the series will continue. Not for nothing is there great perspicacity in the phrase "One man, one vote, one time." Third, what difference does it make? Suppose, counter factually, we assume for the sake of argument that Buchanan and Tullock are correct in their premise of continuous change. Why does that render their analysis one whit more useful?

The uncertainty does not exist merely because of "the impossibility of reciprocal behavior prediction among individuals,"¹⁹ which could, at least conceivably, be reduced by agreement, as Buchanan and Tullock claim. The difficulty here is that there is an underlying *reason* for this prediction impossibility, and all the agreement in the world will not address it. This reason, as we have seen, is a lack of incentives²⁰ in any system such as the political, which precludes clear property right titles. Agreement, moreover, is extremely unlikely to occur, given secret ballots. How can compliance be monitored? Would people be able to sue in court if vote sellers didn't stay "bought?"²¹

Buchanan and Tullock recognize only a "difference in the degree of responsibility" between political and private decision-making,²² but this is a difference in degree so profound that it amounts to one in kind. To be sure, there are irresponsible private economic actors. In the absence of government subsidies for their mistakes, we have a word for them. It is called "bankrupt." And there is no doubt that some ballot box voters carefully study the issues, and register

19. *Id.*

20. This is but the tip of the iceberg, in terms of the Austrian economic analysis of socialism. First, there is Hayek's critique based on unavailability of information. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945). Even more telling is Mises's analysis of socialism according to which, without private property (which of course does not exist in the political sphere), there can be no such thing as market prices. LUDWIG VON MISES, *SOCIALISM* (Liberty Fund, Inc. 1981) (1922). And, in the absence of the latter the economic system becomes entirely irrational. See also Joseph T. Salerno, *Mises and Hayek Dehomogenized*, 6 REV. OF AUSTRIAN ECON. 113 (1993).

21. There is also the small matter of fact that the buying and selling of political votes is illegal. But the question arises, Should this practice be prohibited by law? No doubt, the general economic predisposition toward allowing free markets comes into play here. There is no question but that if A sells his vote to B for \$100, both parties to the transaction gain in utility, at the very least in the *ex ante* sense. A values his opportunity to express himself at less than \$100, and thereby gains the difference to him between this value and the money he receives. Obversely for B. On the other hand, this calls into question the basic premise of modern democracy, one-man, one-vote. Why practice egalitarianism in this very important "market?" In bygone years, with ownership of property a requirement for the franchise, there was at least an attempt to allot voting power in proportion to general contribution to the society. But why not go further, even all the way toward this goal? If Buchanan and Tullock are so intent on their analogy between political and market voting, why not employ some measure of desert in a more straightforward manner. For example, people vote in corporate annual general meetings not on an equal basis, but in proportion to the number of shares in the company they have purchased. Why not sell shares in the corporation called "U.S. Government," and allow people to vote in proportion to the number of shares they own in this enterprise? This would be the implication of Buchanan and Tullock's claim that the state is really just like a private corporation. For a critique of democracy from a libertarian point of view, see HANS-HERMANN HOPPE, *DEMOCRACY: THE GOD THAT FAILED* (Transaction Publishers 2001).

22. BUCHANAN & TULLOCK, *supra* note 1, at 38.

their accurate views in this process. There is thus a *seeming* shading, or gray area, between the two universes of discourse. But in actual fact they are quite different. In the one case there is an automatic feed back mechanism which penalizes poor choices; in the other there simply is not. Two systems could hardly diverge to a greater degree in this regard.

In the view of Hoppe, moreover:

Contrary to the claim of the public choice school, states and private firms are not doing essentially the same sort of business, but instead are engaged in categorically different types of operations. Both types of institutions are the outcome of different, antagonistic interests. The 'political' interest in exploitation and expropriation underlying the formation of states obviously requires and presupposes the existence of wealth, and hence an 'economic' interest of at least one person in producing such wealth in the first place (while the reverse is not true.) But at the same time, the more pronounced and successful political interests are, the more destructive of economic interests this will be. The public choice school is perfectly correct in pointing out that everyone—a government employee no less than an employee of an economic firm—normally prefers a higher to a lower income and that this interest explains why government should be expected to have no less of a tendency to grow than any other enterprise. However, this discovery—that politicians and bureaucrats are no more altruistic or concerned about the 'public good' than are people in other walks of life—is hardly new even if it has sometimes been overlooked. Yet what is in fact new with public choice—the inference drawn from this correct insight then, that all institutions should hence be regarded as an outgrowth of identical motivational forces and be treated analytically on a par with each other—is false to the point of being ridiculous. Regardless of a person's subjective beliefs, integrating one's actions into the institutional framework of either the state or a 'normal' economic enterprise and pursuing one's wealth maximizing interests here or there will in fact produce categorically different outcomes.²³

