



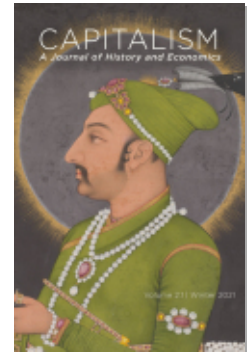
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# Infinite Regress: Virginia School Neoliberalism and the Tax Revolt

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**WHEN MICHAEL BROWN** was fatally shot in August of 2014, it brought to light disturbing networks of collusion among the police, the local court system, and the fiscal politics of the neoliberal state. Ferguson, Missouri, like many other cities across the United States, has seen its ability to spend on essential public services dramatically curtailed in the wake of popular tax revolts that began in the 1970s.<sup>1</sup> Following legislative changes made in the wake of these revolts, cities, towns, and boroughs all across the United States became heavily dependent on the revenues extracted from user fees and fines, including the court fines that are imposed when a fine defaulter fails to appear at a court hearing or the multiple legal fees extracted from low-wage offenders. Missouri State Senator, Eric Schmitt, aptly referred to this as a system of “taxation by citation,” whereby the police are authorized to issue on-the-spot stealth taxes in response to a panoply of often absurd municipal ordinance violations.<sup>2</sup>

This article examines the fortunes of American government in light of the work of James M. Buchanan, the Virginia school political economist whose thinking on constitutional revolution played a formative, if largely

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<sup>1</sup> In 1980, Missouri passed the Hancock Amendment—its own version of California’s Proposition 13—which required local government authorities to call an election and win a majority of votes for almost every new tax or tax increase. Small municipal governments were particularly hard hit by the consequent decline in property taxes and were left scrambling for alternative sources of income. In 1991, the Missouri Supreme Court provided some relief by exempting certain user fees from the category of taxes, while in 1995, the passage of Macks Creek Law prohibited local governments from collecting more than 30 percent of their income from speeding tickets and other traffic fines, but left the door wide open to all other kinds of fine revenue.

<sup>2</sup> Marshall Griffin, “Debate Begins on Traffic Revenue Limits in Missouri Legislature,” *St. Louis Public Radio* (January 22, 2015). <http://news.stlpublicradio.org/post/debate-begins-traffic-revenue-limits-missouri-legislature#stream/0>.

unrecognized, role in shaping the tax revolt. Although recent scholarship has thrown a spotlight on the place of Virginia school public choice in the larger “thought collective” of American neoliberalism, surprisingly little attention has been paid to Buchanan’s role in the California tax revolt and the wave of tax and spending limitations that followed across the country.<sup>3</sup> Yet not only was Buchanan involved in drafting the first tax and spending initiative to be proposed in California in the early 1970s, there is considerable archival and textual evidence to suggest that his ideas on direct democracy, popular constitutionalism, and the supermajority vote were a key source of inspiration for the nationwide tax revolt.

This article considers the influence of Virginia school neoliberalism on the remaking of state and local public finance in the United States and seeks to explain how constitutional tax and spending limits have generated a paradoxical ballooning of municipal and personal debt. The accumulation of user fees and fines for nominally public services is a form of liability that afflicts the low-waged and asset-poor in particular but is not often catalogued among the usual causes of household indebtedness. Unpaid user fees and fines are one of the primary reasons why the low-waged become embroiled in the municipal court system and why so many are burdened with extraordinary levels of penal debt. With this in mind, I argue that the blurring of the boundaries between the fiscal and penological functions of the state is inherent in the philosophy of Virginia school public choice, which is less an argument *against* taxation than an argument in favor of regressive forms of taxation that are rarely acknowledged as such—user fees, fines, and flat-rate levies. When implemented in practice, the “fiscal constitutionalism” advocated by Virginia

<sup>3</sup> I follow Philip Mirowski and Dieter Plehwe in defining neoliberalism as a “thought collective” of scholars united by their affiliation with the Mont Pèlerin Society and their opposition to the social welfarist and Keynesian policies of the 1930s. Mirowski and Plehwe locate the “neo” in neoliberalism in the movement’s candid recognition that the state must be actively involved in the creation and protection of the ideal “free market.” See Mirowski and Plehwe, eds., *Road from Mont Pèlerin*. Buchanan was president of the Mont Pèlerin Society between 1984 and 1986. I follow common usage in identifying at least four distinct schools of neoliberalism: the Virginia school, the Chicago school, the Austrian school, and ordoliberalism (sometimes referred to as the Freiburg school). I use the terms “Virginia school neoliberalism” and “public choice” interchangeably throughout the paper, although public choice, as a method inspired by Kenneth Arrow’s critique of welfare economics, was also deployed by a handful of progressive scholars outside the Virginia school. For a rich account of Buchanan’s place in postwar economics, see Amadae, *Prisoners of Reason*, 175–203. For an account of Buchanan’s place in postwar public policy, see MacLean, *Democracy in Chains*, and on Buchanan’s constitutional philosophy, see Biebricher, *The Political Theory of Neoliberalism*, 79–108 and 150–51.

school neoliberals transfers the fiscal burdens of the state downwards, turning the income- and asset-poor into permanent defaulters on the public fisc and revenue-generators of last resort. In conclusion, I return to the city of Ferguson, Missouri—which has become infamous for its exorbitant use of municipal ordinance violations and court fees to fund local services—as a real-world experiment in Virginia school public finance.

### Market Freedom and the Fiscal Constitution

James McGill Buchanan cuts a distinct profile among the international “thought collective” of neoliberal scholars who congregated around the Mont Pèlerin Society at midcentury. As the intellectual leader of the Virginia school of political economy, Buchanan was almost unique among American neoliberals in dedicating his life’s work to the question of constitutional order and its effects on the tax and spending powers of government. Where Chicago school “law and economics” scholars such as Richard Posner and Gary Becker trained their sights on private law, hoping to extend the logics of contract and tort to growing arenas of social and political life, Buchanan thought that such projects were doomed to failure unless they also addressed the problem of public or constitutional law. This is a focus he shared with the Austrian neoliberal Friedrich von Hayek, who in his three volume *Law, Legislation and Liberty* sought to identify the ideal constitutional order for facilitating market freedom.<sup>4</sup> But where Hayek’s philosophy of law was imbued with Spencerian ideas of evolutionary momentum and spontaneous order, Buchanan never expected the perfect free market constitution to emerge in spontaneous fashion from the workings of self-interested agents.<sup>5</sup> Rather, he thought that the conditions for market freedom needed to be carefully established *ex ante*, through a social contractarian process of constitutional rule-setting. The social contract could settle on any number of constitutional rules, giving rise to wildly different economic and political

<sup>4</sup> Hayek, *Law, Legislation and Liberty*, volumes 1, 2, and 3.

<sup>5</sup> While recognizing the affinity between Hayek’s work and his own, Buchanan writes that “[m]y basic criticism of F. A. Hayek’s profound interpretation of modern history and his diagnoses for improvement is directed at his apparent belief or faith that social evolution will, in fact, ensure the survival of efficient institutional forms. Hayek is so distrustful of man’s explicit attempts at reforming institutions that he accepts uncritically the evolutionary alternative. We may share much of Hayek’s skepticism about social and institutional reform, however, without elevating the evolutionary process to an ideal role. Reform may, indeed, be difficult, but this is no argument that its alternative is ideal.” Buchanan, *Limits of Liberty*, 211n1.

scenarios. But without this prior work of ordering, market freedom would never exist at all.

In many respects, Buchanan's thinking came closest to that of the German ordoliberals, who also believed that the market could only function freely within a certain kind of constitutional framework. Buchanan shared the ordoliberals' conviction that the economic constitution should be infused with moral norms that both enabled and delimited the free play of market forces. He was one of the few American neoliberals to acknowledge that contractual freedom had to be grounded in something other than freedom; that the basic non-contractual obligations of work and family needed to be imposed for the market order to function freely; and that these legal forms of coercion required a pre-market social contract to sustain them.<sup>6</sup> Yet Buchanan never saw himself as a straightforward conservative.<sup>7</sup> Although his entire life's work was animated by a deep nostalgia for the early American Republic, he also insisted that wholesale reinvention—or what he called constitutional revolution—was necessary to reinstate its values in the contemporary era.

As an interpreter of the American constitution, Buchanan aligned himself with the states' rights tradition of Thomas Jefferson and James Madison against the fiscal centralism of Alexander Hamilton, contrasting the formers' "genuine" federalism with the latter's profligate use of public debt as an instrument of central government power.<sup>8</sup> According to Buchanan's narrative of decline, the American economy had prospered only as long as it followed the Jeffersonian model of federalism. For most of its antebellum history, he

<sup>6</sup> Buchanan clarifies the difference between Chicago school and Virginia school perspectives on contractual freedom and coercion in the following passage: "some limits must be imposed on the working of pure self-interest. Individuals must abide by behavioral standards which dictate adherence to law, respect for personal rights, and fulfillment of contractual agreements—standards which may not, in specific instances, be consistent with objectively measurable economic self-interest. Absent such standards as these, markets will fail." Buchanan, "Methods and Morals in Economics," 169. Like the ordoliberals, Buchanan thought that the fiscal constitution rested on laws that were simultaneously economic and moral. For Buchanan's thinking on the role of the family in upholding fiscal order, see Buchanan, "The Moral Dimension of Debt Financing," 190–193. For an illuminating reading of the parallels between Buchanan and the ordoliberals, see Ciampini, "Democracy, Liberalism, and Moral Order." On the question of the economic constitution in the work of the German ordoliberals and the Austrian neoliberal Friedrich von Hayek, see Slobodian, *Globalists*, 182–217. Buchanan's ideas on the "social contract" were also elaborated in dialogue with (and against) the thought of John Rawls. On this point, see Amadae, *Prisoners of Reason*, 182–87.

<sup>7</sup> Buchanan, *Why I, Too, Am Not a Conservative*.

<sup>8</sup> Buchanan, "America's Third Century."

claimed, federal government had adhered to an implicit “fiscal constitution” that prohibited budget deficits and debt finance, except for the exceptional circumstances of war and capital works, and placed a tight lid on governmental powers to spend and redistribute wealth.<sup>9</sup> This constitutional architecture had been progressively dismantled, however, first with the “horrible civil war of the 1860s,” which put an end to “viable federalism” and saw the federal government impose its will on recalcitrant Southern states,<sup>10</sup> and second, with the so-called “constitutional revolution” of 1936, when the Supreme Court lent its imprimatur to Franklin Roosevelt’s New Deal and effectively “rewrote the political economic constitution” along Keynesian lines.<sup>11</sup> With this decision, the Supreme Court ruled that the General Welfare Clause of the constitution—Article I, Section 8, Clause 1—authorized the federal government to levy taxes and expend funds for a range of new welfare programs that were evidently not enumerated in the text of the constitution—Social Security, welfare, workers’ compensation, and unemployment benefits. Buchanan understood the “constitutional revolution” of the New Deal as an egregious violation of Jeffersonian federalism.<sup>12</sup> Not only did it transfer law-making authority from Congress to federal administrative agencies, it trod all over the autonomous police power of states, forcibly enrolling them in a federal welfare structure they had not agreed to and dictating the terms on which benefits were to be financed and disbursed.

But if the New Deal amounted to a “revolution by default,” the same could not be said of the “post-New Deal follies” that ensued.<sup>13</sup> With the generalization of the progressive income tax during World War II, Democratic and Republican administrations from that of Harry S. Truman onwards steadily increased the federal government’s taxing and spending powers to pay for everything from national infrastructure to expanded social welfare programs and national defense.<sup>14</sup> Buchanan feared that the seemingly unstoppable inflation of the federal power of taxation was forcing productive citizens to pay for public services that other “unproductive and essentially parasitic members of society” benefited most from.<sup>15</sup> His fears were intensified by the rulings of

<sup>9</sup> Buchanan and Wagner, *Democracy in Deficit*, 3–4

<sup>10</sup> Buchanan, “America’s Third Century,” 6.

<sup>11</sup> Buchanan, “The Economic Constitution and the New Deal,” 13.

<sup>12</sup> Buchanan, “The Economic Constitution and the New Deal,” 13.

<sup>13</sup> Buchanan, “The Economic Constitution and the New Deal,” 22, 19.

<sup>14</sup> Brownlee, *Federal Taxation in America*, 89–129; Sky, *To Provide for the General Welfare*, 327–41.

