

Whose State and Whose Economy? Buchanan, Samuels, and the Positive Theory of Public Choice

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Abstract:

This paper revisits the debate between James Buchanan and Warren Samuels over *Miller, et al. v. Schoene* (1928). The initial court case—concerning the rights of government in the face of conflicting private interests—and subsequent debate between Buchanan and Samuels have important implications for the interrelations between legal and economic processes, the difference between a normative and positive theory of public choice, and the nature of public choice more generally. In published papers and private correspondence, the writings of Samuels reveal an alternative conception of public choice theory as a positive endeavor divorced from the free market normative implications of Buchanan’s work. Application of Samuels’ framework for public choice to rent seeking, the Coase Theorem, and income redistribution illustrate its continued relevance for political economy.

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1. Introduction

Public choice theory—the application of the traditional tools of economic analysis to the behavior of individuals in politics and the public sector (Buchanan, 1979)—has often been the subject of criticism among mainstream and heterodox economists alike. Criticisms of public choice run the gamut from substantive criticisms about the predictive content of public choice theory (Pressman, 2004; Englen, 2007), to questions about the ideological motivations of leading public choice theorists (MacLean, 2017)². A central factor in the aversion to public choice is found in the purported normative implications of the theory. Pressman (2004) argues that, “[A]t bottom, the problem is that public choice theory begins with an ideological aversion to government and a religious worship of the market. This antigovernment ideology has blinded the entire public choice school.” (p. 15). While it is true that public choice theory has been used to emphasize the possibility of government failure, inefficient regulation, and excessive government, it is not clear that the positive content of public choice theory—understood as mere description of political and public sector behavior, involving the interaction between legal and economic processes—necessitates these normative conclusions.

In this paper, I revisit the debate between Warren Samuels and James Buchanan—first in *The Journal of Law and Economics* (Samuels, 1971, 1972; Buchanan, 1972), then in private correspondence (Buchanan and Samuels, 1975)—over *Miller, et al. v. Schoene* (1928). Both the initial court case—concerning the rights of government in the face of conflicting private interests—and the subsequent debate between Buchanan and Samuels have important implications for the interrelations between legal and economic processes, the difference between a normative and positive theory of public choice, and “the nature of public choice, specifically

² Several scholars have contested the accuracy of MacLean’s (2017) account. See Fleury and Marciano (2018) and Magness, Carden, and Geloso (2019).

the economic role of government and how best to approach it as economists” (Buchanan and Samuels, 1975, p.16). Crucially, the writings of Samuels reveal an alternative conception of the positive foundations of public choice theory divorced from the anti-governmental stance associated with public choice, and in-so-doing properly center concerns about power and distribution—and their relation to government activity—as objects of study for the public choice theorist. Drawing on additional work by both Samuels and Buchanan, I suggest three areas where a positive theory of public choice in the tradition of Samuels can provide new insights: the theory of rent seeking, the Coase theorem, and redistributive policy. These applications illustrate the importance of a positive theory of public choice to economists who would “take a less ideological and less obscurantist view of the economic role of government” than either Buchanan or more traditional public finance theorists (Samuels 2000, p.506).

The rest of the paper is organized as follows. Section 2 summarizes the debate between Samuels and Buchanan. Section 3 outlines the foundations to Samuels’ positive theory of public choice, drawing on private correspondence between Samuels and Buchanan. Section 4 applies insights from Samuels’ work to the issues of rent seeking, the Coase theorem, and redistributive policy. Section 5 concludes.

2. Miller, et al. v. Schoene (1928) Revisited

2.1. Samuels’ Analysis

The debate between Samuels and Buchanan originates in a 1971 article published by Samuels in the *Journal of Law and Economics*, entitled, “Interrelations Between Legal and Economic Processes.” In the article, Samuels (1971) uses the US Supreme Court case *Miller, et al. v. Schoene (1928)* as a prism through which to identify legal-economic interrelationships which had

been “hitherto given inadequate expression and attention” (435). The details of the case, as described by Samuels (1971), are as follows:

Miller et al. v. Schoene is a case which involves red cedar and apple trees and their respective owners; and cedar rust, a plant disease whose first phase is spent while the fungus resides upon its host, the chiefly ornamental red cedar tree, which is not harmed by the cedar rust. The fungus does have a severely adverse effect upon the apple tree during a second phase, attacking its leaves and fruit. The legislature of Virginia in 1914 passed a statute which empowered the state entomologist to investigate and, if necessary, condemn and destroy without compensation certain red cedar trees within a two-mile radius of an apple orchard...

...*Miller et al.*, plaintiffs in error in the instant case, unsuccessfully brought suit in state courts, and sued to reverse the decision of the Supreme Court of Appeals in Virginia. The arguments for the plaintiffs in error were basically simple and direct, as well as of profound heuristic value. Their main contention was that the legislature was, unconstitutionally in their view, attempting to take or destroy their property to the advantage of the apple orchard owners.

Ultimately, the Court affirmed the decision of the lower courts, throwing out the plaintiffs’ appeal. In its decision, the Court held that “[I]t would have been no less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go on unchecked. When forced with such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another” (276 U.S. 272).