III. THE ORGANIZATION OF HUMAN ACTIVITY

Buchanan and Tullock ask: "When will a society composed of free and rational utility-maximizing individuals choose to undertake action collectively rather than privately? Or, to make the question more precise, when will an individual member of the group find it advantageous to enter into a 'political' relationship with his fellows?"²⁴

There are two ways to interpret this series of questions. One, the way in which Buchanan and Tullock would prefer, is rather benign. There are certain things that can be done either on an individual basis, or in cooperation with

23. HANS-HERMANN HOPPE, *THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND ETHICS* 51 (2d ed. 1993).

24. BUCHANAN & TULLOCK, *supra* note 1, at 43.

one's fellows. Raising a new barn, for example. The tradition, at least amongst people such as those of the Amish persuasion, is for the entire community to pitch in together. In the movie *Witness*, a typical scene of this sort occurred. All of the men of the village built a barn for a newly wed couple, while the women cooked a picnic supper for everyone involved. Now barns, of course, can also be created by individuals, on a for-profit basis. In this case, people can cooperate with each other, implicitly, through the intermediation of the market.

Thus, there is a choice. We can cooperate with each other explicitly through communal or "collective" (Buchanan and Tullock's way of putting this) actions, or through markets, implicitly. Alternatively, this can be expressed as follows: We can enter into a "political" relationship with our neighbors, or enter into an "economic" relationship with our neighbors. Each of these options is benevolent, or reasonable, or rational. On a moral sphere, they are indistinguishable. In neither case is there anything untoward going on. If one had to pick an analogy to depict the way in which Buchanan and Tullock see these alternatives, it would be in the comparison of vanilla and chocolate ice cream.

So much for the Buchanan and Tullock perspective. How else can these matters be viewed? For an entirely different outlook, consider Mencken:

The average man, whatever his errors otherwise, at least sees clearly that government is something lying outside him and outside the generality of his fellow men—that it is a separate, independent, and hostile power, only partly under his control, and capable of doing him great harm. Is it a fact of no significance that robbing the government is everywhere regarded as a crime of less magnitude than robbing an individual, or even a corporation? When a private citizen is robbed, a worthy man is deprived of the fruits of his industry and thrift; when the government is robbed, the worst that happens is that certain rogues and loafers have less money to play with than they had before. The notion that they have earned that money is never entertained; to most sensible men it would seem ludicrous. They are simply rascals who, by accidents of law, have a somewhat dubious right to a share in the earnings of their fellow men. When that share is diminished by private enterprise the business is, on the whole, far more laudable than not.²⁵

The point is that a "political relationship with his fellows" is, if not *agreed* upon by them, akin to a gangster or tyrannical affiliation. Here, one orders the other about, without the nicety of first obtaining his permission to be so governed. There is perhaps no more basic distinction in all of political economy between the coercive and the voluntary. Buchanan and Tullock miss this divergence by the veritable country mile. The important variation is not between

25. H.L. MENCKEN, A MENCKEN CHRESTOMATHY 146-47 (1949); see also HANS-HERMANN HOPPE, A THEORY OF SOCIALISM AND CAPITALISM: ECONOMICS, POLITICS AND ETHICS (Dordrecht 1989); HANS-HERMANN HOPPE, THE ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES IN POLITICAL ECONOMY AND ETHICS (2d ed. 1993); ANTHONY DE JASAY, THE STATE (1985); FRANZ OPPENHEIMER, THE STATE (Free Life Editions, Inc. 1975) (1914).

individual and collective action. To say so is to see a gigantic and non-existent importance between team and individual sports, for example. There is no relevant difference between singles and doubles in tennis; yet one is "individual," the other "collective." In contrast, there is all the world of difference between tennis, whether singles or doubles it matters not one whit, played on a voluntary basis, as it is now, and an imaginary scenario where tennis players are forced to take part in this sport against their will. The *latter* is the all-important issue, completely missed by Buchanan and Tullock.