<sup>15</sup> Buchanan, “America’s Third Century,” 7.

the Supreme Court on matters relating to the disposition of public and private property and the widening of the franchise. In 1948, for instance, the Supreme Court ruled that states could no longer enforce racial covenants in real estate—a move it had previously hesitated to make because such covenants were included in private contracts. Without mentioning the *Shelley v. Kraemer* case by name, Buchanan intimated that “municipal zoning” decisions of this kind threatened the basic rules of freedom of contract and amounted to the forcible confiscation and redistribution of private wealth at the hands of a distant elite.<sup>16</sup> Subsequent judicial decisions regarding the electoral divisions employed by Southern states made the threat more immediate. When the Supreme Court, in *Baker v. Carr* (1962), ruled that states could no longer apportion a greater percentage of votes to rural districts, it overturned one of the most significant methods by which conservative Southern Democrats maintained their power over state lawmaking.<sup>17</sup>

As Southern blacks and poor whites threatened to emerge as a numerical electoral majority by the end of the 1960s, Buchanan became increasingly alert to the dangers of majority rule itself, especially in the context of expanding fiscal transfers.<sup>18</sup> What could be expected when the unproductive, non-taxpaying poor got to decide on the disposition of an increasingly generous federal budget? What would stop the voting majority from sucking up all the wealth of the tax-paying minority? Buchanan and Gordon Tullock set out their thought experiment as follows, “Let us suppose that a constitution is adopted which openly and explicitly states that net income transfers among individuals and groups will be carried out by simple majority voting,” and then outlined the likely results. “In this situation, it seems clear that the maximum possible departure from rational behavior in choosing the amount of redistribution could be present. The individuals in a successful majority coalition could impose net taxes on the minority and receive

<sup>16</sup> Buchanan and Tullock, *The Calculus of Consent*, 74, 82.

<sup>17</sup> Crea, “Racial Discrimination and *Baker v. Carr*.” I am in agreement with Nancy MacLean that the *Baker v. Carr* case can be discerned in the background of Buchanan and Tullock’s *Calculus of Consent*. MacLean, *Democracy in Chains*, 74–87. The connection is suggested by Gordon Tullock’s 1965 speech to the American Conservative Union, which refers back to the arguments in *Calculus of Consent* to illuminate the issue of electoral apportionment. Gordon Tullock, carbon copy of speech before American Conservative Union, June 10, 1965, Box 95, Gordon Tullock Papers, Hoover Institution Archives, Hoover Institution, Stanford University [hereafter Gordon Tullock Papers].

<sup>18</sup> A critique of majoritarian democracy is shared by Buchanan and other neoliberal thinkers such as Milton Friedman and Friedrich von Hayek. For a subtle overview of their differences and commonalities, see Biebricher, *The Political Theory of Neoliberalism*, 79–108.

subsidies for themselves . . . It seems certain that ‘redistribution’ . . . will be carried relatively ‘too far’ under these conditions.”<sup>19</sup>

By the mid-1960s, Buchanan was even less sanguine about the future of American democracy. Looking back on his first major work, *The Calculus of Consent* (1962), coauthored with Gordon Tullock, he reflected that “we were optimistic.” The book “conveyed the positive, if also normative, message: ‘Democracy works, if organized along the lines of the American constitutional republic.’”<sup>20</sup> Yet “the manuscript had scarcely been mailed off to the press when, to some of us, American democracy seemed demonstrably to fail.” Buchanan was convinced that the newly elected president, John F. Kennedy, a representative of the liberal elite, had leveraged the power of dynastic wealth to purchase this position. Closer to home, at the University of Virginia, Buchanan faced increasing pressure as colleagues accused him and his associates of being “fascists.” But it was President Lyndon B. Johnson’s War on Poverty and Great Society programs that, for Buchanan, represented the most egregious sign of American degeneracy. “The Johnson landslide, the Great Society, the escalation of Vietnam, the draft dodgers, the generalized erosion of academic order, the breakdown in manners, morals and social convention, the emerging generational gap, the commencement of a drug culture, Woodstock, the follow-on assassinations of 1968, the Chicago convention, the Nixon agonies, the Cambodian spring, Kent State”—all represented a complete breakdown of the fiscal and moral constitution that had hitherto dominated American government and restrained the ambition of New Deal social reformers.<sup>21</sup>

Johnson’s social programs were hardly as generous in the short term as detractors like Buchanan imagined. Still, they did represent a concerted attempt to remedy some of the shortcomings of the New Deal—its deliberate marginalization of the non-unionized, non-industrial, African-American poor and its failure to overcome the resistance of state legislatures to federal mandates—by widening the coverage of existing New Deal programs and introducing major new initiatives to bring educational and health care services to the poor. In the long term, the War on Poverty and the Great Society dramatically overhauled the public finances of the United States. Social expenditures doubled between 1963 and 1969, for the first time increasing faster than defense spending, while state and local governments received

<sup>19</sup> Buchanan and Tullock, *The Calculus of Consent*, 194.

<sup>20</sup> Buchanan, *Better Than Plowing*, 113–114.

<sup>21</sup> Buchanan, *Better Than Plowing*, 113.



huge infusions of federal funding in order to administer a host of new poverty programs.<sup>22</sup> This, in Buchanan's eyes, presaged the arrival of Leviathan government. Soon, he predicted, there would be no more private enterprise left to speak of and private wealth would be under constant threat of expropriation.<sup>23</sup> Johnson's expansion of federal spending was on a different scale than the kinds of government overreach Buchanan and Tullock had critiqued in *Calculus of Consent*. Questions about the proper scope of federal intervention were no longer restricted to the matter of legally demarcating private from public property, segregated from desegregated space, or the extension of the franchise, as they had been in the 1940s and 1950s. Now, Buchanan and Tullock perceived the threat of a wholesale redistribution of wealth to those who had been newly, if only precariously, welcomed into public space—specifically, the African-American urban poor.

It is true that, when compared to the New Deal, Johnson's Great Society programs entailed a much more determined effort on the part of the federal government to generalize its social welfare vision to all citizens—black and white, industrial and non-industrial workers—and to impose its will on recalcitrant states. To accomplish these objectives, the federal government very often channeled funds directly to the local level, allowing it to bypass the state altogether, and coupled grants-in-aid with federal mandates designed to prevent local administrators from diverting funds to other purposes.<sup>24</sup> Its efforts to overcome state resistance were aided by the Warren court, which studiously struck down state defenses for non-compliance and introduced hitherto unheard-of privacy protections for people, many of them black single mothers, on public assistance. In Buchanan's eyes, such maneuvers on the part of the executive and judiciary amounted to outright constitutional confabulation: they “assume the authority to rewrite the basic constitutional contract, to change ‘the law’ at their own will,” he complained—an outrage that, in his eyes, justified an equally insurrectionary response on the part of the “people.”<sup>25</sup>

Buchanan saw the political events of the 1960s as expressive of a deep moral and fiscal “sickness.”<sup>26</sup> As the decade progressed, the willingness of the federal government to continue financing the welfare state despite rising

<sup>22</sup> Panitch and Gindin, *Making of Global Capitalism*, 112.

<sup>23</sup> Buchanan, “America's Third Century,” 7.

<sup>24</sup> Gosling, *Budgetary Politics*, 13–14.

<sup>25</sup> Buchanan, *Limits of Liberty*, 207.

<sup>26</sup> Buchanan, *Limits of Liberty*, 21.

inflation and budget deficits, however meager in hindsight, confirmed Buchanan's fears that the moral and fiscal constitution of the United States had completely broken down.<sup>27</sup> Although Buchanan was willing to tolerate the limited Keynesianism of the New Deal, whose economic benefits were restricted to working white men, he felt that the Great Society had gone one step too far by funding groups of people—in particular, the welfare poor, Black Power militants, and student activists—who were simultaneously undermining the foundations of the family and the nation.<sup>28</sup> The diagnosis of crisis was a familiar one, but Buchanan was unique among the American neoliberals in thinking that this crisis demanded a constitutional solution above and beyond the specific monetary and fiscal reforms proposed by his peers.<sup>29</sup>

### Constitutional Counter-Revolution

From his earliest forays into political philosophy, Buchanan had been contemplating the prospect of a taxpayers' revolt. In his first major work, *The Calculus of Consent*, coauthored with Gordon Tullock, he predicted that the

<sup>27</sup> Buchanan and Wagner, *Democracy in Deficit*; Buchanan, "The Moral Dimension of Debt Financing," 190.

<sup>28</sup> On the welfare recipient and student militant as net consumers of public services or "parasites," see Buchanan, "The Samaritan's Dilemma," 74, 78–79, 82, 83. On the connections among loss of authority in the household, the decline of patriotism, and the funding of public services, in particular higher education, see Buchanan and Devletoglou, *Academia in Anarchy*. In a subsection of that book entitled "The American Tragedy of Race," Buchanan and Devletoglou identify black students in particular as professional abusers of taxpayer largesse and useful alibis for the antics of white student militants (128–30). That Buchanan saw the white working poor as the most marginalized of social groups is confirmed by his candid quip, in correspondence with Gordon Tullock, that "the poor whites" are "the ones getting the screw as always. C'est [sic] la vie." James M. Buchanan to Gordon Tullock, July 12, 1965, Box 95, Gordon Tullock Papers.

<sup>29</sup> For a wider perspective on the backlash against Great Society tax and spending programs, see Michelmore, *Tax and Spend*. Buchanan's peers in the "neoliberal thought collective" included supply siders who advocated marginal tax cuts, monetarists such as Milton Friedman who saw the control of the money supply by the central bank as the most important instrument of reform, Chicago school "antiregulation" scholars such as George Stigler who called for the rolling back of consumer and environmental protections, and Chicago school law and economics scholars such as Gary Becker and Richard Posner who wanted to see social insurance protections replaced by private contract and tort law. For key insights into these different approaches, see Canto et al., *Foundations of Supply-Side Economics*, and Friedman and Gordon, *Milton Friedman's Monetary Framework*. For representative essays by Stigler, Becker, and Posner, see Stigler, *Chicago Studies*. Outside James M. Buchanan and the Virginia school, one of the few American neoliberals to foreground the importance of constitutional law is Richard A. Epstein, although Epstein writes in the Austrian-school tradition of Hayek; see Epstein, *The Classical Liberal Constitution*.

growing willingness of the federal government to confiscate and redistribute private wealth through its tax and spending powers would eventually incite a backlash from rational individuals.<sup>30</sup> By the late 1960s, he felt sure that a “taxpayers’ revolt” was in the offing, thanks largely to the widespread resentment caused by the War on Poverty and Great Society programs.<sup>31</sup> Here, Buchanan mused that something had shifted in the cost-benefit calculus of the average taxpayer—something that might well persuade him to revise his previous support for the New Deal welfare state. “By a dramatic shift in the prevailing mythology,” Buchanan reflected, “the willing taxpayer may become a part of the taxpayer revolution. Whereas he may have previously considered himself to be receiving a flow of benefits from the program as valuable at the margin as his dollar of tax, he may come to feel that the flow of benefits has diminished below expectations.”<sup>32</sup> This shift in calculus, Buchanan observed, had to do with the very “publicness” of public goods—which, unlike private goods, were liable to become less enjoyable depending on the kind of person they had to be shared with.<sup>33</sup> As the average taxpayer saw the benefits of his taxes flow further and further beyond his family or local community, the less likely he was to feel any personal satisfaction in the redistribution of his taxes. “A shift in the interpersonal, interfamilial, intergroup distributional mix away from that initially anticipated will tend to reduce the overall marginal desirability of the spending program. Hence, budgetary reallocations aimed at making public services more fully available to those ‘in need’ may cause taxpayers not qualifying under the selective criteria adopted to man the barricades.”<sup>34</sup>

By the mid-1970s, Buchanan was convinced that only a constitutional (counter)revolution could undo the cumulative damage wrought by the New Deal and subsequent affronts to constitutional law. By “constitutional revolution,” he wrote, “I refer to basic, non-incremental changes . . . in the complex set of rules that enable men to live with one another, changes that are sufficiently dramatic to warrant the label ‘revolutionary.’”<sup>35</sup> Given the widespread distrust of organized politics evident on both the left and the right, he continued, this revolution would necessarily be “popular” in form:

<sup>30</sup> Buchanan and Tullock, *The Calculus of Consent*, 194.

<sup>31</sup> Buchanan and Flowers, “An Analytical Setting,” 355.

<sup>32</sup> Buchanan and Flowers, “An Analytical Setting,” 355.

