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Is Voluntary Government Possible? A Critique of Constitutional Economics

by

WALTER BLOCK AND THOMAS J. DiLORENZO*

“A ‘social contract’ theory of government ... can be used to place a stamp of approval on all, or most, of the actions of the *existing* government (for example, Rousseau). Thus, the theory of the divine right of kings began as a check on government, as an order to the King to stay within divinely-commanded laws; it was transformed, by the State, into a divine stamp of approval for anything the King might decide to do.” (Murray Rothbard)

According to public choice theory, the market and the state are both devices through which cooperation is organized and made possible. This theme of voluntary government is most prevalent in the subset of public choice known as constitutional economics. We believe that the analogy between politics and markets made by constitutional economists is theoretically weak and clouds rather than enhances our understanding of political economy. Politics has very little in common with non-coercive, voluntary exchange in the marketplace. (JEL: D 72)

1. Introduction

Public choice theory attempts to model politics as just another market. Political “exchange” is said to be analogous to market exchange, although certain differences are acknowledged. Consequently, the widely-acknowledged benefits of free markets are said to be the result of certain (not all) political “exchanges.” “The market and the State are both devices through which co-operation is organized and made possible [where] ... two or more individuals find it mutually advantageous to join forces to accomplish certain purposes,” BUCHANAN AND TULLOCK [1962, 19] wrote in their landmark study, *The Calculus of Consent*. The public choice ap-

* We wish to thank Randy Holcombe, Ralph Raico, and participants in sessions at the 1998 Southern Economic Association meetings and the 1999 Austrian Scholars’ Conference at Auburn University for their comments. Gordon Tullock’s critical comments were especially helpful. Two anonymous referees also provided insightful comments for which we are grateful.

proach to the analysis of political decision making, wrote BUCHANAN AND TULLOCK [1962, 23f.], incorporates political activity as a particular form of exchange; and, as in the market relation, mutual gains to all parties are ideally expected to result from the collective action ... the political process ... may be interpreted as a positive sum game.”

The theme of voluntary government is most prevalent in the subdiscipline of public choice known as constitutional economics, which has its roots in *The Calculus of Consent* and in much of Buchanan’s post-1962 research agenda (Tullock’s career took a somewhat different path after that early collaboration). We believe that the analogy between politics and markets that is made by constitutional economists is theoretically weak, often factually mistaken, and clouds rather than enhances our understanding of political economy. Government is an inherently coercive institution that has little in common with the non-coercive, voluntary exchange of the marketplace.

2. State and Market

In *The Calculus of Consent*, the first modern work on constitutional economics, Buchanan and Tullock espouse the so-called public goods theory of the state whereby members of society voluntarily agree to coerce themselves to pay taxes for the provision of public goods. In a Robinson Crusoe economy, they assert, both men (Crusoe and Friday) will recognize the advantages to be secured from constructing a fortress (BUCHANAN AND TULLOCK [1962, 19]). Yet, one fortress is sufficient for the protection of both. Hence, they will find it mutually advantageous to enter into a political “exchange” and devote resources to the construction of the common good. It is in this sense that politics is said to be “voluntary” and “efficient.”

But is it not in human nature to avoid taxing oneself if one can tax someone else instead? And is not this kind of exploitive behavior the very essence of democratic government, since voting rules never require unanimity? All governmental decisions in a democracy are necessarily exploitive of someone.

Political action is typically a means by which one group of people is able to coerce another group to pay for its own free rides. Indeed, in those cases where there is unanimity of agreement within a community on some issue, that issue would not need to be addressed by government at all but would remain in the domain of the private sector. Citizens coalesce every day to voluntarily organize the provision of myriad community benefits – from neighborhood childrens’ sports leagues to multi-million member nonprofit, charitable organizations – without resorting to governmental coercion. If agreement is truly unanimous, and the parties to the agreement have the right to secede from it, then there is no need to involve the state at all.¹ Only when there are dissenters, is the state invoked to override and

¹ An anonymous referee suggests that it is difficult to conceive that such institutions as mandatory elementary schooling, mandatory old-age insurance, and public street cleaning

crush the dissent, as the history of tax revolts proves (ADAMS [1993], [1998]; BEITO [1989]).