IV. COSTS APPROACH TO COLLECTIVE ACTION

The distinction between these two very different political economic philosophies can be highlighted by a discussion of Buchanan and Tullock's justification of the "collective" (e.g., coercive)²⁶ method of organizing human activity:

First, collective action may eliminate some of the *external costs* that the private actions of other individuals impose upon the individual in question. The city policeman keeps the thief from your door.²⁷

This is all well and good if there is some underlying agreement, on the part of the citizenry, to be bound by the government in the first place.²⁸ If there is not, the Buchanan and Tullock model reduces to the other, government-as-gangster model. Here, "external cost" consists of wealth desired by members of the state apparatus that is still under the control of other people. This does not constitute, to say the least, a strong reason for favoring such wealth transfers. As well, there are usually non-coercive ways to attain the supposed benefits provided by the non-consensual government. Private police, or guards, can also keep the thief from your door. And as far as the empirical record is concerned, they usually do a far better job, at a much lower cost.²⁹

Buchanan and Tullock continue: "Secondly, collective action may be required

26. Is the state justified? Is anarchism the only proper system? Such ultimate philosophical challenges are beyond the scope of the present work. However, it does no good to attempt to conceal the essential nature of government. It is a legal monopoly of the right to use force in a given geographical territory. This is purely a matter of positive, not normative economics. Whatever one's position on the justification of the state, the demands of accuracy require one to acknowledge its essentially coercive nature. It is an entirely rational position to maintain that the government is an evil, because of this compulsory element, but that it is a necessary evil, for other reasons. But to deny that the political sphere is the ultimate source of forcible constraint in society, as Buchanan and Tullock seek to do, is just plain mistaken.

27. BUCHANAN & TULLOCK, *supra* note 1, at 43.

28. Even the Mafia Don guards from random violence those who he has forced to pay him protection money.

29. Gustave de Molinari, *The Production of Security*, in OCCASIONAL PAPERS SERIES #2 (Richard M. Ebeling ed., J. Huston McCulloch trans., The Center for Libertarian Studies 1977) (1849); Rothbard, *supra* note 6; Edward Stringham, *Market Chosen Law*, 14 J. OF LIBERTARIAN STUD. 53 (1998-1999); Patrick Tinsley, *Private Police: A Note*, 14 J. OF LIBERTARIAN STUD. 95 (1998-1999); WILLIAM C. WOOLRIDGE, *UNCLE SAM THE MONOPOLY MAN* (Arlington House 1970).

to secure some additional or external benefits that cannot be secured through purely private behavior. Individual protection against fire may not be profitable."³⁰

There are difficulties here as well. To begin with, it is by no means clear why dealing with a thief is an "external cost" while putting out a fire is an "external benefit." It would appear that arsonists and thieves create analogous harms, and should therefore be analyzed in the same manner, not in diametrically opposite ways. Thus, external benefits in this context are *likewise* other people's wealth not yet obtained by the gangsters. Similarly, it is difficult to see why private fire companies should not be able to out-compete services provided under government monopoly.³¹ Further, it may well be that under certain circumstances "individual protection against fire may not be profitable." The same applies to individual protection against bad breath, the "heartbreak of psoriasis," and tooth decay. If so, it is the rare economist who would conclude that government should therefore supply breath mints, Preparation H, and tooth brushes. Rather, the clear implication would be that either advertisers had not done their usually competent job of scaring us about these "threats," or that the people in this community, for some reason or other, were just not interested in making these purchases. No one would deduce the justification of forced government provision from the mere failure of the market to supply an unwanted good or service. Why, then, do it in this case?

