JAMES BUCHANAN, GORDON TULLOCK, AND THE “RADICALLY IRRESPONSIBLE”

ONE PERSON, ONE VOTE DECISIONS

BY DANIEL KUEHN*

Abstract

James Buchanan and Gordon Tullock took a keen interest in the United States Supreme Court’s reapportionment decisions of the 1960s, which established a “one person, one vote” standard for state legislative apportionment. This paper traces the long arc of Buchanan and Tullock’s opposition to the “one person, one vote” standard. The Calculus of Consent offers a highly qualified efficiency argument against “one person, one vote,” but over time Buchanan and Tullock grew even more vocally critical of the decisions. Buchanan ultimately advocated a constitutional amendment overturning “one person, one vote” in a private set of recommendations to Congressional Republicans. This paper additionally assesses Tullock’s 1987 complaint that scholars and judges neglected The Calculus of Consent’s analysis of reapportionment. A review of the reapportionment literature between 1962 and 1987 demonstrates that while the book was frequently cited, the literature generally ignored its analysis of the efficiency of apportionment standards.

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James Buchanan, Gordon Tullock, and the “Radically Irresponsible” One Person, One Vote Decisions

Daniel Kuehn¹

I. Introduction

James Buchanan and Gordon Tullock published *The Calculus of Consent* just as the Supreme Court was deciding the question of whether the US Constitution permitted apportionment of state legislatures on a non-population basis. By the 1960s, most state legislatures were “malapportioned” (i.e., not apportioned according to population), either because they refused to redraw legislative district boundaries as population shifted or by constitutional design. In 1962, the Supreme Court decided the historic *Baker v. Carr* case, which affirmed that the state legislative apportionment question was justiciable. In the 1964 *Reynolds v. Sims* decision the Court laid down its “one person, one vote” standard, which set off a wave of state legislative reapportionments. “One person, one vote” has different meanings in different contexts. The phrase is sometimes a synonym for majoritarian democratic principles and fair elections, broadly understood, or as a reference to the franchise. But in the US in the 1960s “one person, one vote” typically referred to the apportionment of state legislatures on a population basis.² Chief Justice Earl Warren consistently identified the “one person, one vote” decisions as the most important decisions of his tenure (Smith, 2014). Howison (2011) argues that the “one person, one vote” decisions were a galvanizing force for American conservatives because, unlike *Brown v. Board of Education*, *Baker v. Carr* and *Reynolds v. Sims* united Southern and non-Southern conservatives alike against the threat of a liberal court.

¹ This paper benefited significantly from comments by Art Carden, Paul Dragos Aligica, Alexander Cartwright, Pedro Duarte, Andrew Farrant, David Glasner, Calvin TerBeek, and three anonymous reviewers.

² In practice these usages intermingled with each other. For example, in a January 18, 1957 letter to the editors of the *Cape Times*, W.H. Hutt justified his weighted franchise scheme for South Africa by writing at length on the public’s acceptance of the malapportionment of the U.S. Senate. The franchise and legislative apportionment are distinct problems of democratic procedure, but Hutt and others considered them in tandem because both determine the weight of a citizen’s vote. See Hutt to the Editors of the *Cape Times*, January 18, 1957, W.H. Hutt Papers, Hoover Institution Archives. I thank Quinn Slobodian for sharing a copy of the letter. See Slobodian (2018) for details on Hutt’s weighted franchise. At the 1963 March on Washington, John Lewis referred to this South African situation when he declared that “‘one man, one vote’ is the African cry. It is ours too.” Lewis’s speech focused on franchise concerns rather than apportionment, but his African inspirations, notably Steven Biko, were additionally concerned with unequal apportionment of power through weighted voting in South Africa and Southern Rhodesia.

This paper traces the arc of Buchanan and Tullock’s views on the reapportionment decisions over the second half of the twentieth century, beginning with their analysis of apportionment in the *Calculus of Consent*. Clarifying Buchanan and Tullock’s views on the “one person, one vote” standard deepens our understanding of the relationship between the history of economics and the progress of political equality, democratic practice, and civil rights in the United States.³ Buchanan and Tullock’s views on apportionment were complicated and sometimes qualified, changing over time and always intersecting with their broader criticisms of the Warren Court. Their direct engagement with the apportionment question begins in 1962 with *The Calculus of Consent*.⁴ The book argues that “numbers diversity” (their term for apportionment on a non-population basis) enhances the efficiency of a bicameral legislature by reducing the external costs of collective action without substantially increasing decision-making costs.

