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IN DEFENSE OF A POSITIVE APPROACH TO GOVERNMENT AS AN ECONOMIC VARIABLE

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JAMES Buchanan offers what he calls an alternative approach to the interpretation of *Miller et al. v. Schoene*. I agree that there is a conflict of approaches but suggest that we are not trying to do the same thing. The two approaches are not analytic alternatives. Whereas mine is an attempt to describe *what did happen*, his is an evaluation of the case in terms of his normative model and a statement of *what might have, would have, indeed should have happened* if his normative model were followed. His is evaluation and mine is descriptive, positive analysis. Whereas I did not try to reach normative conclusions but only to describe what happened so as to generate some positive conclusions applicable to the interrelation of legal and economic processes generally (that is, public choice broadly conceived), he started with his normative approach and model (the Pareto-Wicksell analysis) and interpreted and evaluated the case in its light. We are doing epistemologically different things. Neither is more important than or superior to the other—nor are they mutually exclusive; but they are epistemologically different.

The fact that I share some of Buchanan's concerns and values in normative matters is irrelevant here; so is the fact that I disagree with him in some normative matters. What is important is that his normative analysis provides not one whit of positivist refutation of my positivist conclusions. Nor does he intend to, for his approach is self-admittedly normative. I still insist on the conclusions generated by my analysis of the case. Without repeating those conclusions, I will only say that they involve fundamental problems of legal-economic interrelations and policy, ultimately the reconciliation of continuity and change, freedom and control, and related questions which have been posed and treated both normatively and positively in economic and legal philosophy but which are identified in my article as positive problems necessarily confronting any society. Buchanan's model, on the other hand, involves a particular normative solution to those problems or to a particular formulation of them. I do not challenge either in my article or here his normative approach as such (though I do have reservations about it, which are discussed at

length elsewhere¹ and noted below); but I do insist that the processes of public choice (as in the interrelation between legal and economic processes) are as a matter of fact broader and more complex than his normative model recognizes. Indeed, to show this was a major stated purpose of my earlier article. What I did *not* attempt was to derive normative inferences; my aim was to generate some much needed positive conclusions about law and economics.

I find it therefore ironic that Buchanan attributes all sorts of normative inferences or status to what I offered as positive conclusions and which I continue to urge are positive conclusions whether one likes them normatively or not. Thus Buchanan has me relying upon arbitrarily imposed social-welfare functions; has me accepting state choice between conflicting claimants whenever previously existing rights to property are challenged; has me applauding an activist state, a state which, as he puts it, never rests; has me supporting a cost-benefit approach to property rights independent of distributional consequences;² has me forestalling market decision-making; reduces my analysis to an argument for resort to collective or state action; and imposes the requirement of a normative model on my positive analysis.³ None of this is correct. My analysis neither supports nor challenges any particular uses of government. My analysis describes fundamental aspects of government with regard to property rights and legal-economic change as they are found in the actual world; it describes governmental decision-making in its diffused complexity, in part as an arena and process in which ubiquitous conflicts, problems, interests and values of freedom, power, control, continuity, and change meet and are composed, one way or another; it describes the role of government in part insofar as it is used to structure participation in market decision-making; in sum, it describes some of government as it is. Buchanan is thus critical of me for describing legal-economic reality when that reality fails to conform to

¹ Warren J. Samuels, *Welfare Economics and Property*, in *Perspectives of Property*, (Gene Wunderlich and W. L. Gibson, eds) 61-148 (1972).

² This is especially ironic inasmuch as my actual view of cost-benefit analysis (not discussed in my article) envisions it as a tool of rational policy analysis and decision-making with full consideration of its great limitations. The real difference between Buchanan and me in this matter involves the fact versus desirability of social change through law. Buchanan is of course correct that deliberate collective choice requires evaluation of alternatives; he is opposed to (some types of) collective choice deliberately made.

³ Thus when Buchanan says, *supra* at 445, that "The analysis suggests that there might have been an efficiency basis for resort to collective or state action in the apple-cedar interaction under discussion here, but that this basis required the presence of certain narrowly-defined conditions," he is imposing his own conditions. I nowhere suggest those conditions or any other conditions are necessary for collective or state action to be justified, because I nowhere consider the problem of justification. No implication as justification can properly be drawn from my analysis; whereas "legitimate" state action (his next sentence) is strictly a function of his *a priori* normative model.

his normative model. But Buchanan's is only *one* particular normative approach; and, more important, I no more glorify the state than does Schelling applaud organized crime or economists generally praise poverty in analyzing those phenomena. Perhaps because his own perspective and approach is normative, Buchanan fails to perceive that positivist analysis, while potentially useful for normative or policy analysis, is only *is* knowledge and that before such knowledge can become a policy mandate ("ought") an additional normative premise has to be added. Such a premise I did not add.