V. PURE PRIVATE GOODS

There is method in Buchanan and Tullock's seeming madness. They are, of course, relying on the traditional concept of externalities now so popular within the profession of economics. They do so in order to provide a seemingly value free "justification" of coercive state activity. In this regard they must first single out a purely private good with which to contrast those tinged with a public interest. And what is the Buchanan and Tullock nomination in this regard? It is red underwear: "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."³² To this the members of the newly formed Anti Red Underwear League (ARUL)³³ offer a loud Bronx cheer. *Of course* the wearing of red underwear is harmful;

30. BUCHANAN & TULLOCK, *supra* note 1, at 43-44.

31. ROBERT C. POOLE, CUTTING BACK CITY HALL (Reason Press 1976); WOOLRIDGE, *supra* note 29.

32. BUCHANAN & TULLOCK, *supra* note 1, at 45.

33. So far, the membership of ARUL consists of the present author. However, the organization is growing quickly (we started with zero a week ago, and now have one member; this amounts to an infinite increase), and we have hopes of receiving vast amounts of government subsidies. The argument we shall put forward in our proposal to the state is of course the one put forth by Buchanan and Tullock: there are externalities all over the place. People are frothing at the mouth in hatred at the wearers of Red Underwear. However, each of them fears to act on the grounds that the others will benefit "free ride" from his efforts. Only a heavily subsidized ARUL can internalize this particular externality.

not only to the wearer, but to the general public. The practice is even more the hideous for being hidden. Apart from leaving residues of red dye on the person of the wearer, this practice is highly immoral, reeking of Communism.³⁴

Now there are some who will dismiss ARUL as arrant nonsense, as a joke. Buchanan and Tullock, for all we know, may even be amongst this number. But the oppressors of the downtrodden always find denigrated groups to be hilarious. All we can say is that this outrage is no laughing matter to ARUL.

Nor is red underwear the first subterranean practice to outrage the general public. The activities of adult homosexuals in the privacy of their own bedrooms, the reading of pornography, might *also* be seen by such as Buchanan and Tullock as of purely private concerns. But a case can be made that this is clearly not so, as shown by the millions of opponents of such carryings on.

Moreover, the Buchanan of *Cost and Choice* (1969) and *L.S.E. Essays on Cost* (1981) could not logically have written the present screed. In those earlier works, Buchanan defended the Austrian subjective cost doctrine, according to which no outside observer is ever in a position to determine the costs of another person. This is because costs are essentially alternatives foregone, and, as such, can only be known by the economic actor who prefers yet an even better option. The best choice, for those now reading the present publication, is to do just that; this alternative would not have been chosen were there a better one open to the reader. But what is the cost of this activity? It is the next best option renounced in order that the reading could be engaged in. And what, pray tell, is that? Only the Buchanan of *The Calculus of Consent* can tell us. Perhaps it has something to do with the wearing of red underwear. But the Buchanan of *Cost and Choice* (1969) and *L.S.E. Essays on Cost* (1981) would have been far more modest in his claims to be able to measure other people's costs. He would have said that for some readers the cost of perusal was sleep foregone; for others, eating; for still others, engaging in paid employment. He would *not* have been able to point to one specific cost, for another person, and label this the true sacrifice.

The same analysis applies to the Buchanan and Tullock definition of "interdependence costs" as the "sum of external costs and decision-making costs."³⁵ No subjectivist could seriously base an entire political economic system—or anything else of any significance, for that matter—on such *objective* cost considerations.

But we need not resort to other publications of Buchanan to show Buchanan and Tullock's internal self contradictions. They do so in this publication as well. According to Buchanan and Tullock, "Economic theory does not explain the organization of private choices sufficiently to enable the professional economist to predict the precise composition of the national product, the exchange ratio between any two goods or services, or the price of any one good in terms of

34. It is a free country, and we the members of ARUL are as entitled to our opinions as are Buchanan and Tullock.

35. BUCHANAN & TULLOCK, *supra* note 1, at 46.

money. Such predictions would require omniscience, not science, because we must deal with individuals as actors, not as atoms."³⁶

Yes, indeedly do. Here, Buchanan and Tullock point to the fact that people are subjective actors, not objective atoms. But if this is so, and this consideration precludes prediction of some of the most basic elements of microeconomics, how does it allow us to make the cost calculations called for in their analysis of "interdependence costs"?

Let us put this into specifics. Buchanan and Tullock claim that, "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*."³⁷

The problem, at least as far as subjectivity of costs is concerned, is that these costs are likely to be different for different people! If so, then how are we to determine whether (coercive) political action is justified?