Samuels uses the decision of the Court to illustrate three principles of a positive theory of public choice: (1) the necessity of choice on the part of the government—particularly, choice over the relative rights of competing interests, (2) the role of government as a dependent variable (that is, the role of the public choice theorist in answering the question of “*who* uses government for *what* ends” (442)), via the impact of private interests on the state, and (3) the interrelationship between the economy as an object of legal control and the law as means for seeking private economic gain.

In contrast to the normative analysis commonly employed by Buchanan and other public choice theorists—an analysis preferential to the status-quo distribution of rights as a result of its adoption of the unanimity rule as a basis for social change, based on the methodologically individualist presumption that “no social values exist apart from individual values” (Buchanan, 1959, p.203)—Samuels’ discussion of *Miller, et al.* does not begin with questions of how government should act, but rather seeks to explain *why* government acts the way it does. Samuels’ argument reveals that even if the methodological individualist is correct, governmental actors are nonetheless required to make decisions that violate the unanimity principle. In the conflict between red cedar owners and the apple orchards, the unanimity principle (also referred to by Buchanan as Wicksell-efficiency) is of no help: “[D]amned if it did and damned if it didn’t, government had to choose between the effective promotion of one group or the other: government is in both cases a participant in the economic decision making process” (Samuels, 1971, p.441). The government was faced with an “existential necessity of choice over relative rights, relative capacity to visit injury or costs, and mutual coercive power (or claims to income)” (p.442) such that whether the government acted or not, there would be a violation of Wicksell-efficiency. Although Samuels offers no guidance for what rule (if any) should replace unanimity, his analysis makes clear that the inevitability of government choice renders the unanimity rule of little use—even in a prescriptive setting. Suggesting the government should only act with unanimous consent provides no guidance for action in cases where neither action nor inaction would receive it. To the extent that such cases are the norm, the government must appeal to external justificatory criteria. The second question facing the public choice theorist therefore concerns what factors influence such appeals.

In its attempt to adjudicate conflicts between competing interests, government must appeal to external justificatory criteria. Normative questions of what criteria *should* be used aside, what criteria government is likely to use depends on the answer to the question: “who will use government?” (p. 443). In the case of *Miller et al. v. Schoene*, Samuels claims that the court, in favoring the apple orchards, “may be interpreted to have in effect opted for pecuniary (or economic) over aesthetic values, interests, or considerations” (p.444). Samuels argues the decision illustrates that “opportunities for gain whether pecuniary profit or political advantage, accrue to those who can use government” (p.444). Importantly, Samuels does not make a normative judgment, claiming that the use of government in this fashion “is neither sordid nor the exception; rather it is part of how government operates and for what it is used” (p.444). The facts merely illustrate that the inevitability of government choice implies favoring one interest over the other (the apple orchards over the cedar owners), and that which interest receives favor depends on whose values influence the government in each instance. Samuels writes:

Simply put, the question of whose interests the state will be used to effectuate reduces in part to the question of which specific interest will dominate in a particular case. This ultimate specificity of choice is the existential burden of man, which no reference to general or neutral principles will avoid...[W]hat the economy produces is not only goods but men, and in producing men it produces values and interests also” (p.445).

The central role of values and interests³ in affecting both who uses government and government’s response to values in the “ineluctable necessity of choice” (p. 438) suggests that the law will be sought out as a means of creating private gain. These efforts may appear as prototypical “rent seeking”—although the exact meaning of the term becomes less clear in Samuels’ framework, as shown below—but may refer to any effort to use the government for personal gain—including efforts geared at *reducing* the amount of government action. Without

³ A key connection between Samuels’ positive theory of public choice and social economics, broadly conceived.

making a claim about whether government action is justified—either in the specifics of *Miller, et al.* or in general—Samuels’ analysis of *Miller, et al. v. Schoene* suggests important questions, the answers to which are necessary if one wishes to explain outcomes involving the interrelations between legal and economic processes—including how particular government actions may arise.

2.2 Buchanan’s Response

Buchanan’s 1972 response to Samuels, titled “Politics, Property, and the Law: An Alternative Interpretation of *Miller et al. v. Schoene*,” sets out to contrast the “Virginia School” approach to public choice theory with the approach of Samuels, whom he lumps in with “post-Pigouvian welfare economics.” Buchanan claims that the “post-Pigouvian” approach relies on “social welfare functions to provide guidance to governmental authorities, treated as independent from citizenry” (p. 439), thereby invoking unwarranted justifications for state action.

Three primary objections are contained in Buchanan’s response. First, Buchanan argues that “[S]amuels appeals too readily to state decision-making which, in its very nature, forestalls the exchange or market-like pressures toward internalizing the interdependencies that may arise as exogenous elements to modify the overall social environment” (p. 441). That is, Samuels fails to acknowledge the possibility of Coase-type-internalization of social interdependencies. Second, even if the pre-conditions for the Coase theorem fail—such that there are “large numbers of apple growers involved in each interaction, and...transaction costs were such that voluntary agreement could not be predicted to emerge” (p.445)—the efficient provision of a public good requires adherence to the principal of unanimity. Given that the principle of unanimity is unsatisfied in this case—due to the absence of fair compensation for the red cedar owners—Buchanan is lead to conclude that the Court “[S]hould not have included any attempt at making a judgment as to the economic efficiency or inefficiency or to the equity or inequity of the

legislative choice actually made” (p.450). The focus of Buchanan (1972a) therefore appears to be about the conditions under which state intervention is justified, the precise question that Samuels (1971) attempted to avoid in his effort to develop a positive analysis. In a later effort, Buchanan (1972b) further clarifies his position:

Can we really say which changes are defensible “exchanges” from an existing status quo position? That is what I am trying to answer, without full success, in my paper in response to Warren J. Samuels discussion of the *Miller et al. v. Schoene* case. There I tried to argue that, to the extent that property rights are specified in advance, genuine “trades” can emerge, with mutual gains to all parties. However, to the extent that existing rights are held to be subject to continuous redefinition by the State, no one has an incentive to organize and initiate trades or agreements. This amounts to saying that once the body politic begins to get overly concerned about the distribution of the pie under existing property-rights arrangements and legal rules, once we begin to think either about the personal gains from law-breaking, privately or publicly, or about the disparities between existing imputations and those estimated to be forthcoming under some idealized anarchy, we are necessarily precluding and forestalling the achievement of potential structural changes that might increase the size of the pie for all. (Buchanan, 1972b, p.440).

This passage confirms the normative nature of Buchanan’s concerns. In his analysis of the case, Buchanan (1972a) argues that intervention of the sort depicted in *Miller, et al. v. Schoene* is inefficient. Samuels (1971) makes no such normative claim, pointing out only that such interventions do, in fact, occur—efficiency be damned.

Despite the aforementioned objections to Samuels’ analysis, Buchanan acknowledges that the distinction between “constitutional” and “political” decision making implies an ambiguity with respect to the possibility of (in-)efficiency judgments about state action. Acceptance of a less-than-unanimity rule as the basis of political decision making may be acknowledged to be optimal at the constitutional stage by rational individuals weighing the trade-off between the costs of decision making and the costs of interdependence (or external costs) (Buchanan and Tullock, 1962). In the case of *Miller, et al. v. Schoene* the implication of

this result is that “[W]e might think of both apple and cedar growers as having acquiesced in the continuing operation of a legislative process embodying constrained majority voting in the recognition that, on occasion, the economic interests of any particular subgroup in the community might be damaged, and perhaps severely” (Buchanan, 1972a, p.449). Thus, Buchanan’s third and final argument is that even if the conditions for the Coase theorem fail, the rule of unanimity is satisfied, and constrained majority rule was deemed optimal in some earlier constitutional decision process, the Court’s decision in *Miller, et al. v. Schoene*—understood as an attempt to impose an “effective new law of property” in accordance with arbitrary external value criteria—represents an abdication of its judicial mandate. Buchanan (1972a) argues the judiciary’s only role in this case should be “one of determining whether or not the decision taken by the legislature was made constitutionally” (p.449). Insofar as it attempted to “inject its own standards of value measurement in determining the constitutionality of the legislation” (p. 451), the Court did so in error.

2.3 Samuels’ Rejoinder

In a rejoinder to Buchanan—appropriately titled, “In Defense of a Positive Approach to Government as an Economic Variable”—Samuels agrees that the interpretations of *Miller, et al. v. Schoene* advanced by himself and Buchanan are in conflict, but suggests this conflict arises because the two approaches are not analytic alternatives: Buchanan and Samuels “are not trying to do the same thing” (p.453). While Buchanan (1972a) is focused on the conditions under which state intervention of the sort depicted in *Miller, et al. v. Schoene* might be justified, Samuels (1971) is concerned with describing the process by which such intervention actually occurs. Samuels (1972) writes:

Whereas mine [Samuels' approach to *Miller, et al. v. Schoene*] is an attempt to describe *what did happen*, his [Buchanan's approach] 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. (p. 453).

The interpretations advanced by Saumels (1971) and Buchanan (1972a) amount to two ships passing in the night. Samuels (1971) describes the case as it occurs, as a means for understanding the interrelation between legal and economic processes more generally. Buchanan (1972a) attempts to depict how an ideal government *should* behave and criticizes Samuels for not adopting a similar set of assumptions. Nowhere in his analysis does Samuels (1971) attempt to justify the Court's decision: "As positive propositions my conclusions strictly speaking neither support nor condemn the status quo; they only attempt to understand it" (p.455). Samuels (1972) somewhat sarcastically remarks that "[B]uchanan is critical of me for describing legal-economic reality when that reality fails to conform to his normative model" (p.454-455).

Samuels (1972) goes on to criticize the normative framework adopted by Buchanan as but one of many possible frameworks for evaluating government action: "[H]is [Buchanan's] model expresses a dislike for activist government, or for one seen as activist, but is *itself* one approach to the use of government" (p.455). If adoption of the Wicksell-Pareto normative vision itself requires an appeal to external justificatory criteria, then Wicksell-Pareto is subject to the same criticism as any other normative framework: the conflict is not between a supposedly value-neutral Wicksell-Pareto approach and other forms of justificatory appeal, the problem, for the normative political economist, is selecting from one of many different possible value criteria.