<sup>33</sup> Buchanan and Flowers, “An Analytical Setting,” 355.

<sup>34</sup> Buchanan and Flowers, “An Analytical Setting,” 355.

<sup>35</sup> Buchanan, *Limits of Liberty*, 212.

it would need to eschew the constraints of representative democracy and bureaucratic party structures and instead avail itself of the methods of direct democracy championed by the likes of a George Wallace on the right and a George McGovern on the left.<sup>36</sup> Further, it would need to impose *constitutional* limits on the government's power to tax and spend so as to protect such safeguards from the vicissitudes of electoral politics and the temptations of professional politicians.<sup>37</sup> And it would have to introduce further constitutional changes at the level of voting procedure in order to protect the taxpaying minority from the excesses of majority rule.<sup>38</sup> These two imperatives—tax and spending limits and supermajority requirements for changes to tax legislation—would henceforth serve as the guiding principles for Buchanan's vision of constitutional change.

Studiously neutral in his choice of references, Buchanan almost always turned to progressive thinkers when looking for historical precedents for his ideas. Much of his language ventriloquizes the American tradition of populist and progressive reform, even when he arrives at diametrically opposing positions on tax and spending. Buchanan's use of the distinction between producers and non-producers, for instance, draws directly from the agrarian Populists of the late nineteenth century, although the non-productive parasites are now the welfare poor rather than landed rentiers.<sup>39</sup> And his complaint that "special interests" have captured the power of the state is formally indistinguishable from the arguments of American Progressives, even when Buchanan's rent-seekers have morphed from railroad conglomerates into government bureaucrats and welfare recipients.<sup>40</sup> It is hardly surprising, then, that Buchanan would follow the Populists and Progressives in identifying direct democracy as the best way of countering the power of special interests. Positioning himself as a rigorous defender of the popular will against anti-democratic elites, Buchanan reflected that the "residual fear of demos . . . combined with adherence to electoral democracy restricted to the selection of rulers, is a highly dangerous mixture," and mused that this "widespread attitude [was]

<sup>36</sup> Buchanan, *Limits of Liberty*, 20, 116.

<sup>37</sup> Buchanan, *Limits of Liberty*, 205; Brennan and Buchanan, *Power to Tax*, 6.

<sup>38</sup> Buchanan, *Limits of Liberty*, 191; Brennan and Buchanan, *Power to Tax*, 154.

<sup>39</sup> Buchanan, "The Samaritan's Dilemma."

<sup>40</sup> On the welfare and student rent-seeker, see "The Samaritan's Dilemma." On the bureaucratic rent-seeker, see Buchanan, *Limits of Liberty*, 197–204. For a wider perspective on the public choice theory of the rent-seeker, see Buchanan, Tollison, and Tullock, eds., *Toward a Theory of the Rent-Seeking Society*.

perhaps instrumental in opposing reforms that allow for either direct or indirect democracy to become more influential in politics.”<sup>41</sup>

If Buchanan recognized that direct democracy could be legitimately critiqued too—on the grounds that it would always elevate the voice of the majority over that of the minority—here again he sought the help of a progressive thinker, the Swedish economist Knut Wicksell, rather than the many American critics of progressivism who could have served the same purpose. From Wicksell, Buchanan borrowed the idea that the allocation of tax burdens and distribution of public goods should hew as closely as possible to the wishes of individual voters—one vote, one tax.<sup>42</sup> Following this thought experiment to its logical conclusion, Wicksell hailed the “unanimity vote” as the utopian horizon of all democratic decision-making. But since complete consensus could never be attained in practice, he suggested the principle of “near unanimity” as the most efficient way of counterbalancing the overweening power of the many. Buchanan embraced this argument as his own, selectively failing to mention that in the American context, Wicksell’s “near unanimity” rule found a close equivalent in the tradition of the supermajority vote.

Despite the formal identity of their arguments, the political motivations driving Wicksell and Buchanan could not have been more disparate. As someone who had campaigned for universal suffrage, free of all gender exclusions and property requirements, Wicksell worried that the votes of the newly enfranchised could be cancelled out by the formation of voting blocs among propertied men.<sup>43</sup> Buchanan, by contrast, was concerned that the achievement of democratic voice by Southern blacks and impoverished whites would threaten the hard-earned tax dollars of propertied whites. Hewing to the letter rather than the spirit of Wicksell’s thought, Buchanan repurposed the “near unanimity” rule as a way of protecting propertied taxpayers from those who were now empowered to vote for a greater redistribution of public wealth. With the American and European progressive traditions apparently on his side, Buchanan could present himself as a champion of unmediated democracy while nevertheless calling for a “democracy within limits.”<sup>44</sup>

<sup>41</sup> Buchanan, “Direct Democracy,” 236.

<sup>42</sup> Buchanan, *Limits of Liberty*, 188–89. The relevant reference is Knut Wicksell’s “A New Principle of Just Taxation,” which Buchanan translated.

<sup>43</sup> For an historically informed reading of Wicksell’s contribution, see Johnson, “Wicksell’s Social Philosophy.” For a consideration of Buchanan’s selective misreading of Wicksell, see Johnson, “Wicksell’s Unanimity Rule.”

<sup>44</sup> Buchanan, “Direct Democracy,” 237.

## The California Tax Revolt

By the end of the 1970s, Buchanan's call to constitutional revolution was seemingly answered in the form of California's Proposition 13. Approved by an overwhelming margin of 65 percent of voters, the so-called Jarvis-Gann amendment of 1978 responded to widespread concern among suburban homeowners who were seeing their property tax assessments ratcheted up under the influence of house price inflation. The amendment introduced constitutional limits on the taxing powers of state and local government. It lowered property taxes to 1 percent of assessed market value and restricted annual increases in property tax assessments to 2 percent per year for as long as homeowners continued to occupy the same home. It also instituted significant procedural limits on the power of government to introduce new taxes or raise existing ones. From this point on, a two-thirds supermajority vote from each house of the legislature was required for any increase in state taxes. At the local government level also, cities, councils, and special districts were prohibited from introducing new taxes or raising rates unless they secured the approval of two-thirds of voters at a local referendum.<sup>45</sup> One year later, Proposition 4, known as the Gann initiative, placed annual limits on state and local government appropriations and forced government to reimburse taxpayers for any spending in excess of these limits.<sup>46</sup> A further constitutional amendment, Proposition 58, was passed in 1986, exempting houses bequeathed from parents to children from market-value reappraisal at the moment of transfer. The message could not have been clearer. In a context of diminished social spending, the family home was classified as a protected class of wealth and a convenient alternative to public services—at least for those who were set to inherit.

California's experiment in constitutional reform—with its trio of tax limits, spending ceilings, and supermajority votes—would soon be reproduced in tax revolts across the country, to similar effect. More important in the long run than the specific tax and spending limits introduced by these initiatives was the fact that a small legislative minority was now empowered to block any attempt to break loose from these constraints and open the spigots of public spending. In hindsight, it is obvious that the arrangement has played perfectly into the hands of anti-tax conservatives, imparting a permanent regressive bias to government revenue decisions, whatever the intentions

<sup>45</sup> Plotkin and Scheuerman, *Private Interest, Public Spending*, 139; Peterson, "Intergovernmental Financial Relations," 218.

<sup>46</sup> McCubbins and McCubbins, "Proposition 13," 3

of the government in power. In the state of California, one-third plus one member of either house of the legislature now wields sufficient power to block a budget, while a much more improbable supermajority is required to loosen the strings on government spending or enact more progressive tax rules. Republicans have been in the minority in both houses of state government for all but two years since Prop 13 passed, and yet during that time they have held continuous veto power over government revenue decisions, with predictable consequences for education, infrastructure, and welfare spending.<sup>47</sup>

How were so many Californians persuaded to vote for an amendment that has crippled the state's governing process and appears in many ways to have worked against the interests of its supporters? And why, after a series of failed initiatives in the 1960s and early 1970s, did the tax revolt garner so much support when it began to focus on property taxes in particular—the mainstay of local government revenue? Although it is no doubt true that the tax revolt could have been avoided if state political leaders had taken more timely and vigorous action to address real concerns on the part of low-income homeowners, this failure alone cannot account for the sheer scale of popular support for Prop 13, which extended far beyond the bounds of the low-income and elderly.<sup>48</sup> Rather, the answer seems to lie in the new role accorded to local government in the roll-out of President Johnson's Great Society programs and the symbolic importance accorded to local property taxes as a result of this.

One of the effects of Johnson's Great Society programs was to dramatically increase the amount of federal money pouring into large cities and, in so doing, to bring local government decisions under federal oversight. Between 1962 and 1972, cities such as Los Angeles became dependent on federal aid for large parts of their social budget and almost tripled their per capita spending.<sup>49</sup> The opening of a direct line of communication between federal and local levels of government was a deliberate strategy on Johnson's part: by detouring around state governments, he hoped to neutralize the resistance that had often greeted federal welfare initiatives in the past and to directly address the issue of racial inequality at the urban level.<sup>50</sup> But this meant that local governments were now burdened with federal spending initiatives that were unpopular amongst middle-class white voters. These

<sup>47</sup> Mathews and Paul, *California Crackup*, 85

<sup>48</sup> Sears and Citrin, *Tax Revolt*, 22.

<sup>49</sup> Peterson, "Intergovernmental Financial Relations," 208.

<sup>50</sup> Peterson, "Intergovernmental Financial Relations," 209.

initiatives—ranging from public housing construction to legal aid offices, welfare support services, local health centers, preschool aid, and employment support for low-income youth—were perceived as radical, even subversive, by a broad swathe of the voting public and were frequently resented by the local government officials who had to implement them. To prevent any misuse of funds, the federal government disbursed resources to local government authorities in the form of “categorical grants” whose spending objectives were assigned by mandate and could not be diverted to other uses. In their first phase of implementation, most federal grants were allocated on a matching basis, meaning that an equal amount of local tax revenue had to be spent for every dollar provided by the federal government.<sup>51</sup> The more federal money poured into these programs, the more local tax revenue went to them also, fueling the fears of white property owners that their private wealth was being diverted to fund the irresponsible and idle lifestyles of the non-white welfare poor.

This sense of alienated wealth assumed a starkly geographical form as a result of the growing suburbanization of the white middle class. Federal housing programs initiated during the New Deal and scaled up after World War II not only triaged the population according to their status as homeowners or renters, but also led to the growing segregation of metropolitan space as the white middle class was encouraged to flee the inner cities and set up house in the sprawling suburban hinterland. During the 1950s and 60s, homeownership rates soared among white, male industrial workers and their families thanks to a gamut of federal mortgage protections and tax subsidies, while African Americans and other racial minorities were largely cut off from housing assistance and relegated to the high-rent inner cities.<sup>52</sup> By the time of the tax revolt, several decades of invisible, asset-based welfare had allowed the white middle class to accumulate substantial wealth holdings that they could plausibly attribute to their own hard work and financial acumen. But this same wealth also exposed them to inflated home prices and higher property taxes. When suburban homeowners looked towards the inner city, they could all too easily be persuaded that its residents were profiting unjustly from their confiscated wealth—after all, taxes on inner city properties were negligible given their low assessments and most inner-city residents were renters anyway.<sup>53</sup> Homeowners’ sense of injustice was accentuated by

<sup>51</sup> Peterson, “Intergovernmental Financial Relations,” 208.

<sup>52</sup> Hyman, *Debtor Nation*.

<sup>53</sup> Lo, *Small Property Versus Big Government*, 152, 163.



the fact that most of Johnson's anti-poverty programs were directed precisely towards those who had historically been excluded from housing wealth.

These, then, were the larger reasons why the question of property taxes became so inflamed and why a sudden increase in assessments led to a full-scale tax revolt, garnering support far beyond the bounds of those who feared the eventual loss of their homes. Quite simply, local government taxation had come to materialize the difference between property owners and the non-propertied poor at a time when federal welfare programs were beginning to attend to the latter. As a marker of the dividing lines between those who paid taxes on private wealth and those who were, for the first time, becoming the recipients of redistributed public wealth, local property taxes became a flashpoint for much wider anxieties around the racial and sexual politics of redistribution.