But there is another problem as well: Buchanan and Tullock's doctrine violates the basic philosophical premise that one cannot deduce an "ought" from an "is." Their argument may be phrased in the form of a syllogism:

A. If the costs of costs of organizing decisions (the costs of social interdependence) are lower than the costs of externalities, wealth may be maximized through the coercive collective political system.

B. The costs of costs of organizing decisions (the costs of social interdependence) are lower than the costs of externalities.

Therefore, C. The state is justified. (That is to say, it is justified to force people to join the collective system, even against their will.)

But why is it moral to (presumably) maximize wealth even at the cost of imposing our will on innocent people (e.g., forcing them to join the government over their opposition)?

Further, at the very least Buchanan and Tullock involve themselves in a problem of interpersonal comparisons of utility. For the costs of *some* might be such that a coercive government is "justified." The cost considerations of others might suggest the very opposite conclusion. If so, then if we are to argue that the state is in any case justified, it must be because we take the utility of some people as being higher than that of others. Needless to say, there is no warrant for any such conclusion which is based on value free economics.

Elsewhere one of these authors offers a ringing condemnation of interpersonal comparisons of utility:

Modern welfare economics owes its stimulus to Pareto, who developed a criterion, admittedly a very restricted one which enables social situations or positions to be classified into nonoptimal and optimal sets without requiring that interpersonal comparisons of utility be made, or external ethical norms be

36. *Id.* at 5.

37. *Id.* at 48 (emphasis in original). Below, we shall refer to this quote as statement A.

introduced Economists who wanted to say a lot about public policy issues were not at all happy with the Pareto criterion. Therefore, they reintroduced interpersonal comparability in the form of an externally defined social welfare function, which they admitted to be dependent on explicit ethical norms. But, of course, there are as many social welfare functions as there are people to define them; in this sense, the notion is equivalent in all respects with the political scientists' conception of the public interest

How are we, as external observers, to know when a person is, in fact, better off or worse off? Here there admits of only one answer. We can judge the better-offness and worse-offness only by observing individual choices. If a man is observed to choose situation A when he could have remained in situation B, we say that he is better off in A, as revealed to us by his own actions.³⁸

It is unfortunate that more of this sentiment did not more fully permeate *The Calculus of Consent's* discussion. Let us consider A as a society without a constitutional democracy, and B as the sort of constitutional democracy Buchanan and Tullock are so anxious to foist upon us, claiming all the while that it is a matter of a voluntary choice. Why, then, did the entire citizenry *not* sign the constitution, or otherwise signify that it had agreed to take up this form of government? Had they done so, we could have deduced that they preferred this B to the alternative A they had previously "chosen." But they did not do so. Therefore, according to the precepts correctly laid out by Buchanan,³⁹ we as external observers are entitled to conclude that of the two alternatives they preferred A, the situation *without* the constitutional democracy.

VI. EQUALIZATION

Let us now consider the socialist tendencies of Buchanan,⁴⁰ specifically those in favor of Canadian equalization schemes, where the richer provinces are forced to subsidize the poorer ones. This egalitarian nostrum is responsible for the economic malaise of Atlantic Canada, as firms have little incentive to locate there to take advantage of inflated unemployment insurance payments. For the same reason, the denizens of these provinces have little incentive to locate elsewhere, in search of employment.

States Buchanan:

In a final or summary evaluation, what is to be said about fiscal equalization in a federalized structure of governance? There is an incoherence or inconsistency between the workings of an integrated national economy, with free resource flows throughout an inclusive territory, and the devolution of substan-

38. JAMES M. BUCHANAN, *WHAT SHOULD ECONOMISTS DO?* 150-52 (Liberty Press 1979).

39. *Id.*

40. Martin Masse alerted me to this aspect of Buchanan's philosophy. I now thank him for this.

tial fiscal authority to provincial governments, the boundaries of which may include quite different bases for the financing-provision of shared goods and services. Absent any scheme for fiscal equalization among the disparate regions, there is no assurance that the resource concentration patterns that will emerge reflect overall economic efficiency, quite apart from any equity considerations. And, although the analysis is not as definitive, the weight of evidence seems to me to suggest that, without an equalization scheme, there will be an overconcentration of resources in those regions that embody differential fiscal advantage. Too many resources will be attracted to those regions that contain the relatively larger incomes and wealth.⁴¹