Instead of a positivist analysis, Buchanan tries to suggest *what would have happened* if his normative model had been followed. But this is projective and not descriptive. Indeed, he acknowledges that the descriptive accuracy of the results predicted under his normative model is an empirical question; but it can become an empirical question only if his normative model is actually followed. My analysis, on the other hand, attempts to describe *what did happen* in the case at hand and generalize on that basis. It, too, involves empirical questions but they rely upon the existing arrangements, the status quo, whether one likes it or not. As positive propositions my conclusions strictly speaking neither support nor condemn the status quo; they only attempt to explain it. On the other hand, as I shall point out below, Buchanan's approach has a distinctive normative treatment of the status quo once his model is followed. I repeat that Buchanan's alternative approach is only a restatement of a normative analysis which I sought, in my article, to improve upon with a positive approach so as to identify certain basic legal-economic interrelationships hitherto given inadequate expression in that normative model.

Mine is essentially a positivist analysis of the role of government in public choice, of how law is a vehicle for effectuating social change and solutions to social change, generating and reinforcing new institutions, etc. Without challenging the normative basis of his model, which is beside the point here, Buchanan's approach is but *one* normative approach to how government should function; he would build in his preference function to the neglect of others and to the neglect of the fact that government *is*, whether he likes it or not, an arena and process in which preference functions compete. He thus accepts certain tasks for government and rejects others. His model would comprehend government only in terms of its postulated normative terms, whereas mine attempts to comprehend government as it actually is and as it has been used. His model expresses a dislike for activist government, or for one seen as activist, but is *itself* one approach to the use of government.⁴ It is my positive proposition that, like red cedar and apple orchard owners, his model must compete in the legal-economic arena over what ought to be done.

⁴ See Warren J. Samuels, *Government in the History of Economics: A Principle and an Interpretation*, (mimeographed, 1972).

My model only describes that with respect to which his takes a normative posture. His use of government is a once-and-for-all-time governmental identification of property rights with subsequent change coming through market exchange of rights.⁵ That may be how it should be but that is not how it is. Moreover, Buchanan has too pure or simplistic a theory or vision of legal history: he presumes an original identification (and assignment) of property rights that was immaculate with regard to power and change. But historically all rights have emerged from power play and have involved change of legal status and support as new and/or different interests are effectuated through government. He neglects the positive fact that the state is in these respects not only an independent but a dependent variable: going to the legislature *is* an economic alternative to bargaining in the market; legislation is not so much a surrogate for voluntary negotiation but an alternative. As Stigler has recently put it, "the procuring of favorable legislation *is* a commercial undertaking."⁶ Further, Buchanan's "certain" rights approach, while laudatory as far as it goes normatively ("certainty" has to be balanced against "reasonableness" and "continuity" against "change"), is illusory as a matter of fact. So long as men have acted as economic men, the state has been an economic alternative, a means through which they have attempted to reach their economic objectives and thereby to influence the results of the market. Rights have always been uncertain: with respect, first, to legal change and, second, in market significance.

Buchanan's normative model, whatever one thinks of the values ensconced therein, thus obscures several things which are a matter of positive description. First, there is no sense of perspective with regard to the historical pluralization of both economy and polity: government, economy, and property have become less class and more democratic institutions. The processes involved in this transformation have been the most critical normative questions in legal-economic history over the last two centuries and beyond, but Buchanan's normative model is silent with respect to them. His normative model thus neglects and obscures an historically important set of problems which are relevant as a matter of empirical fact to any meaningful approach to law and economics. Second, his approach to efficiency obscures (or takes a narrow and inconclusive position on) the role of government in determining who shall count. It obscures the continuing problem of jockeying for position over income distribution, which is based on the facts that both economic optimality

⁵ Buchanan's approach obscures and neglects the problem of the *assignment* of property rights, the fundamental distribution issue; it is he, not I, who neglects distributional implications.

⁶ George J. Stigler, *Smith's Travels on the Ship of State*, 3 *History of Political Economy* 265, 266 (1971).

and income distribution are a function of the power structure within which the market operates and that the power structure is a partial function of the use of government.⁷

Buchanan's approach also posits a misleading distinction between legislation and judicial review. His distinction is utterly unrealistic. I am quarrelling not with what *he* would have the courts do or refrain from doing, but with his pretense⁸ that the courts are not legislating when they decide on constitutionality and common law. The fact of the matter is that the courts *are* part of government and *are* making the constitution and law—yes, legislating—even when they pretend not to be doing so.⁹ I am neither defending nor criticizing the courts for being part of government; some of their decisions I like and others I dislike; but as a matter of positive analysis, that is what they are doing; and Buchanan's normative model obscures it.¹⁰

Buchanan says that the operative problem becomes one of implementing his set of efficiency norms through the political process, and he is critical of my analysis for not accepting his normative criteria. Without reiterating points already made above, let me say only that the political process is not only a process in which efficiency norms are adopted which give weight to established power positions, but also an arena which goes beyond static efficiency norms to problems of the assignment and change of assignment of rights and therefore change of power positions. I again urge that optimal solutions be seen as a function of power structure and thereby partially as a function of government, and that government be seen in a general equilibrium system as both a dependent and independent variable.