Buchanan and Tullock realize that a voting rule of unanimity – which is required for the neoclassical definition of efficiency – is never attainable, so they explore the features of “relative unanimity.” But relative unanimity is simply not a substitute for the real thing. It cannot be concluded that coerced minorities (however, small in number) benefit from being coerced. By their revealed preferences, the minorities have shown that they would, in fact, be harmed. The only way in which so-called relative unanimity can be labeled as economically efficient is if one presumes that it is possible to make interpersonal utility comparisons, which it is not.

The state is an institution whereby a controlling group uses its powers to exploit non-controlling groups.² One cannot realistically expect the controlling group to promote something called “the public interest” when it can promote the interests of the members of the controlling group instead (KALT [1981]). Even when governments appear to be altruistic – at least with regard to another group in society – they are practicing such “altruism” by taxing one group and giving that group’s wealth away to yet another group (usually in return for the subsidized group’s political support).

2.1 “Conceptual” Unanimity

Buchanan and Tullock posit in *The Calculus of Consent*, as does Buchanan in numerous subsequent publications, that government can be viewed as “efficient” and “voluntary” in the “constitutional stage of decision making.” That is, just as self-interested behavior in the free market can “further the general interests of everyone in the community” (the invisible hand theorem), an “acceptable theory of collective choice can perhaps do something similar in pointing the way toward those rules for collective choice-making, the constitution, under which the activities of political tradesmen can be similarly reconciled with the interests of all members of the social group” (BUCHANAN AND TULLOCK [1962, 23]). There may not be unanimous agreement over each individual policy choice, but those individual choices can nevertheless be deemed “voluntary” and not coercive, according to Buchanan

are a means by which one group of people coerces another group to pay for its free rides. This point is well taken as long as one only (or primarily) considers monetary values. But if we include subjective or psychic benefits, it is not too hard to conceive. After all, there must be some reason why one group (the majority) would coerce another group to pay for something the second group does not wish to pay for. It may be to save themselves money or there may be ideological reasons, such as with the public school movement. All we can deduce is that there is some reason why the first group works to coerce the second group.

² Some public choice theorists have argued that no real exploitation occurs in a democracy since the losers in one contest may become winners in another. This is the view of Dennis C. MUELLER [1989], a former president of the Public Choice Society. We find this view that, as long as governmental exploitation is pervasive, it really does not exist – to be bizarre.

and other “contractarians,” if one assumes that when the rules of the political game (i.e., the constitution) were chosen there *was* unanimity.

Evidence of actual unanimity is not necessary, only “conceptual unanimity” is. As BUCHANAN [1977, 127] stated in a more recent publication, “[t]o the contractarian that law is legitimate, and just, which might have emerged from a genuine social contract in which he might have participated. That law is illegitimate, and unjust, which finds no such contractual basis.” This statement is more or less the keystone of what Viktor VANBERG [1998] has referred to as Buchanan’s “enterprise of developing a theoretical approach to the state as a voluntary institution” (i.e., constitutional economics).

According to this viewpoint, the constitution may or may not be a written document. It may merely consist of the existing features of society that theorists can assume everyone (implicitly) agrees to. Politics is admittedly a series of predatory zero-sum games, but in reality such games are really positive-sum because “each and every participant has implicitly accepted the ‘contract’ embodied in the rules of the game ...” (BUCHANAN AND TULLOCK [1962, 254]).

Moreover, there need not be any actual political convention at which voting rules are agreed upon by the citizens; their mere existence gives them their legitimacy. And these rules may be in a constant change of flux, even though members of society do not hold any formal constitutional conventions to change the rules. “The ‘social contract’ is best conceived as subject to continual revision and change, and the consent that is given must be thought of as being continuous” (BUCHANAN AND TULLOCK [1962, 260]). Why it “must” be thought of as such is never explained, only asserted.

In a later publication BUCHANAN [1975, 96] claims the existence of an “existing and ongoing implicit social contract, embodied and described in the institutions of the *status quo*.” This impossible-to-verify “implicit” contract should cement in place the legitimacy of the *status quo*, according to Buchanan, even “when an original contract may never have been made, when current members of the community sense no moral or ethical obligation to adhere to the terms that are defined in the *status quo*, and ... when such a contract ... may have been violated many times over ... The *status quo* defines that which exists. Hence, regardless of its history, it must be evaluated as if it were legitimate contractually” (BUCHANAN [1975, 84f.]).