According to Samuels, there are good reasons to detract from the normative criteria advanced by Buchanan. First, the status-quo bias of such a framework ignores the fact that “historically all rights have evolved from power play” and that “going to the legislature *is* an economic alternative to bargaining in the market; legislation is not so much a surrogate for voluntary negotiation as an alternative” (p. 456). Second, the framework ignores empirically relevant problems (such as the inevitability of government choice). Third, Buchanan’s framework “obscures (or takes a narrow and inconclusive position on) the role of government in determining who shall count. It ignores the continuing problem of jockeying for position over income distribution” (p.456). Fourth, “Buchanan’s approach also posits a misleading distinction between distinction between legislation and judicial review” (p.457). Finally, the Wicksell-Pareto framework advanced by Buchanan “functions as a defense of the status quo power structure, whatever it is”⁴ and neglects “the structure and role of private power including its operation through government” (p. 458). Given what he therefore describes as the limited positive relevance and ambiguous normative significance of Pareto-Wicksell, Samuels concludes that the fundamental difference between himself and Buchanan 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” (p. 459).

3. Towards the Positive Analysis of Government as an Economic Variable

3.1 An Exchange of Correspondence

⁴ Buchanan’s emphasis on the unanimity criterion has received similar criticism from economists on the opposite end of the political spectrum from Samuels. See the following from Murray Rothbard’s review of *The Calculus of Consent*: “[T]hus, the unanimity rule, seemingly libertarian, actually turns out to be more of a fallacious support for the status quo — whatever the status quo happens to be — than a plea for libertarian principle” (Rothbard, 2011, p.928).

It is in private correspondence with Buchanan concerning their debate in the *Journal of Law and Economics* that Samuels most clearly lays out the principles for a positive theory of public choice, emphasizing the inevitability of government choice, the role of government as a dependent variable, and the way in which power and the distribution of wealth are a function of law, and law a function of power and the distribution of wealth. In the preface to the correspondence published in the *Journal of Economic Issues* (of which Samuels was a long-time editor) the two authors clarify that the letters begin with a debate over the nature of positivity, and then move to “the consequences of a positive analysis which posits the working rules of law and morals as contingent and subject to change and to concern with the consequences of an assumed propriety of the status quo system of power and use of government” (Buchanan and Samuels, p.113).

In an initial letter, dated 18 May 1972, Buchanan responds to an early draft of Samuels’ (1972) rejoinder. Buchanan writes to Samuels: “you protest too much your positive stance...I submit that an unbiased reader of your piece would indeed read normative elements into it, and sometimes strong ones” (p.114). In his response, dated 24 May, Samuels agrees with Buchanan “concerning the impossibility of a completely value-free positivism” but insists on the value of attempting to generate “as pure propositions as possible...[P]eople will read normative things from any positive proposition, but in reality they are adding their own normative premise” (p. 115). In a follow-up letter, Samuels re-emphasizes this point in reference to Buchanan’s attempt to derive normative constitutional principles from a purely positive analysis:

You cannot derive an ought from an is alone and your analysis will not permit you to do so: you will be applying the ought built into your logical system or whatever you call it... (1) there should not be an economic science built up pretending to be a science but which is only another ideology, and (2) there should be positive descriptive work (of my type) so that those who do want to

construct normative systems will be better informed as to what is involved.
(Buchanan and Samuels, p.119).

Samuels' objection to Buchanan's constitutional analysis is rooted in its effort to "enjoin others' use of government while denying their own use of government, when the heart of the matter is which (whose) use of government" (p. 120). According to Samuels, a positive theory of public choice—a positive analysis of government as an economic variable that extends beyond the question of whether it *should* act—is necessary to arrive at the answers required *prior* to normative inquiry.

In a follow-up letter, dated nearly a year later (27 March 1973) Buchanan denies the normative position ascribed to him by Samuels, and further rejects Samuels' positive analysis as one from which Buchanan "simply cannot extrapolate this into a viable future social order at all" (p.123). However, Buchanan does concede that he was wrong to place Samuels in the "social welfare function camp" (p.124) in his 1972 paper. Samuels doubles down on his characterization of Buchanan in the next letter, claiming that Buchanan's system "contains infinitely more implicit ethicizing" (p.125) than his own. However, the debate ultimately moves on from classificatory labels, transitioning to Buchanan's defense of the status quo regime of property and Samuels' claim that Buchanan overlooks the use of power and the distribution of wealth as key determinants of status quo rights. In two key letters, dated 1 September 1973 and 13 December 1973, Samuels provides his most detailed critique of Buchanan's work, and in-so-doing lays out the principles of a positive theory of public choice.

First, Samuels argues that Buchanan's appeal to the Pareto-Wicksell unanimity rule as the basis for social change arbitrarily limits the scope of public choice theory to the analysis of choice *within opportunity sets*, when the objective of public choice theory is to "study the formation of the structure of opportunity sets, as they are in the real world" (Buchanan and

Samuels, p.128). As Buchanan himself elsewhere describes it, public choice (and particularly constitutional political economy) is concerned with the analysis of “choice among constraints” (Buchanan, 1990). At minimum, the unanimity-consent rule misses non-Pareto optimal changes as they occur through the market, such that—when these changes are accounted for—the status quo loses its normative force.