Tax conservatives were quick to hail Prop 13 as a popular insurrection against public spending in general and against "welfare" in particular. Yet surveys conducted immediately before and after the vote revealed a great deal of confusion about the role of public spending in maintaining services that were taken for granted by everyone and even greater confusion about the precise boundary lines between general public spending and this thing called "welfare." Basing their analysis on survey data collected between 1977 and 1980, David O. Sears and Jack Citrin found that, when Californians were asked whether or not spending should be increased on a series of specific budget items (as opposed to government spending in general), respondents consistently supported either a continuation of the status quo or, more often, an actual increase in resources.<sup>54</sup> Those surveyed were almost unanimously in support of greater spending on public services that, at least in principle, were available to everyone—the police, the fire department, public transportation, parks, and schools. The one item that was repeatedly singled out for cuts was "welfare"—public assistance programs for the non-contributing poor (the aged, the disabled, and children). Yet even here there was considerable confusion. As noted by Sears and Citrin, the word "welfare" was so negatively weighted that when its constituent programs for the elderly and disabled were singled out and presented separately, they received much stronger support.<sup>55</sup> Again, the one exception was Aid to Families with Dependent Children (AFDC), the welfare program for single mothers and their children that was most heavily stigmatized in the popular imagination.

<sup>54</sup> Sears and Citrin, *Tax Revolt*, 47–49.

<sup>55</sup> Sears and Citrin, *Tax Revolt*, 49.

The irony here is that, in most cities and certainly in Los Angeles, AFDC was not funded from local taxes at all but rather from a combination of state and federal budgets. And yet, because this one particular welfare program had come to represent all that was wrong with the welfare state—its alleged corruption of racial, sexual, and economic norms—it came to serve as a symbolic lightning rod for organizers of the tax revolt.<sup>56</sup> The largely unmarked nature of asset-based subsidies to white homeowners flattered them into thinking that their lifestyles were sustained only by private initiative and the intergenerational transmission of familial wealth. By contrast, the welfare disbursed to inner-city renters was heavily marked as unearned and therefore illegitimate income, and widely stigmatized as subsidizing the familial dysfunction of the urban black poor. And by extension, public spending as a whole was associated with the demoralization of the white family through its subsidization of student radicals and (short-lived) Medicaid coverage of abortion after *Roe v. Wade*. The organizers of the tax revolt, like Buchanan himself, construed the failure of the welfare state in inextricably moral and economic terms.<sup>57</sup>

Convinced of the causal connections among public spending, racial redistribution, and family dysfunction, tax resisters had a ready-made solution to the combined economic and moral malaise of the late twentieth-century welfare state. The tax funds that were now redistributed from homeowners to renters, from whites to blacks, and from working fathers and their families to fatherless nonworking families, would need to be repatriated. Ideally, they would be returned to the family through the protection of inherited

<sup>56</sup> Molly Michelmore is particularly illuminating on the symbolic role of AFDC in the larger tax revolt movement. Michelmore, *Tax and Spend*, 3–4.

<sup>57</sup> As noted by Romain Huret, the destruction of the family at the hands of the fiscal state was a recurrent complaint among anti-tax crusaders and one that linked the fate of the welfare poor, assumed to be black or migrant, with that of middle-class whites: “Middle-class tax resisters expounded in newsletters and pamphlets their belief that the leviathan state has increased both permissiveness among citizens and the waste of taxpayers’ money . . . Taxpayers feared that liberal policymakers were usurping their authority as parents . . . In San Francisco, the organization Parents and Taxpayers established a place for itself by attacking welfare policy as an agent of moral decay . . . The association’s bulletin devoted many articles to the multiple causes of evil, including busing, the Black Panthers, and welfare programs . . . The *Roe v. Wade* (1973) decision was compared to the *Dred Scott* (1857) decision, prophesying a civil war to come.” Huret, *American Tax Resisters*, 211. Similarly, Natalia Mehlman Petrzela points out that tax revolt militants were not simply concerned with the amount of tax money being spent on schools but the new curricula that schools were teaching. They were particularly enraged that the family home was being taxed to subsidize sex education and bilingual instruction that they understood as inimical to the family and the nation. Petrzela, *Classroom Wars*, 203–18.

wealth and sequestered within the confines of the local community—reserved for those whom the taxpayer recognized as neighbors, not strangers.<sup>58</sup> As Buchanan predicted, the tax revolt was catalyzed less by a general animus against public spending than a parochial and communitarian desire to hoard hard-earned tax dollars for one's own kind—namely, fellow middle-class suburban whites.

### Virginia School Neoliberalism and the Tax Revolt

The California tax revolt seemed to confirm Buchanan's sense that there existed a deep groundswell of popular support for a constitutional counter-revolution. In a long retrospective commentary on the referendum vote, Buchanan and his coauthor, the Australian political scientist Geoffrey Brennan, noted approvingly how closely the results hewed to Buchanan's long-standing prescriptions for constitutional counter-revolution. The tax revolt had "emerged not from within normal 'parliamentary' process and inter-party competition, but from *outside* the system" and had availed itself of the instruments of voter initiative and referendum that were peculiar to California's distinct tradition of direct democracy.<sup>59</sup> "The enormous success of Prop 13 in California in the face of indifference and even opposition from most of the political establishment," they remarked, "must surely raise some doubts about the extent to which normal political processes reflect the popular will."

Buchanan and Brennan also commended the amendment for eschewing one-off tax and spending cuts in favor of "explicit constitutional constraints designed to be operative over an indefinite future."<sup>60</sup> In addition to limiting property taxes to 1 percent of market value, Prop 13 stipulated that any future increase in state taxes would need to be approved by two-thirds of the state legislature, and allowed local governments to introduce new taxes or raise existing taxes only if they could secure two-thirds of electoral votes in a local referendum. Although the use of supermajority rules was not entirely new in California, these requirements were of a much more extensive and constraining kind than anything that had gone before.<sup>61</sup> Interestingly—and, it turns out, not coincidentally—they seemed to very precisely enact a version of the

<sup>58</sup> Plotkin and Scheuerman, *Private Interest, Public Spending*, 131–32.

<sup>59</sup> Brennan and Buchanan, *Power to Tax*, 25.

<sup>60</sup> Brennan and Buchanan, *Power to Tax*, 25.

<sup>61</sup> California was one of the few states to require a supermajority legislative vote to approve state budgets, a provision that had been introduced as far back as 1933. However, the supermajority vote did not apply to taxes before Prop 13.

Wicksellian near-unanimity rule for tax decisions that Buchanan had been elaborating in his writing for more than a decade now.

There is a distinctly disingenuous tone to Buchanan and Brennan's commentary on the tax revolt, as if popular insurgency had arisen out of nowhere to dictate the terms of a new "fiscal constitution." Buchanan and Brennan were merely delivering to the world what the popular will was telling them. But the role of Virginia school neoliberals in shaping the tax revolt was much more direct and longstanding than this text suggests. In 1972, Governor Ronald Reagan convened a Tax Reduction Task Force under the leadership of Lewis K. Uhler and assigned him the task of drafting the text of Prop 1, a first campaign to introduce tax and spending limits that was narrowly defeated by referendum in 1973 but successfully reprised in 1979. Uhler, a former member of the John Birch society and a veteran of Reagan's state-led attacks on welfare, insisted on conscripting a number of leading economists to the task force—these included James Buchanan himself, his former doctoral student William Craig Stubblebine of Claremont Men's College, his colleague and co-author Gordon Tullock, future chairman of the Cato Institute William A. Niskanen, the Chicago school economist Milton Friedman, future Supreme Court Justice Anthony Kennedy, and Norman B. Ture, a leading proponent of what would soon be known as supply-side economics.<sup>62</sup>

Buchanan was enthusiastic from the start: in response to Uhler's invitation, he wrote, "I can attest that, in my view, this is the single most important domestic policy issue that confronts us, and indeed I think it overrides almost all others. Furthermore, it transcends any party or group affiliation."<sup>63</sup>

<sup>62</sup> Uhler wrote to Buchanan in July of 1972, insisting that he was "indispensable to our effort." See Letter from Lewis K. Uhler to James M. Buchanan, July 18, 1972, C0246, Correspondence Box 32, Folder "Reagan, Ronald 1972–1974," James M. Buchanan papers, Special Collections Research Center, George Mason University Libraries [hereafter James M. Buchanan papers]. It appears that later that year, Uhler and Buchanan met in Blacksburg, Virginia, where Buchanan had assembled a team of colleagues to work further on the draft amendment before the whole committee was reconvened in Los Angeles in December. See Letter from Lewis K. Uhler to James M. Buchanan, November 9, 1972, C0246, Correspondence Box 32, Folder "Reagan, Ronald 1972–1974," James M. Buchanan papers. See also William Craig Stubblebine, Interview by Enid H. Douglass, "The Development of Proposition #1," 5 and Lewis K. Uhler, Interview by Enid H. Douglass, "Chairman of Task Force on Tax Reduction," 15–16. For a detailed overview of Lewis K. Uhler's role in state and federal campaigns to limit tax and spending, see Martin, *Rich People's Movements*, 168–71.

<sup>63</sup> James M. Buchanan to Lewis K. Uhler, July 24, 1972, C0246, Correspondence Box 32, Folder "Reagan, Ronald 1972–1974," James M. Buchanan papers. It was Buchanan who suggested the names of Tullock, Friedman, Niskanen, and Ture as potential members of the committee.

Buchanan confessed his “near-despair and resignation” at the “apparent failure of small-scale attempts to get a taxpayer revolution off the ground” in the past but noted that if “someone of the national scale of Governor Reagan could take the lead,” there would be “genuine prospects of success.” Uhler, for his part, was won over by Buchanan’s proposals for constitutional revolution and was largely responsible for communicating these ideas to a broader public.<sup>64</sup> Buchanan’s work appears to have convinced Uhler that constitutional tax and spending limits, as opposed to legislative action or court challenges, were the most promising way to undo the welfare state.<sup>65</sup> It also seems likely that Buchanan’s defense of the near-unanimity voting rule is what inspired the inclusion of a supermajority voting requirement in the draft of Prop 1—an innovation that was reproduced in Prop 13 and multiple constitutional tax reforms across the nation.

Ironically, the first true success of the tax revolt, Prop 13, was spearheaded by political outsiders Howard Jarvis and Paul Gann, who were widely dismissed as cranks by Reagan’s task force of advisors. After this first breakthrough, however, Howard Jarvis’s political fortunes waned and Lewis Uhler’s National Tax Limitation Committee, filled with veterans of the Prop 1 campaign such as Friedman, Buchanan, Stubblebine, and Niskanen, went on to establish itself as the true driving force behind the national campaign to limit state and federal taxes.<sup>66</sup> Especially active in these campaigns was Buchanan’s former student, Stubblebine, who helped draft the successful Gann amendment of 1979—a simplified version of Prop 1—and went on to consult on similar tax and spending referenda in other states.<sup>67</sup> All mem-

<sup>64</sup> Without mentioning Buchanan by name, Uhler’s publications during this period faithfully translate Buchanan’s theory of constitutional revolution into policy-friendly language. See Uhler, “A Constitutional Limitation on Taxes,” “The Case for Constitutional Tax Limitation,” and “Tax Limitation.” Uhler was apparently responsible for proposing the idea that Reagan’s tax reduction strategy should take a specifically *constitutional* form. See Uhler, Interview by Enid H. Douglass, 13. Buchanan’s student, Stubblebine, notes that he was skeptical of the project until it had been formulated in constitutional terms, as “some kind of amendment—something that had some kind of relationship to theory and some aspect of enforceability, predictability, or control aspect of it.” In language strongly redolent of Buchanan, he explains that Prop 1 was an attempt to “place the elected officials in a different institutional environment, a different environment within which to make decisions. The whole exercise is predicated on the basis that elected officials respond to the kinds of pressures that they find come to bear on them . . . That is, there’s a bias in the democratic process and that these constitutional limitations on the power of legislatures to tax and to spend are ways of dealing with an inherent bias in the situation.” See Stubblebine, “The Development of Proposition #1,” 21, 45–46.

<sup>65</sup> Kuttner, *Revolt of the Haves*, 277–78.

<sup>66</sup> Kuttner, *Revolt of the Haves*, 277–79.

<sup>67</sup> Adams, *Secrets of the Tax Revolt*, 168, 282; Sears and Citrin, *Tax Revolt*, 21.

bers of the National Tax Limitation Committee, including Buchanan, were later involved in the campaign to introduce a balanced budget amendment at the federal level—a campaign that failed in formal terms but that has nevertheless been highly successful in converting both sides of the partisan divide to the rhetoric, if not the practice, of limited spending and balanced budgets.<sup>68</sup> Buchanan’s work on constitutional reform was the abiding intellectual inspiration behind each of these initiatives.