It is worth noting that David HUME [1965, 263] long ago dismissed this notion of tacit “contractual” consent with his example of the conscripted sailor who, by refraining from committing suicide by jumping overboard, does not thereby “consent” to the ship captain’s alleged “authority” over him.³ Hume understood that the greatest of governmental tyrannies could be rationalized by cleverly-crafted theories of “tacit” consent – even if the authors of those theories would themselves be appalled by the governmental actions for which their theories provided intellectual support.

³ This was brought to our attention by Leland YEAGER [1985, 270].

We must also point out that, despite Buchanan's assertions that constitutional political economy has its roots in the political theory of the American founding fathers, the most renowned founding father, George Washington, explicitly rebuked this kind of thinking. In his September 19, 1796 Farewell Address, President Washington warned of the tyranny that would result from any changes in the Constitution that were not the result of a formal convention. "If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed" (ALLEN [1980, 521]).

There is also a logical difficulty here. Constitutional economists try to derive a theory of human and property rights from their constitutional framework and they seek to do so on a consensual basis. But how can people give their consent to a contract before it is clear that they have any rights to do so? Where do these rights come from? How can a person agree to be bound by a constitution if it is this very document which can alone establish his rights? If rights are established only by constitutions, then before their advent individuals have no rights. But if they have no rights, what "right" do they have to participate in the construction of a constitution?

3. *The Myth of the Consensual Origins of the State*

Constitutional economics fails to adequately confront the voluminous philosophical, historical, sociological, and economic literature which points to the fact that the origins of the state have always been based on conquest and exploitation, not consent. Buchanan and Tullock and other constitutional economists frequently argue that their theories are normative and, consequently, that their policy prescriptions should be beyond criticism. But in *The Calculus of Consent* and elsewhere the normative theories are used to rationalize actual policy interventions, and in doing so the authors frequently mix normative and positive analyses, including many real-world examples. As such, constitutional economics can become more or less a stamp of approval for virtually any and all government interventions. We reject this line of thought and believe that it is entirely appropriate to criticize such theories from an historical perspective, as we do in the remainder of this section.

Many historians have noted that the origins of the Roman Empire, like other empires in antiquity, were in war and conquest. In the sixteenth century philosophers began investigating this question, and most of them came to agree with Jean Bodin, who wrote in *Six Books of the Commonwealth*, that "[r]eason and common sense alike point to the conclusion that the origin and foundation of commonwealths was in force and violence" (OPPENHEIMER [1997, 1]). A contemporary of Bodin's, Blaise PASCAL [1932, 81], concurred that "[m]ight is the sovereign of the

world,” and that “[m]en will doubtless fight till the stronger party overcomes the weaker, and a dominant party is established.”

In *A Treatise on Human Nature* David HUME [1978, 556] argued that “this certain, that if we recount to the first origin of every nation, we shall find, that there scarce is any race of kings, or form of a commonwealth, that is not primarily founded on usurpation and rebellion ...” HUME [1987, 473] reiterated this theme in his essay, “Of the Original Contract,” in which he stated that “[a]lmost all the governments, which exist at present, or of which there remains any record in history, have been founded originally, either in usurpation or conquest, or both, without any pretense of a fair consent, or voluntary subjection of the people.” Hume further explained that citizens typically were lulled into accepting the state and reconciling themselves to its authority.

Anne-Robert-Jacques TURGOT [1973, 69], a precursor of the modern Austrian School of Economics, wrote in 1750 that “[t]he first [governments] were necessarily the product of war, and thus implied government by one man alone. We need not believe that men ever voluntarily gave themselves *one master*.” Another Frenchman, the historian Augustin Thierry, asserted that every government has been “created by the mixture of several races: the race of the invaders ... and the race of those invaded” (OPPENHEIMER [1997, xiii]). And Friederich Nietzsche believed that “the State originates in the cruelest way through conquest” (OPPENHEIMER [1997, xiii]).

The German sociologist Ludwig GUMLOWICZ [1963, 199], whom Franz Oppenheimer called the “pathfinder” of the conquest theory of the state, explained in great detail why he believed that “[e]very political organization ... begins at the moment when one horde permanently subjugates another.”