Second, Buchanan’s public choice framework ignores the *inevitability* of non-Pareto optimal choice by government. As in *Miller, et al. v. Schoene*, it is the exception rather than the rule that choice by government be greeted with unanimous consent. Yet the government must choose, nonetheless. In such cases, the unanimity rule—as a normative guide—is of no use to government actors (how can unanimity be a guide when neither action nor inaction receive unanimous consent?), and neither can the unanimity rule function as how a positive description of government behavior, given observed dissent from any course of government action. In such cases, reliance on the unanimity rule “neglects the hard decision-making society faces with regard to difficult issues of the power structure” (Buchanan and Samuels, p.129). As a result, it attaches an arbitrary normative weight to those already in power:

It allows the privileged in the status quo to hold out and perpetuate themselves by being able to withhold their consent. As attractive as the consent (unanimity) rule is, it places too much power in the hands of the already privileged, indeed cementing their mortgage upon the future; and it fails to comport with the experience and realities of public choice...[I]n other words, in part, it reinforces the power of the powerful in the status quo to produce non-Pareto optimal changes not subject to controls exogenous to themselves, and it does this by giving them a veto (Buchanan and Samuels, p.129).

The arbitrary preference for the already powerful leads to Samuels’ third critique of Buchanan’s approach, namely that it “completely avoids the distributional issues: distribution of income, wealth, power, and so on” (p. 129). In ignoring distributional issues, the Buchanan-school of public choice overlooks the way the legal system and property rights—including status quo

property rights—are a function of that distribution (a point that is crucial to Samuels' (1992) later analysis of the Coase theorem).

Finally, by ignoring the inevitability of government choice, the possibility of non-Pareto optimal changes through the market, the role of government as a dependent variable—with law determining the distribution of income and the distribution of income simultaneously determining law—Buchanan mistakes social change through unanimity for the absence of coercion, when in-fact “there is coercion even in a market relying upon contracts; the problem is not coercion or no coercion but coercion within which institutional or power structure” (p.135). By framing the analysis of government in terms of the unanimity rule public choice theory forgoes a substantive analysis of power, an analysis required to undertake a comprehensive positive approach to government as an economic variable. Samuels illustrates the potency of this failure in his critique of Buchanan's desire to reduce the size of government. In-so-doing, Samuels indicates a path forward for public choice theory devoid of the free-market implications of Buchanan's work.

Blinded by his insistence on the unanimity rule as a basis for social change, Buchanan's desire to cut the size of government misses how such changes alter the prevailing power structure, presumably altering the subsequent distribution of rights, paving the way for both market and non-market changes that may not satisfy the Pareto-Wicksell criterion. Samuels' first charge against Buchanan therefore concerns his inability to see that power is always relative: “[T]he power of alpha is relative to the power of beta” (p. 131). In cutting the size of government, the central question becomes “whose power is enhanced if government power—central government power—is reduced?” (p. 131).

By failing to ask this question, Buchanan's advocacy of small government misses the possibility of equally pernicious concentrations of private power, whose concentrated decision making at scale rivals that of government, and which are equally likely to make decisions that violate the unanimity criterion. In contrast, Samuels' approach to public choice "looks to all concentrated power" as influencing and influenced-by the legal system. Samuels concludes that the relative nature of power implies that a reduction in the size of government is equivalent to an increase in the power of private enterprise, but—*a priori*—there's no reason to believe that concentrated private decision making is any more efficient than public decision making: "[I]f Howard Hughes were the nation's or the system's sole capitalist we would be just as socialized as if we had a traditional socialist regime" (p.132). The difference between Soviet-style planning and monopoly capitalism lies not in the scale or concentration of power, but in *who* makes the decisions, and whose interests are counted. The basic problem of decision making in the face of conflicting and mutually inconsistent interests—the inevitability of choice—remains just the same. In Samuels' words: "[I]t is not a question of government or no government, but which government or which interests government is to support" (Buchanan and Samuels, p. 132). Application of Samuels' positive approach to the issues of rent seeking, the Coase Theorem, and income redistribution illustrates its continued relevance for political economy.

4. Rent Seeking, the Coase Theorem, and Redistribution

Rent Seeking

Beginning with Tullock (1967), a large literature growing out of public choice theory in particular, and neoclassical economics more generally, has concerned itself with a class of activities identified as "rent seeking" (Krueger, 1974; Buchanan, Tollison, and Tullock, 1980; Murphy, Shleifer, and Vishny, 1991). Rent seeking is variously defined as competition for

income arising from governmental restrictions on economic activity (Krueger, 1974), the pursuit of income arising out of “redistribution of wealth from others and not from wealth creation” (Murphy, Shleifer, and Vishny, 1991, p.), and “resource-wasting activities of individuals in seeking transfers of wealth through the aegis of the state” (Buchanan, Tollison, and Tullock, 1980, p. ix). More recently, heterodox authors have also attempted to address the problem of rent seeking. Von Seekamm (2017) incorporates rent seeking—defined as the pursuit of a redistribution of income in which no new output is created—into a Kaleckian growth framework via the inclusion of the share of income paid to “facilitating labor.”

A cursory glance at the literature reveals that at least one problem with the concept of rent seeking is a lack of a definitional consistency. Christophers (2019) rightfully critiques the lack of definitional clarity surrounding rent seeking, and offers an alternative understanding rooted in the monopoly power of rentiers. Beyond definitional concerns, a question remains as to the extent to which the analysis of activities classified as rent seeking put forward by public choice theorists reflect substantive positive advances in the understanding of government as an economic variable, or whether the literature on rent seeking simply reflects an undue normative prejudice against government intervention. While few economists would deny that lobbying, regulatory capture, and other, similar activities typically associated with the term “rent seeking” constitute important real-world phenomenon, the public choice approach to explaining this behavior is hamstrung by reliance on a misguided notion of economic efficiency. Samuels (1992b) illustrates three ways that adherence to static efficiency criteria undermines the usefulness of traditional rent-seeking analysis.