The Calculus of Consent itself only hesitantly defends numbers diversity on “efficiency grounds,” but Buchanan and Tullock were personally more perturbed by the reapportionment decisions. The co-authors’ reactions to the “one person, one vote” decisions were often similar, but also differed in certain respects. Buchanan referred to the decisions more frequently and emphasized the importance of “the federal principle” and the priority of states’ rights (Buchanan, 1969, p. 4) more often than Tullock. However, both men went through the same basic trajectory in their reactions to the subject. Buchanan called the court’s decisions “radically irresponsible” (Buchanan, 1969) and “extremely naïve” (Buchanan, 1968). He even counseled Congressional Republicans to pass a constitutional amendment to overturn *Reynolds v. Sims*. Tullock (1965, p. 16) pointed to “most of the civil rights cases and the reapportionment decisions” as an example

³ These goals reflect the Statement Against Systematic Racism of several officers of the History of Economics Society encouraging publications on these “histories that have so far been ignored” on “racism, colonialism, and other forms of bias” (<https://historyofeconomics.org/diversity-initiatives/>).

⁴ Buchanan actually addresses the malapportionment of the federal Senate earlier than *The Calculus of Consent*, and at some length, in his dissertation. However, the dissertation’s discussion is relatively distinct from the state malapportionment question of the early 1960s. In the dissertation, Buchanan recognizes the fairness case for population-based apportionment made by the populous states but argues that the malapportionment of the Senate “would not seem to amount to much when reduced to economic value terms” as long as “the central government is limited in the exercise of its powers to those areas consisting of the definition and enforcement of broad policy rules” (Buchanan, 1948, p. 262). Although the dissertation does not speak to state malapportionment, it does set a dismissive tone towards the problem. He concludes his digression on the Senate by noting that “[t]he question of the securing of complete political equality is not within the scope of this essay. If its attainment is found to be in conflict with the more important maintenance of political liberty it may well have to be sacrificed to some degree” (ibid, p. 263).

of the Supreme Court “actually changing the Constitution.” Eventually their fervor subsided. Buchanan showed signs of losing hope on overturning the “one person, one vote” decision by the end of the decade in his contribution to the 1969 edited volume, *State and Local Tax Problems*. At the twenty-fifth anniversary conference for *The Calculus of Consent*, Tullock also noted his disappointment with “the subsequent history of *The Calculus of Consent*,” because Duncan Black and Anthony Downs’s contributions to public choice had led to relatively more “research and elaboration.” Tullock specifically lamented that their arguments on apportionment had never been taken seriously.⁵ He said that,

“As the author of the chapter in the book on bicameral legislatures (Chap. 16), I find it notable that it too has had no discernible effect on researchers. In essence, I argued for bicameral legislatures on efficiency grounds and urged that the two houses be elected by radically different methods. Not only has this idea vanished into the memory hole, but the actual trend has been in the opposite direction. The Supreme Court, for example, decided some years after the Constitution had been ratified that although it was all right for the federal government to have a senate that was not elected according to population, it was undemocratic for anyone else to do it. In so doing, they sharply reduced the efficiency of the state legislatures without anybody, except myself, realizing that they had done so. The decision was criticized because it was a pretty cloth-headed thing to do from a constitutional standpoint, but no one mentioned that it would lower efficiency.” (Tullock, 1987, p. 315)

If there was any uncertainty in 1962 about whether Tullock saw *The Calculus of Consent*’s numbers diversity concept as relevant to the reapportionment cases, his anniversary lecture settles the question. After presenting Buchanan and Tullock’s views on the “one person, one vote” standard, this paper reviews twenty-three articles and book reviews discussing both reapportionment and *The Calculus of Consent* to assess how the “number’s diversity argument was received in the literature. The review proves that Tullock is essentially correct that *The Calculus of Consent*’s discussion of apportionment was neglected, although a few authors come close to recognizing the significance of the analysis for the “one person, one vote” decisions.

⁵ Buchanan’s remarks at the anniversary conference do not exhibit the same pessimism.

