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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

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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 (BERTO [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 welfareism 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 an actual one, that a theorist, "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 unspakable 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, 294ff.]).

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 singular form the Constitution had taken would encourage a dangerous concentration of governmental power dangerous to liberty. The power that these men were warning their fellow citizens against was the absence 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 or 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 remedy for indentured servitude is not government, it is freedom. In the U.S. 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 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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