In the late eighteenth century the British philosopher Josiah Tucker pointed out that the Lockean philosophical system, which had inspired the recently-concluded American revolution and which argued that governments derive their just powers only from the consent of the governed, constituted a test that no government could ever pass. The Lockean system, TUCKER [1967, 101] argued, was “an universal Demolisher of all Civil Governments, but not the builder of any.” Tucker supported his position by pointing out that the newly-created American government, which was supposedly based on Lockean “natural rights,” in fact ignored these principles by not allowing any citizens, not even the residents of a single state, the right to live in a “state of nature” without any government at all.

Edmund BURKE [1968, 53] wrote in 1756 that “all empires have been cemented in blood” and that “the greatest part of the governments on earth must be concluded tyrannies, impostures, violations of the natural rights of mankind, and worse than the most disorderly anarchies.”

Franz OPPENHEIMER [1997] carried this tradition forward by using the inductive method of history and the deductive method of economic theory (the kind of theory favored by the Austrian School) to show that the origins of the state lie in conquest, subjugation, and exploitation.

Albert Jay NOCK's [1983, 40] description of the origins of the state also seems much more accurate than the theories of constitutional economists. According to Nock, "the State invariably had its origin in conquest and confiscation. No primitive State known to history originated in any other manner ... no primitive State could possibly have had any other origin ... the sole invariable characteristic of the State is the economic exploitation of one class by another."

BUCHANAN AND TULLOCK [1962, 12] simply assume this historical tradition away with the statement that "we ... reject any theory or conception of the collectivity which embodies the exploitation of a ruled by a ruling class ... Any conception of State activity that divides the social group into the ruling class and the oppressed class, and that regards the political process as simply a means through which this class dominance is established and then preserved, must be rejected as irrelevant for the discussion which follows."

No reason is offered for this. It is merely asserted that the phenomenon of one class of citizens using the powers of the state to exploit and plunder another class – a feature of governments throughout human history – "must be rejected." In doing so, Buchanan and Tullock ignore not only Marxist class analysis but all other non-Marxist theories of class domination without offering any explanation for their rejection.

One political theorist who understood and explained virtually every political phenomenon that has been studied by modern public choice scholars is John C. Calhoun, whom many historians consider to have been the last of the American founding fathers in terms of his educational background and political philosophy (LENCE [1992]). Calhoun spent four decades (1811–1850) as a US congressman, senator, secretary of war, and vice president. Once democratic government is established, Calhoun wrote in his "Disquisition on Government," the community will inevitably be "divided into two great parties, a major and a minor, between which there will be incessant struggles on the one side to retain, and on the other to obtain the majority – and, thereby, the control of the government and the advantages it confers" (LENCE [1992, 16]).

This "deeply seated tendency" that is common in all democracies is sure to divide every political community into "two great hostile parties" which are not Marxian class interests but "the payers of the taxes and the recipients of their proceeds" (LENCE [1992, 17]). The "necessary result" of democratic government is "to divide the community into two great classes; one consisting of those who, in reality, pay the taxes, and, of course, bear exclusively the burden of supporting the government; and the other, of those who are the recipients of their proceeds," or of "taxpayers and tax-consumers" (LENCE [1992, 19]).

While Buchanan and Tullock assert that even an unwritten or "conceptual" constitution is sufficient for what they believe to be voluntary government, Calhoun issued a dire warning against such thinking more than a century earlier. He thought that even a written constitution that ostensibly prohibited the plundering of one class by another is unworkable, and history seems to have proven him correct. Over time, the majority would "endeavor to elude" any constitutional restric-

tions on its powers and would simply ignore the arguments of the strict constructionists. Appeals to reason, truth, justice, or the obligations imposed by the constitution would be sneered at by the ruling class as “folly” with the result being a “subversion of the constitution” (LENCE [1992, 27]).

Calhoun was an intellectual descendant of the early nineteenth-century French “Industrialist” school of political economy, which originated the study of class conflict not in the Marxian sense but in the sense of one group of citizens being exploited by another group via the auspices of the state. Among the members of this school were Augustin Thierry, Charles Comte, Charles Dunoyer, Destutt de Tracy, Benjamin Constant, and Jean-Baptiste Say (RAICO [1998], EUSZENT AND MARTIN [1984]). The French Industrialists anticipated the modern economic concept of rent (or rather, loot) seeking, for they distinguished between “producers” (businessmen, working people) and “exploiters” who used politics to live off the labor of others.