### Democracy Turned Against Itself

The California tax revolt must be counted as the first truly significant, because undeniably popular and democratic, insurrection against the welfare state. Against a background of rising discontent among business conservatives, the referendum vote was an unhopd-for gift to the right—not only because it elicited resounding support from a large cross-section of the white voting public, but also because it took place outside the usual channels of representative party politics, availing itself of California’s long and vigorous tradition of direct democracy.<sup>69</sup> To those who suspected that the tax revolt was mere cover for elitist designs against progressive taxation, the right had only to respond that the will of the people had finally prevailed against those who would silence them.

The choice of methods was by no means self-evident. After all, the turn-of-the-century Populists and Progressives who first championed direct democracy were diametrically opposed to the objectives behind the 1970s tax revolts.<sup>70</sup> Blocked by the usual channels of political representation, the Populist and Progressive movements had embraced the initiative, the referendum, and the recall as alternative modes of democratic expression that might elevate the voice of the people against the “special interests” of established political parties and corporate elites. And they did so with the precise aim of ensuring a greater redistribution of wealth. Arguably elements in both of these movements were tainted from the beginning: their productivism (which designated only some kinds of workers as truly deserving), their nativism (materialized in anti-migration and eugenic policies) and their familialism (conveyed through the maternalist vision of women

<sup>68</sup> Morgan, “Unconventional Politics.” The campaign continues to this day, now led by the Koch-backed American Legislative Exchange Council (ALEC).

<sup>69</sup> Smith, *Tax Crusaders*.

<sup>70</sup> Allswang, *The Initiative and Referendum*.

social reformers) added up to a very restricted understanding of social welfare.<sup>71</sup> Yet as advocates of popular constitutionalism, these movements were decisive in instigating the first forms of progressive taxation and income redistribution in modern America.<sup>72</sup> And they were directly responsible for building up the modern fiscal state that later tax revolt militants found so burdensome.

In what was surely a strategic move, the architects of the tax revolt revived the preferred methods of American Populists and Progressives with the express intention of reversing their accumulated achievements.<sup>73</sup> Much like Buchanan, they recuperated Populist and Progressive language for very different ends, designating taxpayers as the true producers and representatives of the people and denouncing their exploitation at the hands of the rentiers—an alliance of unproductive and parasitic welfare queens and government “rent-seekers” intent on expropriating hard-earned wealth. As Uhler explained:

The “general interest” is best defined as the citizens wearing their taxpayers’ “hats.” The term “special interest” historically has conjured up visions of cigar-smoking lobbyists representing oil, railroads, financial and other business interests. In recent years, there has been a proliferation of special interests. But these are very special interests—welfare rights organizations, associations of grantees of government funds, etc. While the classical special interests sought their “piece” of the public pie, their overriding interest was protection of their existing wealth positions and curtailment of government interference with their ability to make a profit. The new special interests are largely oriented to obtaining government funds and increasing the size of the public sector as a means of improving their wealth positions. In light of the complexion of many legislative bodies today, the new special-interest groups, largely oriented to redistribution of wealth, are more potent political forces than the traditional special interests.<sup>74</sup>

<sup>71</sup> There is a vast literature exploring the ambivalence of the Populist and Progressive movements on questions of race and gender. See, for example, Goebel, *A Government by the People*, and Frankel and Dye, eds., *Gender, Class, Race*.

<sup>72</sup> Mehotra, “Envisioning the Modern American Fiscal State.”

<sup>73</sup> In his encounters with the Democratic Governor Pat Brown and the League of Women Voters, Stubblebine presented the referendum as an instrument of radical democracy and a defence against what he saw the elitist tendencies of the Democratic party. Stubblebine, “The Development of Proposition #1,” 37, 46–47

<sup>74</sup> Uhler, “A Constitutional Limitation on Taxes,” 380–81.

Buchanan also was keenly attuned to the strategic value of the initiative and referendum process. While noting that constitutional reform of the kind attempted by Reagan's Tax Reduction Task Force required "the efforts of political entrepreneurs," it was in the interests of such campaigns to present themselves as expressions of the will of the demos—that is, to adopt the form of direct democracy.<sup>75</sup> Enacted in this way, the "[o]pponents of such proposals can be challenged as if they are furthering the interests of establishment elites, who remain fearful of demos."<sup>76</sup> In fact, it was Gordon Tullock who recommended this strategy to Buchanan as early as 1965 when, in private correspondence, he suggested that "instead of trying to develop a quasi-market [to oppose social welfare measures] it might be better to become advocates of initiatives and referendums." Such a proposal "really would give the dirigiste a shock," he wrote, since "they would find it very difficult to oppose . . . we would be on their left by their own definition of 'left.'"<sup>77</sup>

As cynical as these arguments no doubt are, they do raise serious questions about the relationship between neoliberalism and democratic process. The fact that the American neoliberal revolution began with a popular tax revolt, achieved through the initiative and referendum process, complicates the idea that this was exclusively a "revolution from above" or that neoliberalism harbors an intrinsic animus towards democracy.<sup>78</sup> The undeniably popular success of the tax revolt seems to suggest the rather more troubling conclusion that the longstanding racial divide between whites and blacks was so potent that it was able to convince a good portion of the white working and middle classes to vote against public spending *in general*, and hence against their own apparent interests as recipients of public services, in order to disenfranchise blacks *in particular*. This racial divide, along with the notion that welfare should be reserved for those in normative family relationships, appears to have galvanized a resoundingly democratic vote against the very idea of the welfare state.

<sup>75</sup> Buchanan, "Direct Democracy," 240.

<sup>76</sup> Buchanan, "Direct Democracy," 240.

<sup>77</sup> Gordon Tullock to James M. Buchanan, July 13, 1965, Box 95, Gordon Tullock Papers.

<sup>78</sup> This seems to be a shortcoming of Nancy MacLean's otherwise compelling account of Buchanan's work in *Democracy in Chains*. When MacLean looks for empirical examples of Buchanan's influence, she cites Chile's 1980 constitutional reform under Pinochet (154–68) but does not consider the more proximate example of the California tax revolt. Where Pinochet's Chile seems to corroborate her representation of Virginia school neoliberalism as an elite and shadowy force imposing anti-democratic reform from above, this analysis is much harder to maintain when it comes to Prop 13.



Here we are reminded of the dangers that attend any attempt to cast claims to greater wealth redistribution in the language of productivism. As Richard Hofstadter first suggested and others have argued in detail, any political movement that begins by distinguishing between the productive and hence deserving worker and the unproductive rentier runs the risk of scapegoating those who, through a history of dispossession, have always been relegated outside the sphere of formal waged labor—Native Americans, enslaved or bonded African Americans, non-citizens, and women.<sup>79</sup> When the meaning of “productive” shifts imperceptibly from the waged worker to the taxpayer and homeowner, as it did after World War II, the discursive and political chain of association between the rentier and the unproductive welfare poor or public sector worker becomes all too seductive. The Populist and Progressive movements were divided between those who promoted a nativist definition of the American people and those who held to a much more inclusive vision of social change. But their productivist idiom lent itself seamlessly to the right-wing populism of the tax revolt.

Political strategists such as Buchanan and Tullock had only to suggest the method of direct democracy to translate this popular resentment into a formidable force for change. What was no doubt less perceptible to suburban tax resisters was the fact that their groundswell of anger was about to be locked in time—its consequences rendered almost irreversible—thanks to the peculiar constitutional rule of the supermajority vote. This was the strategic tour de force accomplished by Buchanan and his followers. By yoking the racial and gendered resentments of white homeowners to the constitutional form of the supermajority vote, they made sure that historically specific and targeted grievances would be set in stone for the foreseeable future. Once the supermajority vote was ratified, its tendency to diminish public spending would become self-reinforcing, so that middle-class tax resisters would soon discover, to their surprise, that they too were the consumers of public services and that their services were next in the line of fire, after the first round of attacks on the welfare poor.

<sup>79</sup> This critique of productivism is implied in Richard Hofstadter’s analysis of the Populist and Progressive movements in *Age of Reform*. For an insightful analysis of productivism in American right-wing populism, see Berlet and Lyons, *Right-Wing Populism*, 6–7, and for a perspective on Tea Party productivism during the Obama administration, see HoSang and Lowndes, *Producers, Parasites, Patriots*, 19–46.

### The Long Southern Tax Revolt

Although Buchanan's style of formalistic exposition tends to obscure historical precedent in favor of thought experiments and deductive logic, the constitutional solutions he developed are far from novel in the American context. Tax limits and supermajority provisions have a very long history in the American South, where they have commonly served the interests of propertied white citizens against the perceived depredations of northeastern elites, former slaves, and impoverished whites. During the constitutional debate that followed the American Revolution, Southern anti-federalists argued against the inclusion of a general welfare clause in the new American constitution, fearing that it would impose onerous taxes on the states without any assurance of equal representation in Congress. To forestall this threat, they called for the introduction of a state supermajority vote to ratify the passage of any federal tax bills.<sup>80</sup>

The fears of Southern property owners became more acute in the first decades of the nineteenth century, as Northern states became steadily more urbanized and populous than the still largely agricultural South, where slaves were not counted as citizens. Reproducing the arguments of the early anti-federalists, proponents of "states' rights" such as John C. Calhoun again urged the Southern states to protect themselves from the fiscal impositions of the North by seeking an extension of the concurrent majority or supermajority rule, which was already necessary for ratifying constitutional amendments, to the question of taxation. Under Calhoun's proposal, a law would be constitutional only if it were validated by majority in the federal legislature and a concurrent majority in every state legislature; the outlier state would therefore be imbued with the power to "nullify" specific federal laws within its borders. Calhoun's posthumously published *Disquisition on Government* (1853) framed the question of states' rights in terms of a searing critique of majority rule, where Southern slave owners were imagined as a beleaguered minority ranged against the overweening power of Northern elites.<sup>81</sup> The nullification of federal law, and failing this, secession from the union, were the Southern state's weapons against federal despotism.

A number of commentators from both the left and the right, most notably the historian Nancy MacLean, have highlighted the resonance between Buchanan's constitutional critique of majority rule and the political thought

<sup>80</sup> Pinnegar, *Virginia and State Rights*, 35–38.

<sup>81</sup> Calhoun, *A Disquisition on Government*.

of John C. Calhoun.<sup>82</sup> The *conceptual* affiliation appears irrefutable—Calhoun was, after all, the great American theorist of minority veto power—and much more convincing than Buchanan’s attempts to attribute his debts to Swedish social progressive Knut Wicksell. But the *political* affiliation is less so, given that Calhoun never lived to see emancipation and the struggles around racial redistribution that followed. Calhoun was writing in a context where nullification of federal edicts and secession from the union were still possible. The defeat of the South in the Civil War shut down these alternatives and forced Southern Democrats to look for new, more adaptive avenues of dissent. Calhoun proposed the constitutional instruments of nullification and the supermajority vote to preempt the possibility of slave emancipation; the Southern Democrats were counter-revolutionaries, seeking to claw back power they had lost and contain freedoms that had been won. Buchanan was writing at a similar moment of transition when the long civil rights movement was winning significant gains in the realm of voting rights and African Americans were for the first time enjoying some of the benefits of public spending. Although many Southern Democrats still clung to the hope that civil rights legislation could be nullified, Buchanan seems to have accepted that nullification and secession were no longer an option and instead sought to imagine the possibility of “internal exit without secession.”<sup>83</sup> In this respect, Buchanan’s project appears more closely aligned with that of the Southern Democrat “Redeemers” who spent the last decades of the nineteenth century trying to block the new tax and spending powers of Southern states while remaining within the formal constitutional limits imposed by the Civil War.<sup>84</sup>

<sup>82</sup> See MacLean, *Democracy in Chains*, 1–12. For a similar argument from within the public choice movement, see Tabarrok and Cohen, “The Public Choice Theory of John C. Calhoun.”