Here is Masse's comment on Buchanan's support of socialism:

Buchanan's early work on equalization half a century ago provided the inspiration for Canada's system, which is now more than a simple spending program, it's even enshrined in the constitution. It's part of the "kinder, gentler" Canadian way of doing things. There are many critics of it in Canada—on the right side of the political spectrum of course—who say that it's just a glorified welfare program and that not only does it not help the poorer provinces, it serves to keep them backward. All of us can understand that of course. Buchanan was invited to revisit his earlier work and tell us if he had changed his mind about it. I expected him to reject not only the efficacy but the morality of such programs. Nope. He still thinks they provide "economic efficiency" in a federation. No mention of any ethical problem with it.

However, he admits he was a bit naive 50 years ago in thinking that any such program would automatically provide the expected benefits. He says today that the way it is implemented is crucial to avoid perverse effects, like local political coalitions hijacking the funds for their own benefit. The central government should thus get more involved in the way these funds are spent—in effect, he's calling for more central planning from the imperial capital.⁴²

Let us allow Buchanan to continue:

How might the basic model of the commons be applied to the problem introduced by the fiscal disparities among provincial units in a federalized polity? The willingness of the relatively high-income recipients, concentrated in certain provinces, to pay larger shares in publicly supplied goods to be made available on equal access terms to all residents of those provinces is a resource that is genuinely productive of economic value. But it is also a resource that may be overexploited if persons are allowed free and open

41. James M. Buchanan, 1986 Nobel Laureate in Economics, Luncheon Talk: Fiscal Equalization Revisited (Oct. 25, 2001), *available at* <http://www.fcgp.org/publication.php/198> [hereinafter "Buchanan Remarks"].

42. Private correspondence between Masse and present author.

access. Efficiency requires that the resource be used to its value maximizing level, but not beyond.⁴³

This should occasion surprise only to those who have interpreted Buchanan as an advocate of laissez faire capitalism. But as these remarks make clear, this is a mistaken assessment. No advocate of free enterprise would look upon rich taxpayers as geese to be plucked.

Masse continues:

After the speech, and given his stated support for equalization, someone in the audience asked him tongue in cheek: what about the whole world?, what about equalization between the rich and poor countries? Buchanan answered that this could have been envisaged positively before September 11, but now the U.S. are under attack and should draw back from the world, and should not help fund countries that don't accept the modern world, or something to that effect. So there we have it, the Buchanan Solution (in times of peace) to bring economic efficiency to the whole world: a global socialist state redistributing money from rich to poor countries. Planetary equalization.⁴⁴

There is nothing unique about such a theory being espoused on a college campus. Indeed, this is probably the modal opinion on the part of the professoriate in the North America and Europe.⁴⁵ What is somewhat unusual, and, yes, alarming, is that such a view should be articulated by someone who is everywhere taken as a spokesman for laissez faire capitalism.

VII. ANTITRUST LAW

There is no difference between the "ordinary" semi free market socialistic position of the right wing (the Chicago School) of mainstream economists, and that of the followers of Public Choice in terms of their analysis of monopoly. Both agree that when concentration rates are too high, or, reality fails to sufficiently resemble the neoclassical model of perfect competition in any other

43. Buchanan Remarks, *supra* note 41.

44. Masse, *supra* note 42.

45. There are numerous writings on the prevalence of cultural Marxism at universities, of the sort championed by Buchanan. See, e.g., *Measuring Liberal Bias in Academia*, SPARTACUS BLOG (Jan. 8, 2004, 4:16 PM), http://spartacus.blogs.com/spartacus/2004/01/measuring_liber.html; *The Liberal "Bias" in Academia*, JEFFREY ALAN MIRON BLOG (Aug. 4, 2006), http://jeffreyalanmiron.typepad.com/jeffrey_alan_miron/2006/08/a_liberal_bias_.html; *More on Political Bias in Academia*, SPARTACUS BLOG (May 5, 2005, 8:56 AM), http://spartacus.blogs.com/spartacus/2005/05/more_on_academi.html; Patrick Kennedy, *Leaning Left: Why Is There Liberal Bias in Academia?*, THE JOHNS HOPKINS NEWSLETTER (Johns Hopkins Univ., Baltimore, Md.), Oct. 28, 2005, <http://media.www.jhunewsletter.com/media/storage/paper932/news/2005/10/28/Opinions/Leaning.Left.Why.Is.There.Liberal.Bias.In.Academia-2242888.shtml>; Annie Karni, *Universities' Growing Liberal Bias is Documented*, N.Y. SUN (Nov. 14, 2007), <http://www.nysun.com/new-york/universities-growing-liberal-bias-is-documented/66418/>.

way in a given industry,⁴⁶ there is then “market failure.”