BUCHANAN AND TULLOCK [1962, 22] claim to reject all such analyses as “irrelevant” to their discussion, yet at one point they refer to “preventing the undue exploitation of one group by another through the political process.”

More recently, SOWELL [1998, 5] focused on the cultural effects of governmental conquest down through the ages. But his work also sheds light on the essential nature of the state and its origins. In cataloguing the history of conquests from the Roman empire through the twentieth century, Sowell observes that “spontaneous atrocities and deliberate, systematic terror have long marked the path of the conqueror.”

Another contemporary author who has catalogued the exploitive essence of the state is Fred MCCHESENEY [1997] who argues persuasively that much of contemporary government is essentially an extortion and protection racket whereby politicians threaten (with proposed laws and regulations) to confiscate the wealth of various individuals or groups unless they receive political payoffs and bribes in the form of campaign contributions and other benefits.

Government, in MCCHESENEY’S [1997, 2] opinion, seems hardly different from a legalized Mafia. “Payments to politicians often are made, not for particular favors but to avoid ... political disfavor, that is, as a part of a system of political extortion ... Because the state, quite legally, can (and does) take money and other forms of wealth from its citizens, politicians can extort from private parties payments not to expropriate private wealth.” Among the tools of political extortion are threats to impose price controls, to close off business opportunities, increase a business’s costs through regulation or taxation, deny occupational licenses, or even to nationalize an industry.

4. *A Blank Check for Interventionism*

Applying the constitutionalist perspective, Buchanan has even argued that a thief really favors strict law enforcement and the punishment of thieves. The thief does not want his own property to be stolen any more than anyone else does. Thus, it can be said that a thief consents to his own punishment. But, as a rule and as a

practical matter, professional criminals do not frequently run to the police for help or lobby for harsher punishment of criminals. Murderers are not enthusiastic supporters of the death penalty, nor are thieves supporters of the Middle Eastern custom of cutting off the hands of those who are caught stealing.

Myriad other government interventions have been rationalized and endorsed by contractarians based on the idea that there must be “conceptual” unanimity, even for policies that appear to benefit only a small number of citizens while imposing enormous costs on everyone else. Sometimes elaborate mathematical models are presented to argue that laws that appear to everyone to benefit only narrow special interests really do benefit everyone after all.

One especially clear example is an article by BUCHANAN AND LEE [1992] which addressed a growing body of historical research showing that the original antitrust laws – including the 1890 Sherman Act – were designed to benefit special interests (i.e., uncompetitive businesses that could not compete with the trusts). They argue that the Sherman Act was not necessarily a special-interest law, despite the evidence of special-interest influence in the economic history literature. It is conceivable, they theorize, that the “common interest” of a “coalition of cartels” was served by the antitrust laws.

The essence of their argument is that each private cartel wants protection from competition, but if such protection becomes too widespread then individual cartels may lose out. They do not want to pay monopoly prices for the things they purchase any more than anyone else does. A “coalition of cartels” may voluntarily attempt to police output restrictions, but it is cheaper to let government do it. This is what antitrust laws can do – at least conceptually.

BUCHANAN AND LEE [1992, 223] do not assert that anything like this ever actually happened, but that there just may possibly be a situation whereby “the coalition [of cartels] can be thought of as implicitly supporting [antitrust legislation] by accepting it, and accommodating to it. It is in this sense that we argue that it is useful to conceive of our coalition of cartels, and of its support for antitrust legislation and enforcement.”

No cartel actually lobbies for the law; they all just silently accept whatever legislation other politically-active special-interest groups provide for them, in this case the Sherman Antitrust Act. This is essentially a conscripted sailor theory of antitrust. Because businesses did not wantonly violate the antitrust laws (and face criminal penalties) or openly revolt against them too vigorously (and face regulatory retribution, tax audits, or prison), Buchanan and Lee assume that American businesses can be modeled as having “conceptually” supported antitrust laws.

But there is no need to invent such fictions. There is an historical record to study, and research indicates that the Sherman Act benefited smaller, less competitive businesses and gave the Republican Party, which dominated Congress at the time, political cover for the McKinley tariff, which was sponsored by Senator John Sherman himself and passed just three months after the Sherman Act was passed in June of 1890 (DiLORENZO [1985], DiLORENZO AND BOUDREAUX [1995], HAZLETT [1992]).