<sup>83</sup> In the wake of the *Brown v. Board of Education* decision of 1954, the Virginia General Assembly revived the ghost of Calhoun by adopting a nullification resolution expressing its intention to disobey federal laws. That Buchanan rejected the Calhounian solution of nullification and secession was understood by his most astute critics. The libertarian economist, Murray Rothbard, took Buchanan to task for precisely this reason. Rothbard, “The Anatomy of the State,” 79. Interestingly, MacLean’s reading of Buchanan sometimes seems to apply better to Rothbard, who did advocate a Calhounian strategy of secession. But while both Rothbard and Buchanan describe themselves as “libertarians,” Buchanan, unlike Rothbard, does not belong to the American libertarian tradition inspired by the Austrian neoliberal Ludwig von Mises. On Buchanan’s theory of “internal exit without secession,” see Buchanan and Faith, “Secession and the Limits of Taxation.” Buchanan and Faith note that “internal exit” is not only an alternative to secession but also an alternative *form of secession*. The authors are candid in describing internal secession as an option more readily available to the rich, who can easily leverage the threat of tax evasion to extract tax limits from the state (1031).

<sup>84</sup> Foner, *Reconstruction*, 587–89.

With its project to rebuild the South and provide a minimal form of social welfare to newly freed slaves and impoverished whites, Reconstruction bestowed new tax and spending powers on the state and threatened the one remaining property right that white landowners felt to be securely theirs. The threat was made real when public education became compulsory for all students, black and white, across the South, and a new *ad valorem* property tax was established to cover the greatly increased need for public monies. These taxes were bitterly resented by white landowners who, as the historical beneficiaries of landed wealth, were disproportionately subject to the tax but had little interest in the public services funded by them. As the representatives and champions of white landowners, the Redeemers fought hard to block the public spending mandates of Reconstruction and stave off any future government claims by locking in a series of specific constitutional constraints.<sup>85</sup> The Alabama state constitution of 1875 was the first to enact limits on the collection of state and local property taxes, the first to establish a debt ceiling, and the first to establish a supermajority voting requirement for appropriations—innovations that would all be revived in the tax revolt of the 1970s. It was followed soon after by the neighboring states of Texas (1876), Arkansas (1883), Georgia (1890), and Kentucky (1908).<sup>86</sup> Calhoun's defense of states' rights no doubt served as an important source of inspiration for these constitutional reforms, but in the postbellum context, former slaves were now included in the ranks of the threatening majority. Southern wealth holders now imagined themselves as a tax-producing minority under siege from an alliance of non-productive tax enforcers (northeastern elites and pro-Reconstruction Republicans) on the one hand and non-productive tax consumers (African Americans and poor whites) on the other. This double-sided critique, which depicts the property owner as assailed from above and below by unproductive parasites, has remained a feature of white taxpayer populism until this day.

In this tax revolt, as in subsequent ones, the conflict around fiscal transfers was sharpened by the historically racialized nature of property ownership in American democracy. Why would property owners be willing to see their wealth confiscated, in the form of taxes, and transferred to a class of people who, as slaves, had once served as their principle form of taxable property? Not all taxes were equal in the eyes of Southern Democrats. The property tax

<sup>85</sup> Newman and O'Brien, *Taxing the Poor*, 35–36.

<sup>86</sup> Newman and O'Brien, *Taxing the Poor*, 33–34. See also Henricks and Embrick, *State Looteries*, 10–27, for a rich analysis of this period and its resonances in present-day America.

was especially resented because it targeted those who were the historical beneficiaries of private wealth accumulation; sales and other consumption taxes were far less controversial because they were borne by all citizens alike, black and white, property-owning and propertyless.<sup>87</sup> For this reason, the constitutional tax limits implemented by Southern states focused obsessively on the taxation of wealth, but gave legislators free rein to cover their spending needs with exorbitant—and regressive—consumption and excise taxes.<sup>88</sup>

These tax and spending limits remained inscribed in many Southern state constitutions into the twentieth century and, over time, were supplemented by constitutional changes to the procedural rules governing the approval of tax increases. In 1934, Arkansas became the first state to introduce a supermajority vote for tax increases; it remained the sole state to enforce such a provision for three decades.<sup>89</sup> But with the rise of the civil rights movement and the extension of Great Society welfare programs to the poorest citizens of the South, many other states adopted similar constraints. After 1965, Southern states one by one adopted supermajority requirements in an effort to block future tax increases and the further transfers of wealth from the white propertied classes to the black and white poor. In 1966, Louisiana was the first in a new wave of states to amend its constitution, now requiring a two-thirds supermajority to increase any tax in the state. Mississippi and Florida followed suit in 1970 and 1971.<sup>90</sup> These supermajority amendments were the immediate political precursors to the California tax revolt and very likely an inspiration for Buchanan's "near-unanimity" rule, despite his overt references to Knut Wicksell.

In some respects, then, it might be argued that California merely imported a tax revolt that had been initiated in the South nearly a century earlier.<sup>91</sup> Yet the California tax revolt was a watershed precisely because of the very different fiscal history of California as a big spending, big tax state. When Southern states introduced tax limits and supermajority rules in the 1960s and 70s, they were reverting to form and entrenching what was already a highly regressive tax regime with limited room for fiscal transfers. They simply did not have much of a public sector to pare down. The situation in California could not have been more different. In the 1950s and 60s, public services in

<sup>87</sup> Newman and O'Brien, *Taxing the Poor*, 1–30.

<sup>88</sup> Permaloff and Grafton, "Political Geography and Power Elites," 248–50.

<sup>89</sup> Newman and O'Brien, *Taxing the Poor*, 32.

<sup>90</sup> Newman and O'Brien, *Taxing the Poor*, 40–41.

<sup>91</sup> On the Southern tax revolt, see Kruse, "The Politics of Race."

California were ranked among the most generous in the country, and state and local expenditures remained well above the national average right into the 1970s.<sup>92</sup> Both Republican and Democratic governors invested heavily in public infrastructure and poured money into schools, community colleges, universities, hospitals, and parks to keep up with the expanding population.<sup>93</sup> Even Governor Reagan was not able to arrest the momentum.

The passage of Prop 13 was a turning point, triggering a huge but short-lived drop in total state and local tax revenues and a permanent decline in the share of revenues derived from property.<sup>94</sup> When compared with other states, the overall (visible) tax burden on Californian citizens went from well above average in the 1970s to average in the first decade of the twenty-first century.<sup>95</sup> And yet the public demand for government spending did not diminish along with tax receipts. Searching around for new sources of revenue, state and local governments generally resorted to new sales taxes that, despite their inherently regressive nature, rarely generated the same public outrage as the more immediate, lump-sum taxes on property. But they also steadily increased their reliance on less visible sources of income such as user fees and charges—consumption taxes in anything but name.<sup>96</sup>

Comparing the tax composition of American states from the 1950s to 2000s, Newman and O'Brien found that the northeast and midwest had much higher property tax rates than the South in the 1950s, with the west lying somewhere between the two. By the 2000s, however, western states such as California had moved much closer to the tax composition of Southern states, where regressive sales and consumption taxes—and, we might add, invisible forms of taxation such as user fees and fines—had long outweighed the contribution of property taxes.<sup>97</sup> Its public services wore the consequences. Californian public schools and infrastructure now rank well below the national average, bringing the state much closer to the South in terms of its commitment to social redistribution.<sup>98</sup>

The California tax revolt was a phenomenal victory for the right precisely because it managed to import a Southern tax structure into a high spending

<sup>92</sup> Sears and Citrin, *Tax Revolt*, 23–24

<sup>93</sup> Bell, *California Crucible*.

<sup>94</sup> Schwadron and Richter, *California and the American Tax Revolt*, 8–9.

<sup>95</sup> Mathews and Paul, *California Crackup*, 84

<sup>96</sup> Schwadron and Richter, *California and the American Tax Revolt*, 11; McCubbins and McCubbins, "Proposition 13," 19–20.

<sup>97</sup> Newman and O'Brien, *Taxing the Poor*, 40–42.

<sup>98</sup> Mathews and Paul, *California Crackup*, 87

state and to permanently reorient its tax composition in a regressive direction. The experiment would soon be replicated nationwide.

### The Regressive Tax State

By the early 2000s, twenty-seven states had some kind of tax and expenditure limitation in place, while fourteen states required a legislative supermajority and two an electoral supermajority to approve any tax increase.<sup>99</sup> Tax and spending constraints have also been widely adopted at the local level, with one in eight municipalities now subject to some kind of constitutional or statutory limit on its ability to spend.<sup>100</sup> But even in the absence of such constitutional limits, the mere threat of a voter referendum on public spending appears to have permanently altered the landscape of local and state politics, orienting much of the electoral debate around questions of fiscal overreach and persuading candidates that new spending initiatives are too hot to touch.

When in place, constitutional tax and spending limits have failed to substantially reduce overall volumes of public spending. What they have succeeded in doing is significantly transforming how public spending is financed and what public money is allocated to.<sup>101</sup> Many states have opted for increased reliance on unguaranteed public debt as one way of getting around budget restraints—an ironic outcome, given the aversion of public choice economists to budget deficits and public debt.<sup>102</sup> Others have introduced so-called impact fees that are imposed on developers to pay for the construction of public infrastructure and upkeep—indistinguishable from traditional property taxes except for the critical fact that these fees are “earmarked” for use in and around the new development itself and therefore contribute to de facto privatization of public space.<sup>103</sup> In general, state revenue collection—always less progressive than local and federal tax regimes—has moved even further in a regressive direction, as state governments vie against each other to offer the most attractive tax incentives to business.<sup>104</sup> In a self-defeating attempt to ensure their future growth prospects through business tax cuts, states have overseen a steady decline in revenues from corporate income and a corresponding rise in sales and consumption taxes.

<sup>99</sup> Brunori, “The Limits of Justice,” 203–204.

<sup>100</sup> Brooks, Halberstam, and Phillips, “Spending within Limits.”

<sup>101</sup> McCubbins and McCubbins, “Proposition 13,” 2.

<sup>102</sup> Baer, “Municipal Debt”; Kiewiet and Szakaty, “Constitutional Limitations.”

<sup>103</sup> McCubbins and McCubbins, “Proposition 13,” 20–21.

<sup>104</sup> Brunori, “The Limits of Justice,” 193–201, 207–208.

Most states have also expanded the portion of their revenue they derive from user fees, in some cases dramatically.<sup>105</sup>

This regressive turn has been even more marked at the local level, where counties, cities, municipalities, and special districts have learned to be creative in their efforts to make up for diminishing property tax revenues. Wherever possible, local governments have opted to increase consumption or sales taxes or introduce new ones. These are the easiest options available since even when a new ballot vote is necessary, voters often appear more inclined to support increases in sales taxes rather than income taxes. Despite their regressive nature, the former are commonly perceived as less painful and more consensual than annual tax returns on income.<sup>106</sup> Much more so than states, local governments have also resorted to the subterfuge of increasing user fees and other miscellaneous consumption charges.<sup>107</sup> User fees rose from 27 percent to 37 percent of own-source revenues for all American cities between 1970 and 2008, up from 10 percent at midcentury.<sup>108</sup> The figures are much higher in traditionally regressive tax states such as Alabama, South Carolina, Idaho, Mississippi, and Wyoming.<sup>109</sup> User fees can apply to anything from “recreational” facilities such as parks, pools, and libraries to services that are generally considered indispensable, such as garbage collection, sewer systems, ambulance transport, or parking. Increasingly, municipal courts also collect user charges to finance local criminal justice systems; these include both court-ordered fees imposed as part of the punishment process and fees-for-service to cover the cost of public defenders, private probation, rehabilitation services, or simply time spent in jail. Recourse to penal fees has escalated since the 1980s, precisely when many local governments came under pressure from falling tax revenues.<sup>110</sup>

In some local government areas—typically the most disadvantaged and those that have least opportunity to collect property and sales tax—fines have come to serve as another form of invisible taxation. Following the shooting of Michael Brown in 2014, the city of Ferguson, Missouri, gained notoriety for its practice of generating revenue from a panoply of

<sup>105</sup> South Carolina, Alabama, and Utah all derive around a quarter of their state revenue from such sources—a trend that accentuates their historically regressive tax profile. Sjoquist and Stoycheva, “Local Revenue Diversification,” 438–39.

<sup>106</sup> Sjoquist and Stoycheva, “Local Revenue Diversification,” 439.

<sup>107</sup> Clark, “Small Is Innovative,” 30.

<sup>108</sup> Clark, “Small Is Innovative,” 31; Sjoquist and Stoycheva, “Local Revenue Diversification,” 430.

<sup>109</sup> Sjoquist and Stoycheva, “Local Revenue Diversification,” 439.