This literature review is comparable in its goals to Steve Medema’s work on the early reception and comprehension of the Coase theorem in economics (Medema, 2011; 2020), environmental economics (Medema, 2014a), and the law (Medema, 2014b; 2014c; 2019). Like Medema, I probe how and why the reapportionment literature cited *The Calculus of Consent*, and the extent to which the literature understood and applied Buchanan and Tullock’s arguments about diverse bases of representation. In contrast with Ash, Chen, and Naidu (2019) and Cao (2020), who empirically demonstrate the success of the broader Law and Economics movement in influencing the legal profession, I find that Tullock (1987) accurately portrayed *The Calculus of Consent* as neglected by legal scholarship in the “one person, one vote” debate. One reason why Buchanan and Tullock’s arguments faded “into the memory hole” may be that other applications of the book became more pressing as “one person, one vote” was accepted as the law of the land. By the 1970s the states had reapportioned and chapter sixteen’s analysis lost its currency.

The paper concludes with thoughts on whether this neglect of Buchanan and Tullock’s apportionment argument was justified. By applying standards outlined by Buchanan (1974a) in his paper “Good Economics, Bad Law,” I argue that there are significant flaws in Buchanan and Tullock’s analysis of the Supreme Court decisions, and that the neglect of *The Calculus of Consent*’s analysis was justified.

This paper is particularly relevant to recent work situating James Buchanan in the socio-political dynamics of mid-century Tennessee (Marciano, 2018; 2019) and mid-century Virginia (MacLean, 2017; Kuehn, 2018). Tennessee and Virginia were defendants in the 1962 and 1964 reapportionment cases, respectively, and both of their legislatures were reshaped by the Court’s decisions.⁶ Buchanan and Tullock’s analysis of reapportionment can also be thought of as a case of economists’ postwar interest in collective decision-making (Cherrier and Fleury, 2017) and an early application of constitutional economics to practical policy issues, like Buchanan’s application of constitutional economics to education (Fleury and Marciano, 2018). Finally, this paper provides historical context to modern work in public choice on bicameralism and apportionment (e.g. Grofman, Brunell, and Feld, 2012; Lee, 2016; Lee and Park, 2018).

⁶ Baker v. Carr addressed Tennessee’s malapportionment. Virginia was challenged in Davis v. Mann in 1964.

II. The “One Person, One Vote” Decisions

Over the first half of the twentieth century, most states failed to reapportion their legislatures to account for urbanization and migration. Refusal to reapportion was particularly problematic in the upper houses of state legislatures, mirroring the distribution of power in the federal Senate. Some state constitutions even guaranteed a certain number of seats to particular political sub-divisions, regardless of their population.⁷ Seat guarantees only exacerbated malapportionment over time. Prior to 1962, the Supreme Court considered state apportionment a political question rather than a constitutional question. This position was reaffirmed in the 1946 *Colegrove v. Green* decision, with Justice Frankfurter famously warning the court away from “this political thicket” of reapportionment.

The first reapportionment decision of the 1960s was *Baker v. Carr*, which determined that the extreme malapportionment of the Tennessee General Assembly was justiciable. Rather than establish standards of apportionment for Tennessee, the Supreme Court remanded the case to the lower courts. *Baker v. Carr* was a step towards the “one person, one vote” principle because it overturned the *Colegrove v. Green* precedent that apportionment was a political question, but it did not require “one person, one vote.” Compromise in the Tennessee case was a deliberate strategy by Eisenhower and then Kennedy’s Justice Departments (the latter of which filed an amicus brief in the case), and by the justices themselves, who were aware of the delicate divisions on the Supreme Court. Leaping to a “one person, one vote” standard without making some headway in uprooting the “political thicket” might not have succeeded (Smith, 2014).

Baker v. Carr took direct aim at malapportionment in James Buchanan’s home state of Tennessee. Marciano (2019) frames Buchanan’s Tennessee roots by suggesting that he “was born and raised in a State that was renowned for the stability of its institutions,” but many of Buchanan’s contemporaries (including the plaintiffs in *Baker v. Carr*) saw the situation quite differently. Tennessee forestalled institutional change to a large extent by resisting the reapportionment of its legislature for *six decades*, tying it with Alabama (the defendant in *Reynolds v. Sims*) for the second most severe period of democratic neglect of all the states in the

⁷ For examples, see Hanson (1966), p. 11-14.