In *The Calculus of Consent* Buchanan and Tullock assert that the non-poor can be construed as really being in favor of a welfare state, even if they voice opposition to it publicly. The reason they are for it is that it supposedly provides a form of “income insurance” that is available to them should they become unemployed. Again, as long as everyone is coerced, no one is really being coerced.

Despite their affinity for framing their analysis in constitutional terms, however, Buchanan and Tullock fail to offer an explanation of why government-enforced income transfers for the purpose of establishing a welfare state were outlawed by the US Constitution, at least until the constitutional order was overthrown by the American Civil War. James Madison, the acknowledged “father” of the Constitution, repeatedly denied that such income transfers were constitutional.

The American welfare state did not appear in any significant size until the 1930s, and even then there was fierce opposition to it. Indeed, much of the New Deal was ruled unconstitutional by the US Supreme Court, although later courts, influenced more by politics than by reverence for the Constitution, eventually gave the welfare state their stamp of approval. Still, nothing close to actual unanimous consent with regard to the welfare state has ever existed. There were tax revolts during the Great Depression (BEITO [1989]) and John T. FLYNN [1998] catalogued myriad other opponents of the new welfare state during that period.

If one observes the plight of the typical welfare recipient living in squalor in a government housing project in one of America’s cities, where law enforcement is weak if not non-existent, the schools are dysfunctional, and job opportunities are scarce, it is just not believable that this is what any rational person would consider to be a desirable system of “income insurance” worth purchasing.

There is much evidence, moreover, that welfarism has encouraged illegitimacy, family breakup, and a weakening of intergenerational linkages (MURRAY [1984], [1993]; AN, HAVEMAN, AND WOLFE [1993]; SCHULTZ [1994]). Families used to be the major source of “income insurance” in times of economic trouble or old age, but the welfare state has imposed serious damage on the institution of the family. As a recent article in the *American Economic Review* concludes, the family has traditionally served as “an informal self-insurance, or ‘family-security’ setup,” but this “setup” has been severely damaged by government old-age insurance, which induces many people to rely on government, rather than families, to provide such security (EHRlich AND ZHONG [1998, 151]).

There is a name for genuine (as opposed to “conceptual”) income insurance: savings. But the welfare state and the high level of taxation to finance it deters savings by increasing the rate of time preference.⁴ Furthermore, by draining hundreds of billions of dollars annually from the pockets of productive people, the welfare state makes it more likely that more citizens will be in need of charity at some point in their lives.

⁴ As Hans-Hermann HOPPE [1993, 121] has stated, the introduction of government as “an agency that can effectively claim ownership over resources it has neither homesteaded, produced, nor contractually acquired, also raises the social rate of time preference of homesteaders, producers, and contractors, and hence creates involuntary impoverishment . . .”

Contractarian theories provide theoretical cover for what Buchanan has labeled “apparent” coercion and “apparent” redistribution of income from government policy. One may try to interpret away acts of coercion and theft by calling them “apparent,” but they remain acts of coercion and theft. We agree with Leland YEAGER [1985, 271] that the very word “conceptual,” as used by contractarian theorists, “indicates that a ‘conceptual’ agreement is not an actual one, that a ‘conceptually’ true proposition is not actually true. It is no mere joke to say that ‘conceptually’ is an adverb stuck into contractarians’ sentences to immunize them from challenge on the grounds of their not being true.”

5. *Constitutional Economics versus Constitutional History*

Despite its repetition of the word “constitution,” *The Calculus of Consent* and much of the literature on constitutional economics frequently ignores the actual history of the ratification of the US Constitution. Granted, Buchanan and Tullock claim that theirs is primarily a normative theory. But their book is full of policy discussions, propositions, and specific proposals for welfare programs, ways of dealing with externality problems, financing government fire departments, etc. (BUCHANAN AND TULLOCK [1962]). They invoke historical facts to support their theory and claim that their work is in the same philosophical spirit as that of the American founders who, after all, were involved in creating a practical political document when they wrote the Constitution. For these reasons, we believe it is fair and appropriate to discuss the actual history of the US Constitution as a source of criticism of constitutional economics.