<sup>110</sup> Harris et al., *Monetary Sanctions in the Criminal Justice System*, 51, 156, 173, 186, 201.



absurd monetary sanctions. But Missouri has far from the worst record on this count. According to a survey of 2013 census data, Louisiana, Arkansas, Georgia, Mississippi, and Illinois topped the list of states whose local governments relied most heavily on fines and forfeitures as a source of revenue.<sup>111</sup> It was also found that many cities and counties increased their reliance on all such miscellaneous revenue sources following the great recession of 2007. Indeed, one study of local government finances found that, on average, per capita revenues from user fees grew by 7 percent between 2007 and 2012, while revenue from formal tax sources and state aid declined by an equal amount.<sup>112</sup>

The pathway towards greater tax regressivity had long been advocated by Buchanan. As early as 1960, in the first edition of his textbook introduction to public finance, Buchanan was calling for the expansion of consumption taxes relative to graduated taxes on income and wealth.<sup>113</sup> Dismissing the distinction between progressive and regressive taxation as “spurious,” he predicted that both federal and state levels of government would need to introduce or increase the share of their revenues coming from sales taxes if they were to continue their present path towards increased public spending.<sup>114</sup> Buchanan also assigned an important role to user fees as a future revenue source, especially in light of the fact that they could be included “off the fiscal account” and thereby counted as substitutes for tax rather than an alternative form of tax.<sup>115</sup> As federal and state governments launched themselves into new public infrastructure projects such as the federal highway system and intensified public investments in higher education and health care, Buchanan produced a number of influential policy papers in favor of the principle that the user pays.<sup>116</sup> User pricing, he argued, was more efficient than the free provision of public services, not only in light of its self-financing qualities but also because it curbed the otherwise limitless demand for public services.<sup>117</sup> The user fee, in effect, represented Buchanan’s ideal form of taxation: not only did it target consumption rather than production or investment, it also tailored indi-

<sup>111</sup> Shaw, *Where Local Governments Are Paying the Bills*.

<sup>112</sup> Lincoln House Blog, “Cities’ Increasing Reliance on Fees.”

<sup>113</sup> Buchanan, *The Public Finances*, 1<sup>st</sup> edition, 434.

<sup>114</sup> Buchanan, *The Public Finances*, 1<sup>st</sup> edition, 433.

<sup>115</sup> Buchanan, *The Public Finances*, 1<sup>st</sup> edition, 503–16. For a general discussion of the importance of user fees for Buchanan’s theory of public finance, see Riesman, *Political Economy*, 170–71.

<sup>116</sup> Buchanan, “The Pricing of Highway Services” and “The Inconsistencies of the National Health Service.”

<sup>117</sup> Buchanan, *The Public Finances*, 1<sup>st</sup> edition, 402, 507–508.

vidual benefit to individual burden following the rule of “proportional” (as opposed to progressive) taxation. With the user fee, there was no risk of paying more tax into a general fund than one extracted in the form of individual benefits. The more one consumed in the form of “public services,” the more one had to pay in the form of taxes, and vice versa, such that every taxpayer could “choose” how much he would be taxed.

In the 1960 version of his textbook, Buchanan anticipated that a retreat from redistributive objectives was likely in the near future and predicted increases in public investment primarily in the area of defense.<sup>118</sup> But he was soon compelled to revise his predictions, avowing his personal astonishment that “since 1965, we have witnessed an almost wholly unpredicted explosion in federal [non-defense] spending along with incessant demands for still further expansion.”<sup>119</sup> As the federal government assumed a greater role in the provision of public services, Buchanan became ever more adamant that such services should be financed by the consumer. The 1960 version of his textbook calls for a greater use of motor vehicle license and registration fees to fund road infrastructure and curb congestion; the 1965 version commends the recent introduction of automated parking meters in city streets.<sup>120</sup> Each successive update recommends more extensive reliance on user fees at the local level for general and recreational facilities as well as the reintroduction of tuition fees to fund public universities.<sup>121</sup>

At the time Buchanan was reflecting on pricing public services through user fees, his Chicago school colleague Gary Becker was following a similar line of reasoning with respect to the criminal justice system. Taking note of the expansion of state and federal prisons and their cost to the public purse, Becker recommended that on-the-spot monetary sanctions should be exploited as an alternative to the costly practice of arraigning a suspect before court and providing for their accommodation in the prison system.<sup>122</sup> Becker sought to recast the problem of crime and punishment in terms of

<sup>118</sup> Buchanan, *The Public Finances*, 1<sup>st</sup> edition, 539.

<sup>119</sup> Buchanan, *The Public Finances*, 3<sup>rd</sup> edition, 482.

<sup>120</sup> Buchanan, *The Public Finances*, 1<sup>st</sup> edition, 522–23; 2<sup>nd</sup> edition, 469.

<sup>121</sup> For general user fees, see Buchanan, *The Public Finances*, 1<sup>st</sup> edition, 508; 2<sup>nd</sup> edition, 434; 3<sup>rd</sup> edition, 356. For public university tuition, see Buchanan, *The Public Finances*, 1<sup>st</sup> edition, 509; 2<sup>nd</sup> edition, 428–29; 3<sup>rd</sup> edition, 351.

<sup>122</sup> Gary Becker, “Crime and Punishment: An Economic Approach.” For a closer reading of this text and the roll-out of a similar system of on-the-spot fines in Australia, see my “Money as Punishment: Neoliberal Budgetary Politics and the Fine,” *Australian Feminist Studies* 33 no. 96 (2018), 187–208.

costs and benefits to the public fisc. What if we limited ourselves to considering the public costs of penal services, he asked, and what if we tailored our punishments accordingly—that is, as a user fee for services rendered? He concluded that the monetary sanction, ideally administered outside the court system as an on-the-spot fine, could be considered the most efficient form of punishment because it directly compensated the state and taxpayers for the economic burdens imposed by the crime. All kinds of monetary sanctions, in this view, could be modelled on the parking fine—that is, as user fees for public services paid in arrears.

Buchanan's argument in favor of user fees had an immediate impact on the recomposition of public finances after Prop 13 and has subsequently become a pillar of Virginia school thinking on public sector reform.<sup>123</sup> As the tax revolt gained momentum, Lewis Uhler translated Buchanan's rather arcane academic writings on public finance into more digestible form and reflected on the likely effects of tax limitations as follows:

If there were strict limitations on funds available to government, the politicians would probably begin to make some basic changes. To prevent the development of demands for services which cannot be met, the politicians would try to shift the political "heat" by juxtaposing tax costs with benefits. The politician would say, "we're willing to give you this service, but here is what it will cost *you*, the recipient of the service, not someone else. And here is the user fee or the specific tax that *you* will have to bear." Furthermore, the fee or tax would be more likely to represent the full cost, not the subsidized cost, of the service. This combination of actions would produce a true pricing system and would have the immediate effect of reducing demand.<sup>124</sup>

As Uhler predicted, local governments did indeed find that they had few alternatives other than user fees when faced with immediate and dramatic cuts to their formal tax revenue. In the wake of the tax revolt, even liberal public finance experts were won over to user fees, sometimes mustering arguments that were indistinguishable from those of public choice economists to justify both the inevitability and greater efficiency of consumption-sensitive charges.<sup>125</sup> Becker's plea in favor of monetary sanctions has also

<sup>123</sup> For a collection of Virginia school perspectives on user fees, see Wagner, ed., *Charging for Government*.

<sup>124</sup> Uhler, "A Constitutional Limitation on Taxes," 383.

<sup>125</sup> Mushkin, "The Case for User Fees."

left its mark, as fines have become a favorite source of revenue-generation for cash-strapped municipalities. And although Becker recommended the monetary sanction as an alternative to the fiscal burdens of the criminal justice system, a distorted version of his program for reform has been realized in the guise of expanded user fees *within* courts, jails, and prisons.<sup>126</sup> The criminal justice system is one of the few public services that has seen its revenues grow over the last few decades; this exceptionalism has, in part, been funded by the massive proliferation of court fees.<sup>127</sup>

### Ferguson, Missouri

Thrust into the public gaze by the murder of Michael Brown, the story of Ferguson, Missouri, is not so different from those of many other local government areas that were left struggling to reconcile mounting public service responsibilities and dwindling tax resources in the long aftermath of the tax revolt. What sets Ferguson apart is the extreme fragmentation of the St. Louis County region in which it is located—a jurisdictional maze forged by decades of white flight and facilitated by the state of Missouri's lax rules on municipal incorporation. Under the home rule provisions that were enshrined in the state's 1875 constitution and effective until the late 1970s, local communities of any size were free to incorporate and to dictate their own zoning laws with almost no oversight from the state.<sup>128</sup> White middle-class residents who moved out of the central city into the suburbs beginning in the early twentieth century at first used restrictive deeds and covenants to exclude African Americans from their communities. But when these were struck down by the Supreme Court in the *Shelley v. Kraemer* case of 1948, they turned instead to municipal incorporation and zoning laws as a way of keeping out low-income whites and blacks. While suburban tax resisters in Los Angeles could only dream of secession, municipal secession was such an easily accessible option in St. Louis County, Missouri, that it served almost as a substitute for urban planning. Within a matter of weeks, a group of white homeowners could incorporate as a new municipality

<sup>126</sup> As pointed out by Pat O'Malley, the United States remains an outlier in the sense that it maintains a tight relationship between the administration of everyday fines and the court system. Other countries, such as Australia and the United Kingdom, have come much closer to Becker's prescriptions in expanding the use of on-the-spot administrative fines as an outright alternative to the court system. O'Malley, *The Currency of Justice*, 46–47.

<sup>127</sup> Harris, *A Pound of Flesh*.

<sup>128</sup> Gordon, *Mapping Decline*, 43–45.

replete with zoning rules—such as a requirement for large allotments or a ban on multifamily housing projects—that were calculated to keep out impoverished whites and African Americans. The process was repeated many times over, as low-income whites followed their middle-class peers into the suburbs and African Americans followed in greater numbers after the 1960s. The wealthier white residents responded to successive waves of outmigration by steadily abandoning their old suburbs and moving further and further westward, leaving in their wake an archipelago of independent local jurisdictions. By the early twenty-first century, St. Louis County alone included ninety separate municipal governments ranging in population size from tens of thousands to a few hundred people, each with the legal authority to zone, to tax, and to provide its own public services.<sup>129</sup> The result was an extreme segregation of tax revenues that enabled wealthier communities to finance generous public services at minimal per capita cost while compelling poorer communities to fund dilapidated schools and urban infrastructure at proportionately greater cost to their residents.

When the state of Missouri passed the Hancock Amendment limiting property taxes in 1980, its impact was somewhat belated and redundant.<sup>130</sup> The deindustrialization of St. Louis had been in full swing for over a decade, the city was hemorrhaging tax-paying workers and industries, and property taxes had long been in decline. Meanwhile, many municipalities in the wealthier outer suburbs of St. Louis County had already lowered property taxes of their own accord and replaced them with a new local sales tax.<sup>131</sup> As elsewhere, the introduction of tax and spending limits led to a paring away of progressive taxes on real wealth and a simultaneous burgeoning of regressive consumption taxes, whose costs were always much greater for the income- and asset-poor.<sup>132</sup> After the passage of the Hancock Amend-

<sup>129</sup> Clarissa Ryle Hayward, “After Ferguson,” *Washington Post* (November 24, 2014).

<sup>130</sup> The Hancock Amendment was passed by popular initiative in November of 1980 and is now enshrined in Article X, Taxation, sections 16 through 24 of the Missouri Constitution. The Amendment used a complex formula to limit the amount of taxes that could be raised by state and local governments; capped the rate of increase in assessed property values to the consumer price index or below; and prohibited local government from levying any new or increased “tax, license or fee” without the approval of voters. See Harrison, “The Missouri Hancock Amendment.” As pointed out in note 1, a 1991 ruling by the Missouri Supreme Court relaxed these rules by excluding certain user fees from the category of taxes.

<sup>131</sup> Better Together, *General Administration*, 13.

<sup>132</sup> According to the association *Better Together St. Louis*, “the St. Louis region has gone from having *no* municipal sales tax [prior to 1969] to gathering 36.7% of its regional revenue from sales taxes. Sixty-nine of the ninety-two local governments in the St. Louis region count sales taxes as

ment, municipalities in St. Louis County competed for sales tax revenues by seeking to lure outside residents as consumers. Municipalities vied to poach shoppers, and their tax revenues, from each other by constructing ever larger, more spectacular shopping malls—a zero-sum game that has unsurprisingly worked in favor of wealthier suburbs and left behind a cemetery of abandoned, almost new shopping malls across the county.<sup>133</sup> The fact that sales taxes are paid by all consumers, resident and non-resident alike, means that wealthier municipalities can share the costs of their revenue generation with outsiders while hoarding the benefits for themselves. Many wealthier communities have managed to entirely discard the tax on wealth, which is a burden to them in particular, while relying primarily on regressive sales taxes. The poorer towns struggle to maintain a stable tax base and so double down on their own residents to extract the most regressive kinds of taxes.