However, the Public Choicers do have one advantage over their University of Chicago and other supposed free market oriented brethren: they do not accept the “public interest theory” of the latter. What is that? “Judges and antitrust bureaucrats are assumed to act in the public interest, which in this case means the promotion of economic efficiency in the economy.”⁴⁷ That is, Public Choice theorists should be credited with the insight that anti trust is often motivated *not* by a desire to do that which is in the public good, but by the goal of financially rewarding friends and penalizing enemies. In contrast, all too many other economists blithely assume that if a flaw can be found in the workings of the free enterprise system, it logically follows that government can, if not set things “right,” then at least (substantially) improve matters.

But members of the Public Choice,⁴⁸ the Chicago⁴⁹ and other allied schools of economic thought who presumably appreciate the functioning of markets, are all pretty much agreed in the erroneous conclusion that there is such a thing as the market failure of monopoly. It is only members of the Austrian School of Economics⁵⁰ who reject this premise that there can be market failure due to high concentration ratios, or for any other such reason.⁵¹

Why are the Austrians the odd man out? For one thing, this praxeological

46. “Those markets found wanting on the efficiency scorecard” is how Tollison, characterizes this “failure.” Robert D. Tollison, *Public Choice and Antitrust*, 4 CATO J. 905 (1985).

47. *Id.*

48. KEITH N. HYLTON, *ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION* (Cambridge University Press, 2003); FRED S. MCCLESNEY & WILLIAM F. SHUGHART, *THE CAUSES AND CONSEQUENCES OF ANTITRUST* (University of Chicago Press 1995); Fred S. McClesney, *Public Choice and the Chicago School of Antitrust* in 2 THE ENCYCLOPEDIA OF PUBLIC CHOICE 445 (Charles K. Rowley & Freidrich Schneider eds. 2003); Robert D. Tollison, *Public Choice and Antitrust*, 4 CATO JOURNAL 905 (1985); SPENCER W. WALLER, *PUBLIC CHOICE THEORY AND THE INTERNATIONAL HARMONIZATION OF ANTITRUST LAW*, 48 THE ANTITRUST BULLETIN 427 (2003).

49. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (Basic Books, Inc. Publishers 1978); YALE BROZEN, *CONCENTRATION, MERGERS, AND PUBLIC POLICY* (Macmillan Publishing Co., Inc. 1982); HENRY CALVERT SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* (Univ. Chicago Press 1948); Kenneth G. Elzinga, *A Response to Jeffrey Tucker*, 1 J. MARKETS & MORALITY 83 (1998); Richard Posner, *Antitrust Law* (Univ. of Chicago Press 2001); George J. Stigler, *Monopoly*, in THE FORTUNE ENCYCLOPEDIA OF ECONOMICS (David Henderson ed., 1993); Tollison, *supra* note 46.

50. The Austrians enthusiastically support the Public Choice rejection of the “public interest” theory of government regulation.