The Constitution was anything but unanimously supported; women did not have the right to vote at the time, nor did non-property owners (not to mention millions of slaves). It was adopted with a majority vote of only nine of the thirteen states through statewide political conventions. The Articles of Confederation, which were replaced by the Constitution, did require the support of all thirteen states.

When the Constitution was ratified about three-fourths of the adult males failed to vote in the elections to send delegates to the state ratification elections – either because they were disinterested or because they were disenfranchised by property qualifications. Thus, the delegates to the state ratification conventions were elected by a vote that included only about one sixth of adult males (BEARD [1986, 325]). Many of the states that did vote to adopt the Constitution barely did so, and no state voted unanimously in its favor. Virginia, which was the wealthiest and most influential state at the time, passed it by a margin of 89 to 79 votes; New York voted to ratify by a vote of 30 to 27; Rhode Island’s margin was a mere two votes, 34 to 32; and North Carolina initially rejected the Constitution by a 184 to 84 margin, voting a year later to ratify once the new constitution was an accomplished fact (MCDONALD [1958]).

These four states explicitly reserved the right to withdraw from the Union should the new government threaten their liberties. Patrick Henry was so alarmed

by the preponderance of military men among the state convention delegates who favored the Constitution that he warned his fellow Virginians of the possibility of “armed hordes [of soldiers] marching under the banner of the new government to subvert Virginia’s liberties” (MCDONALD [1958, 262]). At the Virginia ratifying convention Henry exhibited “stamina, argument, and rhetoric unmatched on either side” of the debate, wrote Herbert J. STORING [1985, 293], the chronicler of the anti-federalist movement.

Henry’s main objections were that by centralizing too much power in the central government, the Constitution effectively destroyed genuine federalism; the document represented a quest for “glory and riches” through empire, rather than liberty; there would be no real checks and balances on governmental responsibility, putting citizens at the mercy of “the virtue of the rulers;” the federal power to tax would effectively neutralize the states and impose unspeakable burdens on the people; the Constitution was unduly militaristic, “pretending external dangers and internal turbulence where none exists;” and the absence of a Bill of Rights would inevitably lead to tyranny (STORING [1985, 294f.]).

George Mason, the author of the Virginia Bill of Rights, which was the model for the Constitution’s Bill of Rights, was another vigorous opponent of the Constitution who campaigned tirelessly against it.

The so-called anti-federalists were a large and influential group. They feared that the particular form the Constitution had taken would encourage a dangerous centralization of governmental power (dangerous to liberty, that is).

The notion that there was anything near unanimous consent over the adoption of the Constitution is a myth. Albert Jay NOCK [1983, 90] even argued quite convincingly that the framers of the Constitution “executed a [non-violent] *coup d’Etat*, simply tossing the Articles of Confederation into the waste-basket, and drafting a constitution *de novo*, with the audacious provision that it should go into effect when ratified by nine units [i.e., states] instead of by all thirteen.”

6. *The Failures of Market Failure Theory*

In *The Calculus of Consent* Buchanan and Tullock develop their “interdependence cost” model in the context of a discussion of various examples of externality or spillover effects. It is these “market failure” examples that provide their conceptual rationale for the state based on “cost minimization” arguments.

One example is the organization of a “village fire department” which the authors assume to possess public goods characteristics. Conceptually, the fire department can exist through “purely voluntary co-operative action” under the auspices of a “voluntary” government (BUCHANAN AND TULLOCK [1962, 49]). But, if it were truly voluntary, there would be no need to label it as “government.” There are, in fact, myriad volunteer fire departments that are not funded by taxes. Nor is it necessarily true that “individual protection against fire may not be profitable,” as BUCHANAN AND TULLOCK [1962, 44] assert. It seems to us that it would be im-

possible for a homeowner to purchase homeowners' insurance without fire protection. This would surely provide a powerful incentive for individuals to voluntarily purchase fire protection – in addition to the incentive provided by not wanting to die in a house fire.

Nor is a Department of Swamp Drainage necessary. Buchanan and Tullock use swamp drainage as another example of a public good because of its mosquito-abatement effects. But private land developers have ample incentives to drain swamps before developing their land. And if some swamps remain undrained, so what? Because benefits and costs are subjective, and because interpersonal utility comparisons are impossible, coerced swamp drainage cannot possibly be Pareto-optimal. In a free market some swamps will remain undrained because it is simply not worth it to drain them.