First, Samuels (1992b) argues that rent-seeking theory adopts an arbitrary criterion of economic value rooted in physical production:

But the problem is whether economic well-being is to be defined in terms of the accumulation of real assets *or* personal utility functions. Quite apart from the very important question of whose capital accumulation or personal utility functions are to count, there is no reason why the former definition of well-being is preferred to the latter...to pursue rent-seeking analysis in physical terms by postulating a physical real-asset notion of productiveness and thereby of waste is to conduct analysis at a level independent of human preferences and institutional organization of society (p.117).

The association of economic value with physical production is present even in heterodox approaches to rent seeking: Von Seekamm (2017) models rent seeking as a decrease in the rate of capital accumulation resulting from a transfer of income to facilitating labor.

The identification of economic value solely with physical production has long been critiqued by institutional economists. Veblen famously argued that “[t]he accumulated, habitual knowledge of the ways and means involved in the production and use of these appliances” is of more value than capital itself, because capital equipment is more easily replaced than intangible knowledge, habits, and norms (quoted in Robinson, 1980, p.116). Brown (2005) offers a similar critique, arguing “[t]he economic value of ‘factors of production’ is contingent upon, and may be nonexistent without, their inosculation with other factors of production” (919). To the extent that legal changes arising from rent seeking activities result in an *increase* in the “accumulated, habitual knowledge of the ways and means involved” in production, there is no reason to suppose that rent seeking is necessarily associated with a reduction in overall economic activity or a loss of “efficiency.”

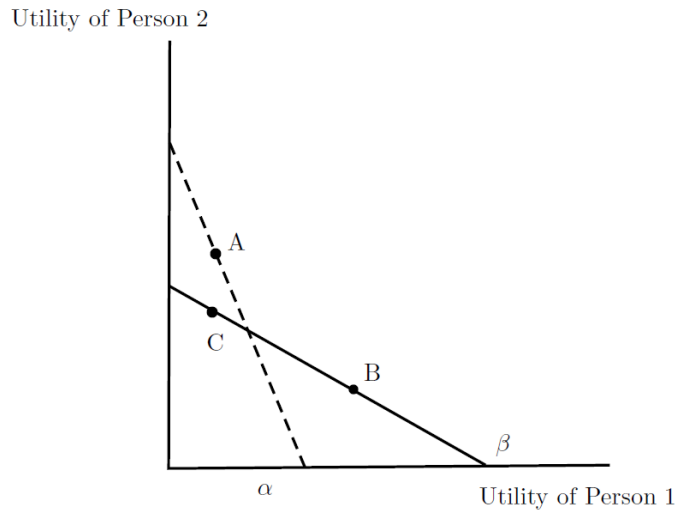


Figure 1: Allocative Efficiency Under Different Property Rights Regimes

Second, Samuels (1992b) argues that because Pareto efficiency is defined under a *given* set of rights, and the presumed objective of rent seeking activities is to alter the allocation of property rights, inefficiency claims by public choice theorists are misguided. What is “wasteful” in one legal structure may be “productive” in another: rights specify efficiency. To the extent that the point of rent seeking activities is to change the legal structure, it makes little sense to evaluate them under the guise of static allocative efficiency. This criticism can be understood with the help of Figure 1. Figure 1 presents two feasibility frontiers, α and β , for a two-person economy. Each feasibility frontier is presumed to be associated with an alternative legal structure. Assume the economy starts at a point like A on α . Suppose that rent seeking activities by Person 1 succeed in moving the economy to point C or point B. Evaluated from α , point C is clearly inefficient. However, if the move from point A to point C occurred as a result of rent seeking, then it must be the case that property rights have shifted as well. Evaluated from the new property rights allocation, β , point C is efficient. The difficulty of applying a static notion of allocative efficiency is even clearer when rent seeking succeeds in moving the economy to a point like B. B is not only efficient under β , but would be unattainable at α . Of course, none of the proposed legal changes in this example are Pareto *improvements* for Person 2, but each

allocation A, B, and C, is equally efficient, given the set of property rights. This example illustrates that static efficiency criteria are meaningless in situations where rent seeking activities have the desired effect of altering the property rights regime. Efficiency criteria would be meaningfully applied to rent seeking only if the property rights regime never changed—that is to say, only if rent seeking had no effect. In this case, why worry about rent seeking at all?

Finally, Samuels (1992b) argues that by applying a static efficiency norm based on a notion of value rooted in physical production, rent seeking theory delivers a selective and arbitrary theory of legal change “with no principle by which conclusively to distinguish permissible from impermissible legal changes” (p.120). The only legal changes allowed within the framework of rent seeking theory, according to Buchanan (1980, p.11), would be those which “allowed equal access to the scarcity values created by governmental intervention in the market economy.” While it is not clear what, exactly, Buchanan (1980) means by this, Samuels (1992b) points out that it likely “involves a radical redistribution of income and wealth, indeed a massive effort at and through legal change –and certainly one in which great investments of resources of a rent-seeking kind might reasonably be expected” (p.123). The only way to eliminate rent seeking, according to Buchanan (1980), is with even greater amounts of rent seeking.