51. See e.g., William L. Anderson, et. al., *The Microsoft Corporation in Collision with Antitrust Law*, 26 J. SOC. POL. AND ECON. STUD. 287 (2001); D.T. ARMENTANO, *ANTITRUST POLICY: THE CASE FOR REPEAL* (Cato Institute 1986); Walter Block, *Austrian Monopoly Theory—A Critique*, 1 J. LIBERTARIAN STUD. 271 (1977); Walter Block, *Total Repeal of Antitrust Legislation—A Critique of Bork, Brozen and Posner*, 8 REV. OF AUSTRIAN ECON. 35 (1994); Donald J. Boudreaux and Thomas J. DiLorenzo, *The Protectionist Roots of Antitrust*, 6 THE REVIEW OF AUSTRIAN ECONOMICS 81 (1992); Thomas J. DiLorenzo, *The Myth of Natural Monopoly*, 9 THE REVIEW OF AUSTRIAN ECONOMICS 43 (1997); Thomas J. DiLorenzo & Jack C. High, *Antitrust and Competition, Historically Considered*, 26 ECONOMIC INQUIRY 423 (1988); High, 1984-1985; Fred S. McClesney, *Antitrust and Regulation: Chicago's Contradictory Views*, 10 CATO J. 775 (1991); MURRAY N. ROTHBARD, *MAN, ECONOMY AND STATE* (Ludwig Von Mises Institute 2004); Fred Smith, *Why Not Abolish Antitrust?*, 7 Reg. 23 (1983); Jeffrey Tucker, *Are Antitrust Laws Immoral*, 1 J. MARKETS & MORALITY 75 (1998); Jeffrey Tucker, *A Response to Kenneth G. Elzinga*, 1 J. MARKETS & MORALITY 90 (1998).

school of thought sees the essence of monopoly as a government grant of exclusive monopoly privilege. For the Austrians, free entry is the key to non monopoly status: as long as there are no regulations preventing competition, there is no, can be no, monopoly. Even if there is only *one* firm presently in an industry, as for a time only IBM was the only producer of computers, and ALCOA the only business providing aluminum, there is *still* no monopoly, even with a one firm concentration ratio of 100%. Why? Because there was never any law prohibiting the entrance of other, competing, companies. In contrast, there are regulations proscribing competition with the U.S. Post Office, and with medallioned taxi cabs in most major cities. Here, then, are the only true cases of monopoly to be found, but these are patently *not* at all part of the free market system.

Another reason is that Austrians deduce from the fact that a trade takes place that both parties to it gain, at least in the *ex ante* sense, if not always *ex post*. But, when a commercial exchange does *not* occur, they take the position that nothing, absolutely follows from this, in terms of welfare economics. Let us apply the analytic framework for monopoly shared by all mainstream schools of thought, including the Chicago and the Public Choice, golf. Then, if Tiger Woods wishes to enter only 12 tournaments per year, instead of the, say, 15 competitions that the antitrust authorities *think* he should play in,⁵² they will accuse him of a "restraint of trade." That is, in their view, Woods *should* be golfing 15 times a year; he only does so for a round dozen times; therefore, he is in effect cheating the public out of 3 appearances per year. They have the effrontery to claim that total welfare, of Tiger plus the rest of us, would be enhanced if he were forced, even at the point of a gun, to go out on the links three more times per year.

Let us now attempt another *reductio ad absurdum* of this system, moving now from golf to monogamous marriage. A man tries to pick up a married woman in a bar, in order to have sex with her. She replies, "Sorry, I am married, monogamously; I may not go to bed with you." His reply: "You are engaged in a bilateral monopoly! You are restraining trade, with *me*. You are guilty of an anti trust violation." If the "logic" of mainstream analysis of monopoly and anti trust were rigorously applied to this scenario, the woman would be fined or jailed for refusing to go along with the urgings of the man, at least if that were her reasoning.

Now, this is not nonsense. It is not even nonsense on stilts. It is *so much* worse than that. It is *preposterous*. And yet, there are fines and jail sentences provided by anti trust law for violators. It makes no sense from a libertarian point of view to *compel* people to "trade" with one another if one of the parties to the commercial interaction is unwilling. It makes no sense, either, from an economic perspective, to say that society will be better off if the recalcitrant economic actor is forced to make a purchase or a sale against his will. To argue

52. Based on their weird and exotic econometric models; don't ask.

the opposite is to commit the fallacy of interpersonal comparisons of utility; it is to say that Tiger Woods, or the married woman, will lose less than golf fans, or the lounge lizard, will gain from the respective forced interactions. When put in these terms antitrust law sounds ludicrous. But, it is no less so when applied to business firms.

VIII. CONCLUSION

Say what you will about the Public Choice School of Economics, it cannot be fairly claimed that it supports, or is even compatible with, *laissez faire* capitalism. To the contrary, it provides intellectual support for socialism, for the regulatory state. That it enjoys a reputation very much to the contrary is one of the great intellectual injustices of the day.