What can I say about his specific normative approach? It is what he has frequently labelled the Pareto-Wicksell approach, advocating a conception of Pareto optimality specified in terms of a unanimity rule and a prejudice (his term) in favor of previously existing rights. He is therefore in favor of defending *some* status quo power structure. But *which* one? As a normative matter, unanimity is attractive (but limited in feasibility, as he recognizes) and maintenance of previously existing rights is not to be rejected out of hand. But one has to know just what the existing structure of rights is that can be changed only unanimously. A Pareto-optimal rule (unanimity) must presume the propriety of the status quo in order for it to have recommendatory force. But which status quo? I would not accept his principles blindly and

⁷ This is detailed in Warren J. Samuels, *supra* note 1.

⁸ See Edward H. Levi, *An Introduction to Legal Reasoning* 1 (1961).

⁹ See *Essays in Constitutional Law* 3-19 (Robert G. McCloskey ed., 1957).

¹⁰ There are also more possible precepts of the "fiscal constitution" than are recognized by Buchanan's normative model.

without reservation.¹¹ But consider them as a matter of positivist analysis: his normative approach functions as a defense of the status quo power structure, whatever it is; my analysis¹² shows the limited *positive* relevance and ambiguous *normative* significance of the Pareto-Wicksell analysis; my analysis¹³ also shows, with regard to Buchanan's (and mine, for that matter) preference for self-choice, that the critical problem is not just self-chosen positions but also the opportunity-set structure comprising the alternatives between which one can choose and the forces and factors governing that opportunity-set structure. All these things his normative analysis ignores or obscures. He is entitled to ignore them. He is entitled to opt for whatever normative model he wants to see instituted. But my positive analysis attempts to identify the basic problems with respect to which (in part) his normative model takes positions, and what those positions involve.

Buchanan's uneasiness with my article is really a quarrel with the world, a world which does not unquestioningly and ubiquitously accept the propriety of the status quo, a world which does not accept his approach to the problem of order or of legal-economic change. Conversely, the world might quarrel with Buchanan, that he is a utopian in the finest sense of the word but that, like most utopians, his is a once-and-for-all-time system: it makes no provision for change except through the market, or no provision for structural change except as a result of unanimity and/or market pressures. Buchanan's model simply comprises his own combination of liberty and authority, with a state strong enough to maintain established privilege but not one which would alter the boundaries of privilege and of exposure to privilege; a state, that is, which is

¹¹ Let me make only three points here. (1) The protection of status quo property rights is, as a positive matter, but the perpetuation of past uses of government; surely government today has no less power than it did earlier and surely the use of government by past users is no more necessarily sacrosanct than that of new users. On the former point, see Justice McKenna, dissenting, in *German Alliance Insurance Co. v. Kansas*, 233 U.S. 389, 411 (1914): "In other words, to say that government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses to-day." (2) Capitalism rests upon both private property and a competitive market. If established rights are concentrated in ownership, competitive is a misnomer and the economy does not necessarily produce the benefits of a Smithian-libertarian system. Buchanan is preoccupied with the role (or some of the roles) of governmental power and neglects the structure and role of private power including its operation through government. (3) Buchanan's intransigent view toward established rights adopts a particular solution to the problem of order as its normative core which, taken to extreme, can only lead to revolution as new interests and classes have to deal with entrenched interests and classes on the latter's own terms, with the state as the exclusive instrument of the latter, and within a cost-price structure skewed by the extant rights structure (the very rights structure they are challenging). On this last point, see Warren J. Samuels, *supra* notes 1 & 4.

¹² Warren J. Samuels, *supra* note 1.

¹³ *Id.*

the instrument of the privileged. My real concern here, however, is not with that—that is the way it tends to be in most if not all societies (a positive proposition requiring elaboration); rather I am more interested that Buchanan ignores the problem of order in the real world and its treatment in a positivist manner. Buchanan and I are really talking about different things: I, with facts and generalizations subject to refutation; he, with an a priori normative model. Insofar as we attempt different objectives, our analyses are not epistemologically competitive. Our fundamental difference resides in our different answers to the question as to the desirability, even the necessity, for an objective, descriptive, positivist, and even agnostic approach to the study of government as an economic variable. Even if Buchanan and I were to completely agree on the elements and thrust of a normative model, this question would remain. I, for one, urge the development of the difficult field of law and economics in as positivist a manner as can be achieved with clear distinctions between ideological or normative preferences and positive propositions.