It is not surprising that rent seeking theory cannot accommodate legal change: it was not meant to. For public choice theorists, rent seeking theory serves a normative purpose of obfuscating meaningful theorizing about legal change by classifying all such change as wasteful: “[T]he thrust of much of the literature on rent seeking is to identify as wasteful all efforts both to change the law and to defend against change of the law” (Samuels 1992b, p.121). Like many other aspects of public choice theory, rent seeking theory ignores the inevitability of both government choice and legal change, and therefore misses the important questions of “what will

change and who will determine the change” (p.121). In contrast, it is these very questions that a practitioner of the positive theory of public choice in the tradition of Samuels would seek to answer.

Coase Theorem

Samuels (1974) discusses two propositions, both of which have been referred to as “The Coase Theorem”: (1) the assignment of property rights and elimination of transaction costs as a market solution to externalities, and (2) the allocative neutrality of rights. In responding to the latter, Samuels (1974) illustrates how a positive theory of public choice—stripped of the pro-market normative vision usually accompanying Coasean analysis—can provide an enhanced understanding of the general equilibrium interactions governing the “real world power play over rights and liability imposition” (p. 9) with which the Coase Theorem is presumptively concerned.

The argument for the allocative neutrality of rights is found in Coase’s (1960) original illustration of the confrontation between a farmer and a cattle rancher over land-use. The Coase Theorem states that—in the absence of transaction costs—private bargaining between the farmer and the rancher will produce similar allocations of resources (the Pareto efficient allocation) regardless of whether there are legally enforceable rights or liabilities on behalf of either party. Whether rights to the land are held by the cattle rancher or farmer, the owner of the more profitable productive activity will find it in her interest to pay (bribe) the owner of the less profitable activity to cease use of the land, resulting in the same amount of activity (cattle production and farming) that would have occurred had the rights to the land been alternatively arranged. The normative takeaway among traditional scholars of public choice and law and economics has been an injunction against judicial activism: judges should avoid attempting to

allocate resource from the bench, because private bargaining will always produce the same allocation, whatever the law.

Samuels (1974) provides a three-fold objection to the Coasean analysis. First—even if the Coasean conclusion regarding the allocative neutrality of rights is substantively correct—in the absence of an unjustified appeal to an external pro-market standard, there is nothing in the positive content of the Coase Theorem that necessitates a preference for a “market-friendly” assignment of property rights over an egalitarian assignment. In fact, one interpretation of the Coase Theorem is that there is no efficiency-equity tradeoff: if market participants will engage in trade to produce the efficient outcome whatever the initial allocation of rights, then society has nothing to lose by assigning initial property rights in the most equal fashion possible. To justify an inegalitarian distribution of rights some external value criterion must be appealed to, regardless of how insistent public choice theorists are about methodological individualism.

Second, the Coasean conclusion regarding the allocative neutrality of rights is not substantively correct, in that it requires an appeal to the partial equilibrium assumption of a fixed income and wealth distribution. In the absence of this assumption, changes in the assignment of property rights will affect the distribution of income and wealth, which will have subsequent impacts on the allocation of resources. Rights are not neutral with respect to resource allocation. Further, it is not clear that there is one true “efficient” allocation which all trades—regardless of initial assignment of rights—must produce. As the example in Figure 1 illustrates, rights specify efficiency, such that—even if private exchange did always lead to an efficient outcome—there is potentially a continuum of different “efficient” outcomes that could be reached, depending on the property rights regime.

Finally, both rights and the distribution of income are part of a general equilibrium process in which “the law is an instrument with which to skew distributional results by manipulating transactional systems to change the structure of power” (p. 21). As in the case of *Miller, et al. v. Schoene*, the question is not should the state intervene? But rather, whose interests will the state serve? Government is present in both action—defining new property rights—and inaction—with respect to the already existing law of property as it has evolved in the courts and the legislature through time.

Redistribution

A third and final application of Samuels’ positive approach to public choice concerns issues of income and wealth redistribution. In particular, the issue of redistribution illustrates how—stripped of its pro-market normative ideology—Buchanan’s writing on public choice can yield new insights. Applying Buchanan’s (1985) distinction between post-constitutional “political redistribution”—a direct change in end-state holdings as a result of transfers (e.g., taxation) within a given set of political rules—and “constitutional redistribution”—an indirect change in end-state holdings as a result of changes in the rules of the game—illustrates this point.

Invoking the distinction between political and constitutional redistribution, Buchanan (1985, p.248-249) argues that because “distributions emerge from the operation of framework rules or institutions within which separate persons interact” and changes in constitutional rules generate “stochastic patterns of end-states, each with distributional characteristics, [making] it difficult for the individual to identify and predict accurately just what his own position might be” the possibility of agreement on redistributive policy is greater in instances of constitutional redistribution than political redistribution. This result applies because of the quasi-Rawlsian

characteristics of constitutional changes: individuals—in a position analogous to Rawls’ veil of ignorance—imperfectly forecast their own post-constitutional positions.