Union. Only Delaware failed to reapportion for a longer period of time than Tennessee in 1962.⁸ One of the last reapportionments in Tennessee occurred when Buchanan’s grandfather, John P. Buchanan, was governor of the state in the early 1890s. A brief submitted in *Baker v. Carr* even quotes Governor Buchanan’s 1891 speech to the Tennessee General Assembly on the importance of population-based apportionment.⁹

The twentieth century saw scattered unsuccessful efforts at constitutional reform in Tennessee. One of Buchanan’s professors at Middle Tennessee State University, Carlton Sims, served as a delegate to the 1953 Tennessee constitutional convention – the first convention in the state since 1870 (Marciano, 2019). But Sims and the rest of the delegates failed to address the malapportionment of the legislature.¹⁰ Buchanan himself acknowledged since at least his days as a master’s degree student in Knoxville that political power in Tennessee was badly distributed. In his thesis on the distribution of the state’s gasoline tax revenue, Buchanan acknowledges the disproportionate power of the “smaller counties” which were “enjoying the advantage over the larger counties” in state government (Buchanan, 1941, p. 92). The inequitable distribution of gasoline tax revenue that caught Buchanan’s attention as a student ultimately came to play an important role in the *Baker v. Carr* case. Empirical evidence on inequitable gas tax distribution compiled by the Nashville City Planning Commission “made a significant impression on the Court” (Smith, 2014, p. 61) by illustrating the real policy consequences of malapportionment.

Urban Tennesseans were not doomed to complete democratic irrelevance, despite the fact that urban votes were diluted by malapportionment. E.H. Crump’s political machine, which dominated Memphis and then state politics for the first half of the twentieth century, had its power base in Memphis and surrounding Shelby County, despite the extreme underrepresentation of Shelby County in the legislature.¹¹ Crump maintained control by allying with rural politicians who held disproportionate power in the malapportioned General Assembly

⁸ For a tabulation of state legislature reapportionments before the *Baker v. Carr* ruling, see Appendix A of “Apportionment of State Legislatures,” by the Advisory Commission on Intergovernmental Relations (1962).

⁹ Transcript of Record, Supreme Court of the United States, October Term. No. 103. *Baker v. Carr*. Filed May 26, 1960. pp. 135-136. The legislature was fairly reapportioned a few weeks after Governor Buchanan’s speech. See MacLean (2017) for additional details on John. B. Buchanan.

¹⁰ See Prendergast (1953) for details on Sims and the convention. Marciano’s (2019) excellent paper brought Prendergast (1953) to my attention. There is no indication of whether Sims wanted to see the convention take up reapportionment or what his personal views were on the issue.

¹¹ See V.O. Key (1984 [1949]) and G. Wayne Dowdy (2006) for details on Crump’s power base in Memphis.

(Smith, 2014). As a native Tennessean, Buchanan was well aware of Crump, who he considered “the arch villain” (Buchanan, 1992, p. 31) of Tennessee politics. He referred to Crump’s control of the state as the “effective dictatorship of Boss Crump,” presenting it as the polar opposite of an idealized “Wicksellian unanimity or quasi-unanimity” (Buchanan, 1974b, p. 28).

After *Baker v. Carr*, seventy-five lawsuits were initiated challenging malapportionment across all regions of the country, of which six made their way to the Supreme Court (Alabama, Colorado, Delaware, Maryland, New York, and Virginia). Since *Baker v. Carr* established no clear standards for proper apportionment, the lower courts came to conflicting conclusions across these cases, forcing the Supreme Court to act (Hanson, 1966). Decisions were rendered on the six cases on June 15th, 1964, with the Alabama case (*Reynolds v. Sims*) serving as the lead case that established the “one person, one vote” standard. The Court had compromised in *Baker v. Carr* to break the logjam of *Colegrove v. Green*, but by 1964 it was clear that they must establish a “one person, one vote” standard to enforce Fourteenth Amendment guarantees of equal protection. A wave of state constitutional reforms followed *Reynolds v. Sims* to implement the “one person, one vote” standard (Smith, 2014). These constitutional revisions were often accompanied by efforts to professionalize state legislatures, including the adoption of annual legislative sessions, adequate staffing, and higher pay for legislators (Teaford, 2002).

Robert Dixon (1964) called the reapportionment decisions a “non-racial” application of the Fourteenth Amendment because they did not directly remedy racial discrimination or race-based gerrymandering. However, because of the geographic distribution of Black Americans, reapportionment did come with significant benefits for Black voters, particularly in combination with the 1965 Voting Rights Act. Gavin Wright (2013) argues that the chronological proximity and substantive interaction of the reapportionment decisions and the 1965 Voting Rights Act makes it impossible to empirically parse the gains in Black political power attributable to one or the other, particularly in the South. In non-Southern states, where Black Americans were concentrated in urban areas, rebalancing legislatures towards cities gave these voters more power in state government. In the South, franchise restrictions interacted with malapportionment to ensure that state legislatures were dominated by the rural custodians of white supremacy. White politicians wielded voting restrictions and openly racist terror tactics to dominate rural Southern politics, despite the high concentration of Black people in those districts. Mickey (2015) uses the

category of “authoritarian enclaves” from comparative politics to describe these rural bases of non-democratic control of Southern states. V.O. Key (1984 [1949]) famously dubbed it “the rule of the rustics.”