To make matters worse, the menu of regressive tax options available to local governments in Missouri is even narrower than elsewhere, thanks to a clause in the Hancock Amendment which specifies that even the introduction of “user fees” should be subject to voter approval.<sup>134</sup> This apparently unintentional detail has resulted in years of litigation seeking to determine the metaphysical difference between a tax and a user fee and has made it that much harder for local governments to introduce user fees at will. For this reason, it seems, cash-strapped municipalities have for the most part followed the path of least resistance and resorted to increasing traffic fines, municipal code violation fines, and court fees whenever they need to make up for revenue shortfalls. According to a 2015 Department of Justice report, the City of Ferguson’s Finance Director simply turned to the police force and exhorted them to write more tickets when faced with the “not insignificant issue” of “a substantial sales tax shortfall.”<sup>135</sup> As neighboring communities face off in a relentless, cut-throat struggle to plunder each other’s sales tax base, the fiscal fortunes of any one town can change dramatically from year to year. The village of St. Ann, for instance, had been living reasonably well off the sales revenue from its Northwest Plaza shopping mall. But when the mall lost its customers to a competing development and was forced to

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their number-one source of revenue.” See Better Together, *General Administration*, 13. Moreover, three of the wealthiest municipalities in the St. Louis region no longer levy a property tax at all (20).

<sup>133</sup> Gordon, *Mapping Decline*, 219; Sarah Kendzior, “In Ferguson, There Are No Malls Left to Boycott,” *Quartz* (November 30, 2014), <https://qz.com/303874/in-ferguson-there-are-no-malls-left-to-boycott/>.

<sup>134</sup> Harrison, “The Missouri Hancock Amendment,” 16–19.

<sup>135</sup> United States Department of Justice, *Investigation of the Ferguson Police Department*, 2.

close down in 2010, local authorities set up radar traps on the highway and ratcheted up court fines and fees to almost 40 percent of general revenues in an effort to make up for lost sales taxes.<sup>136</sup>

Despite its notoriety, Ferguson is not the worst offender in St. Louis County. A report released by the public interest law firm Arch City Defenders found that the small, predominantly African American town of Bel-Ridge collected some \$450 per household in municipal court fines in 2014, making such sanctions its largest source of revenue.<sup>137</sup> In Ferguson, fines were the second-largest source of revenue, and in Florissant, the largest town in St. Louis County, fines came third. As a source of revenue, fines have the virtue of being endlessly elastic. The poorest municipalities already issue a large number of citations for unpaid user fees—overdue utilities bills, failure to register or insure a car, an expired driver's license, unpaid garbage collection fees. But local police can generate a further mass of fines virtually at will by citing arcane municipal code violations, ranging from uncut grass to loitering or wearing baggy pants. These, in turn, can be supplemented by the many penal fines that await the fine defaulter once she arrives in a local court or jail.

As fines are generated for the exclusive purpose of plugging holes in revenue, their relationship to public service provision becomes ever more tenuous. Taxation, in this context, loses any redistributive pretensions and becomes a pure act of confiscation, indistinguishable from punishment. If we can speak of a public service here, it has become so threadbare as to almost entirely consist of the act of extracting tax itself. In Ferguson, schools, sidewalks, and street lights are left in disrepair, while the police and municipal courts—listed as “public safety”—absorb 40 percent of the budget.<sup>138</sup> When Buchanan's recipe for tax regression is pursued to its logical conclusion, the poorest residents—those who cannot buy their way out of public service provision by resorting to private alternatives—are plunged into states of cumulative indebtedness by the mere act of existing in and traversing public space.

Much has been written about the connection between declining public investment in human services and ballooning household debt in recent years. The economists Aldo Barba and Massimo Pivetti have shown

<sup>136</sup> Better Together, *General Administration*, 25.

<sup>137</sup> ArchCity Defenders, *Municipal Courts White Paper*, 30–34.

<sup>138</sup> Aubrey Bryon, “In Much of Ferguson, Walking in the Street Remains the Only Option,” *Strong Towns* (February 20, 2018), <https://www.strongtowns.org/journal/2018/2/19/ferguson-sidewalks-mike-brown-decline>; Tracy Gordon, “Ferguson City Finances: Not the New Normal,” *TaxVox: Individual Taxes* (April 8, 2015), <http://www.taxpolicycenter.org/taxvox/ferguson-city-finances-not-new-normal>

how even middle-income, asset-holding families have been forced to take on debt in order to maintain access to formerly public or government-subsidized services such as education, health, and housing, and how this expanding debt burden has come to replace government deficit spending as a stimulus to demand (so-called “privatized Keynesianism”).<sup>139</sup> But while mortgage, credit card, medical, and student loan debt are the usual suspects here, far less attention has been paid to the peculiar forms of debt that afflict the income- and asset-poor in particular as a result of public service attrition. These burdens remain invisible to the average income earner, for whom the flat-rate pricing of user fees such as motor vehicle registration, public transport, and utilities might appear unremarkable. But in areas such as northern St. Louis County, where roughly a quarter of residents live below the poverty line, the mere act of moving through “public space” or consuming a “public service” has become a minefield by virtue of the fact that it incurs so many fees, each one liable to blossom into cumulative debt via late penalties, interest charges, and court sanctions.<sup>140</sup> The woman who works in a distant mall but can’t afford to register her car or renew her license runs the risk of incurring an arrest warrant if she is pulled over on her way to work. If she avoids court because she can’t afford the fine, she is liable to spend time in jail, where she will incur further fees. The man who is behind on his sewer bills may find himself arraigned before court by the Metropolitan St. Louis Sewer District.<sup>141</sup> The household debt burdens of North County’s African American residents have skyrocketed in recent decades, in large part due to the increasingly regressive nature of municipal tax regimes. These communities continue to bear the brunt of the subprime crisis: almost ten years out from the financial crisis, municipalities such as Ferguson, Black Jack, Spanish Lake, and parts of Florissant were still reporting unusually high rates of mortgage distress and foreclosure.<sup>142</sup> But the African Americans residents of

<sup>139</sup> Barba and Pivetti, “Rising Household Debt,” 113–37. For an analysis of “privatized Keynesianism,” see Crouch, *Strange Non-Death*, 97–124.

<sup>140</sup> For detail on poverty rates in the North County area of St. Louis County, see ArchCity Defenders, *Municipal Courts White Paper*, 35.

<sup>141</sup> It seems that sewer bills are those that most often end up bringing people before the courts. As sewer services can’t easily be cut off, residents who face several overdue bills will typically leave this one till last. Paul Kiel and Annie Waldman, “The Color of Debt: How Collection Suits Squeeze Black Neighborhoods,” *ProPublica* (October 8, 2015), <https://www.propublica.org/article/debt-collection-lawsuits-squeeze-black-neighborhoods>.

<sup>142</sup> Kouichi Shirayanagi, “Mortgage Crisis Still Persists in North St. Louis City, County,” *St. Louis Post-Dispatch* (July 4, 2015), [http://www.stltoday.com/business/local/mortgage-crisis-still-persists-in-north-st-louis-city-county/article\\_ac751ca5-7b3d-5095-ac35-619ab760153f.html](http://www.stltoday.com/business/local/mortgage-crisis-still-persists-in-north-st-louis-city-county/article_ac751ca5-7b3d-5095-ac35-619ab760153f.html).



the North County area of St. Louis are also burdened with astonishing levels of vehicle-related and utilities debt—very specific liabilities that reflect the rising costs of nominally public infrastructure for those who are most dependent on it.<sup>143</sup>

The disproportionate impact of debt on African Americans, even when compared to their low-income white neighbors, can in large part be explained by their historical exclusion from housing wealth. Following the sub-prime crisis, homeownership rates among African American households in St. Louis fell to 40 percent, a drop of almost 10 percentage points; among white residents, they fell to 76 percent, a drop of only 3 percent. Nationwide, the chasm between white and black homeownership is at its widest point since the 1940s.<sup>144</sup> However astronomical their debt and however precarious their income flows, homeowners are asset-holders who can at least rest assured that their debt is collateralized by property, which in the best-case scenario can be leveraged to access more credit and in the worst case can be liquidated as a way of paying off outstanding debt. By contrast, the debt burdens of the asset-poor are collateralized by little more than themselves and whatever portion of their debt burden they can share with friends and family.

How is any of this debt ever redeemed? The jailing of fine defaulters is one very obvious and dramatic way of seizing collateral, and it is no surprise that debtor incarceration has flourished in recent years.<sup>145</sup> But jail time doesn't actually liquidate liabilities—indeed, it very often plunges the fine defaulter into a further spiral of debt through the accumulation of fees for service. Alongside the rise of debt-induced incarceration, then, we have also seen the return of peonage systems that convert debt burdens into forced labor. As collection agencies now increasingly turn to the courts to pursue even the smallest of household debts, court-ordered wage garnishing has risen sharply and often targets those who are already on low and precarious incomes.<sup>146</sup> Most cities have also extended their so-called “community ser-

<sup>143</sup> Kiel and Waldman, “The Color of Debt.”

<sup>144</sup> Uliana Pavlova, “Gap in White and Black Homeownership Grew in St. Louis in Past Decade,” *St. Louis Post-Dispatch* (July 9, 2017), [http://www.stltoday.com/business/local/gap-in-white-and-black-homeownership-grew-in-st-louis/article\\_84bf36d1-d4f8-5c93-a260-df1b7ae841d7.html](http://www.stltoday.com/business/local/gap-in-white-and-black-homeownership-grew-in-st-louis/article_84bf36d1-d4f8-5c93-a260-df1b7ae841d7.html). According to census data, black homeownership rates have been falling across the United States since 2004. See Laura Kusisto, “Black Homeownership Drops to All-Time Low,” *Wall Street Journal* (July 15, 2019).

<sup>145</sup> ACLU, *In for a Penny*.

<sup>146</sup> Kiel and Waldman, “The Color of Debt.” According to this report, the most common plaintiffs seeking to use the courts to recoup debt from consumers are utilities, hospitals, debt buyers, banks, and auto and pay-day lenders—in other words, a mix of public and private organizations.

vice” programs—a euphemism for workfare—to criminal justice debtors, so that someone who has accumulated a debt and been jailed simply for accessing so-called public services can now be mobilized to perform municipal service work for free.<sup>147</sup> Permanent indebtedness to the public fisc becomes redeemable as a fount of unpaid public service labor.

James M. Buchanan was one of the few American neoliberals who acknowledged the necessary relationship between contractual freedom and non-contractual coercion in free-market economics. His theory of constitutional order presumes that political freedom belongs legitimately to those who have already accumulated wealth—the property owners and producers—and that it must be strenuously protected from all threats of confiscation on the part of the rentiers—the nonproductive poor and their bureaucratic allies. This implies that the freedom of wealth-holders can only be upheld if we agree to curtail the power of the state to commandeer the resources of property owners through taxation. Any public service provided by the state must be funded proportionately—that is, regressively—since to do otherwise would be to infringe upon the freedom of wealth-holders. If tax regression means that the asset-poor cannot afford to move in public space or earn a living without incurring a debt to the public purse, then the threat of forced work or jail time must be actively enforced. In Buchanan’s words: “[v]ague thoughts or promises to cut off . . . charity in the absence of work on the part of the recipient parasite will remain empty unless there is demonstrated willingness to carry out such threats.”<sup>148</sup> The tax producers must be protected from the tax consumers, if necessary by denying both their freedom of movement and labor. This, it seems, represents the logical outcome of the tax revolt.

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<sup>147</sup> Herrera et al., *Work, Pay or Go to Jail*. Although focused on Los Angeles, this report also includes a survey of comparable practices across the United States. The authors find that “all 50 states authorize court-ordered community service in at least some criminal cases, and at least thirty-six states use community service as an alternative to court debt in some circumstances, with many states actively considering bills to expand their use” (6).

<sup>148</sup> Buchanan, “The Samaritan’s Dilemma,” 81, 76.

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