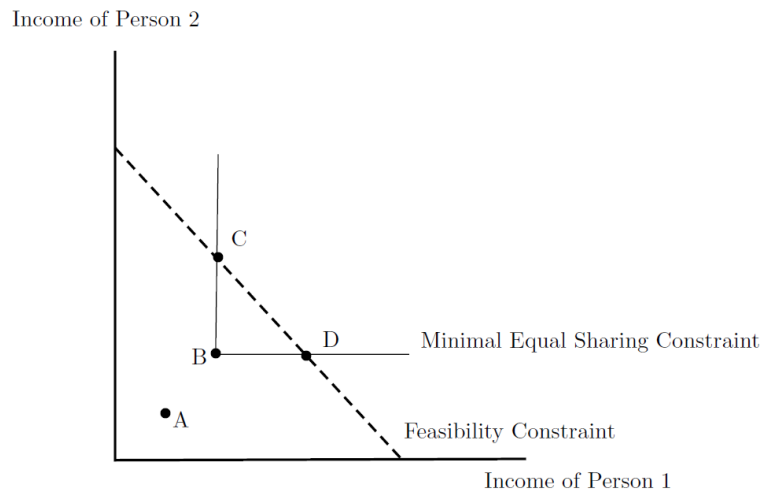


Figure 2: Constitutional Redistribution and the Minimal Equal Sharing Constraint

The distinction between political and constitutional redistribution has a secondary positive implication, glossed over by Buchanan, concerning the possibility of political redistribution in service of constitutional constraints. Political redistribution—in the form of taxes on income or wealth—may garner widespread support if it serves a constitutional purpose. To see this, consider the scenario presented Figure 2, based on the model in Buchanan (1976). Figure 2 depicts various allocations in a two-person economy before and after individuals have entered a definite social contract. Point A represents the allocation in a state like Hobbesian anarchy. Point B represents the minimum allocation attainable under a social contract with equal sharing. That is, while a larger social product may be attainable under conditions of inequality (as indicated by the feasibility constraint), there is an equal-sharing outcome under the social contract that nonetheless represents an improvement over Hobbesian anarchy. The existence of a minimal equal sharing outcome implies a constraint on the various possible distributions that

emerge in the post-constitutional stage. Individuals will desire to be at least as well off as the minimal equal sharing outcome: should the post-constitutional distribution leave an individual worse off, she has an incentive to renege on the social contract, and plunge society back into Hobbesian anarchy. Outcomes outside the minimal equal sharing constraint—even if they are “efficient,” in the sense of lying on the feasibility frontier—are likely to be unstable.

Acknowledging this fact, Buchanan (1975) writes: “[T]he existence of many possible unequal-sharing outcomes that are Pareto-superior to the original position but which may not be Pareto-superior to the equal-sharing position under social cooperation becomes irrelevant. Behind the veil of ignorance, neither person would accept unequal-sharing arrangements that do not dominate, in the Pareto sense, the equal-sharing regime” (p 365). Redistribution may be desirable if the post-constitutional allocation is one in which the minimal equal sharing constraint is unsatisfied (points on the feasibility constraint to the Northwest of C or Southeast of D).

Political redistribution may arise not because of its efficiency properties, but because it is necessary to maintain the stability of the social contract. Focused only on constitutional redistribution as a result of his insistence on the unanimity criterion as a normative guide, Buchanan (1975) misses the possibility that the existence of many possible unequal-sharing outcomes may be irrelevant even when individuals can see beyond the veil of ignorance, due to concerns about social stability. A tax that moves the economy from outside the bounds of the minimal equal sharing constraint to within (even if it results in an allocation inside the efficiency frontier) may garner widespread support, despite the appearance of a reduction in the well-being of one person or group. An application of this principle can be seen in recent calls for a wealth tax in the United States. Proponents of the wealth tax have argued for its necessity based on

concerns of oligarchic drift and the contribution of an unequal distribution of wealth to a breakdown in the social order (Saez and Zucman, 2019). In these arguments, the justification for a wealth tax lies in its constitutional implications. In other words, the wealth tax is an example of political redistribution in service of a constitutional constraint. Growing support for a wealth tax along these lines suggests that understanding the distinction between political and constitutional redistribution, and the possibility of political redistribution in service of constitutional constraints, has value in both positive and normative applications.

5. Conclusion

In concluding his 1972 response to Samuels, Buchanan (1972) writes that “old arguments are important only if they shed light on matters of modern relevance” (p. 451). The same dictum applies to Buchanan’s debate with Samuels over the implications of *Miller, et al. v. Schoene* (1928). In the context of this debate, Samuels’ writings reveal an alternative conception of public choice theory—divorced from the free-market normative implications of Buchanan’s work—rooted in a positive framework of analysis addressing to the inevitability of government choice, the interrelations between legal and economic processes, and questions of who will use government, and for what ends. The ability of this strain of public choice theory to shed light on matters of modern relevance is illustrated with applications to rent seeking, the Coase theorem, and redistributive policy.

While public choice theory has long been the domain of economists with an ideological aversion to government action, the work of Warren Samuels illustrates this need not be the case. The possibility of a positive theory of public choice, free from the “high priest” impulse which characterizes both Buchanan’s work and neoclassical public finance theory, indicates an alternative way forward for economists for whom understanding the economy is not merely

instrumental to “being the power behind the throne” (Samuels 2000, p.507). Samuels (1971) puts it thusly: “[T]he key questions always were: whose state (for example, whose democracy) and whose economy (for example, whose capitalism)?” (p.449). These questions are too important to be left to those for whom the answer is decided in advance⁵.

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⁵ I am here echoing Medema’s (1993) call for a *social* Law and Economics: “Law is too important to be left to the wealth-maximizers as the uncontested spokesmen for the economic approach to law” (p. 151).

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