Higher education is another questionable example of the supposed need for state intervention on the grounds of spillover effects. BUCHANAN AND TULLOCK [1962, 54] argue that because of the inability of students to “mortgage” their future earning power they are unable to borrow the appropriate capital in private financial markets to sufficiently finance higher education. “[C]ollective or state action may be taken which will remove or reduce the private externalities involved here.”

But the reason for this supposed market failure is government intervention, not the free market. Promising to work for an employer, or to work to earn money to pay off one's “educational mortgage,” is essentially a form of indentured servitude, the method that, historically, allowed hordes of immigrants to come to the US. But the 1866 passage of the Thirteenth Amendment to the Constitution outlawed this practice. Thus, the problem is not that such contracts do not arise on the free market; the problem is that they are prohibited by government. The “restrictions on full freedom of contract” that Buchanan and Tullock allude to are not free-market phenomena.

Municipal zoning is also said to be an appropriate intervention where the costs of dealing with spillover effects coercively, through government, are lower than doing so privately through restrictive covenants or corporate ownership. Buchanan and Tullock cite the example of the large bargaining costs involved in the case of a developer seeking to purchase a large number of individual housing units in a city when individual holdouts may have the ability to stop development altogether.

To advocate government zoning laws in this instance is again to embrace the notion of interpersonal utility comparisons. The explicit assumption is that the increased utility of the developer is necessarily higher than the diminished utility of the “holdouts” whom the state forces to sell out. Such comparisons are an impossibility.

A third example of market failure offered by Buchanan and Tullock is the necessity for government-imposed traffic control (lights, etc.). Surely, virtually everyone would agree that this is a proper role for government. But it cannot be denied that in a world of private road ownership there would be no need for gov-

ernment traffic lights; the private owners would have a strong incentive to provide them because of the liability costs to them of not doing so. Furthermore, it should also be acknowledged that in many American cities the phrase “traffic control” is an oxymoron, as traffic has become more and more chaotic – and dangerous. Government “controls” traffic about as well as it operates the post office or the department of motor vehicles (BLOCK [1983]).

Buchanan and Tullock chose these examples of externality and public goods problems in the early 1960s and, to be fair, we must acknowledge that it is possible that they would choose different examples today. New forms of contracts with lower transaction costs may well have been invented in the intervening years. Nevertheless, fire departments, swamp drainage, zoning, higher education, and traffic lights are still widely cited throughout the literature on externalities and market failure and are therefore worthy of comment.

7. *Conclusions*

The fatal flaw in the voluntary theory of the state advanced by constitutional economists is that no state ever has been, or ever could be, voluntary. If one really wants to explore the elements and ramifications of a voluntary society, we suggest closer scrutiny of the libertarian philosophy that no person or group of people may legitimately aggress upon the person or property of anyone else; and that every person has a right to private property, including one’s own body and the natural resources which they transform by their labor (ROTHBARD [1978], [1998]). The application of this doctrine is a promising means of understanding what is meant by a voluntary society.

Recent applied work by Fred FOLDVARY [1994] on the market provision of social services; Robert ELLICKSON [1991] on the private, voluntary resolution of disputes over externality problems; Robert AXELROD’s [1984] work on the evolution of cooperation; Bruce BENSON’s [1998] analysis of private criminal justice systems; and free-market environmentalism are just a few among many promising efforts in this regard (ANDERSON AND LEAL [1991]). Exploring actual institutions based on voluntarism, as opposed to relabeling the inherently coercive institution of government as conceptually, but not actually, voluntary, is a much more promising avenue of research.

Our disagreement with constitutional economics is more than a definitional one. Buchanan and Tullock label a wide range of seemingly voluntary collective choice institutions as “government” and, admittedly, a reasonable case can be made that, say, a village fire department might make a good example of voluntary government, at least on a relatively small scale. But the distinguishing characteristic is that in a truly voluntary setting the parties to an agreement have a right to secede from the agreement. If they do not wish to be taxed to pay for fire protection, they are free to live outside the agreement and forego the services or seek them elsewhere. This is not the case with tax-financed services. For example, joining a

swimming club is a genuinely voluntary act, whereas paying taxes to support a municipal swimming pool necessarily involves some degree of coercion. The phrase "voluntary government" is simply a contradiction in terms.

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