The authoritarian enclave dynamic was a familiar feature of the politics of all of the states that Buchanan and Tullock passed through during their early academic careers. Leveraging malapportionment and the suppression of the Black vote, the Pork Chop Gang of rural northern Florida controlled the state legislature during Buchanan’s time at Florida State University (Adkins, 2016). Using similar strategies, the Barnwell Ring and allied lowcountry politicians in South Carolina controlled the state legislature while Tullock was at the University of South Carolina (Simon 2000; Heath, 2017). One of the best-known cases of this phenomenon, the Byrd Organization of Virginia, with its power base in the Southside region of the state, was still in full control of the state when James Buchanan and Warren Nutter established the Thomas Jefferson Center at the University of Virginia in the late 1950s (MacLean, 2017; Kuehn, 2018). Many of the votes on Massive Resistance to school desegregation in the 1950s would not have passed the Virginia General Assembly if seats were apportioned on a population basis (Lassiter, 1998).

None of these broader historical forces should be automatically attributed to Buchanan or Tullock. Buchanan was a vocal critic of Boss Crump’s political machine in Tennessee, after all, though he was on good terms with members of the Byrd Organization in Virginia.¹² Even at the highest levels of opposition to “one person, one vote,” views on apportionment did not always align with views on civil rights. Everett Dirksen, the relentless foe of reapportionment in the Senate, was also a leader in the passage of the 1964 Civil Rights Act and 1965 Voting Rights Act. Nevertheless, the historical context demonstrates the stakes of “one person, one vote,” and the importance of malapportionment for the maintenance of white supremacy.

III. The Long Arc of Buchanan and Tullock’s Views on “One Person, One Vote”

As Tullock reminded his audience at the anniversary conference, *The Calculus of Consent* spoke to the apportionment question in the chapter analyzing bicameral legislatures. Bicameralism complicated the analytical framework built up over the prior fifteen chapters of the book. Given a voting rule and assuming equally sized districts, a minimum winning legislative

¹² There is no evidence that Buchanan ever had any interaction with the Pork Chop Gang during his time in Florida.

coalition could be easily calculated for a unicameral legislature. But in a bicameral legislature “[t]he precise result will depend in each case on the overlapping of the interest-group coalitions in each house” (Buchanan and Tullock, 1999 [1962], p. 233). Perfect overlap of interests between the two houses would reproduce the same minimum winning coalition as a unicameral legislature. Increasingly dissimilar bases of representation in a bicameral legislature raised the coalition threshold, reducing external costs. Bicameralism provided an opportunity for increasing the efficiency of the legislature that was not available in the unicameral case. Buchanan and Tullock (1999 [1962]) observe,

“...if the basis of representation can be made significantly different in the two houses, the institution of the bicameral legislature may prove to be an effective means of securing a substantial reduction in the expected external costs of collective action without incurring as much added decision-making costs.”
(Buchanan and Tullock, 1999 [1962], p. 233)

They go on to review varying types of dissimilar bases of representation between the upper and lower houses. The analysis of an upper house not apportioned by population—the question at the heart of the reapportionment cases—is addressed at the end of the chapter. Before arriving at malapportioned representation, Buchanan and Tullock discuss what they call “arrangement diversity,” or cases of divergent representation where a group of voters sharing a representative in the lower house of the legislature is distributed across many different representatives in the upper house.¹³ Arrangement diversity increases the difficulty of forging a winning coalition, moving the legislature closer to a unanimity rule. Notably, arrangement diversity sidesteps the problem of malapportionment, since each representative in a given house still represents the same number of voters as any other representative in that house.

After considerable analysis of arrangement diversity, Buchanan and Tullock present the alternative option of “numbers diversity,” or what was more commonly known as malapportionment. Numbers diversity is “fairly common in its pure form in the real world” and differs from arrangement diversity in that diverse bases of representation are achieved when some “voters are much more heavily represented than others” (Buchanan and Tullock, 1999

¹³ “The word diversity” in “arrangement diversity” is a reference to the diverse bases of representation.

[1962], p. 244). Anticipating the obvious objection that malapportionment discriminates against voters in more populous districts, they freely concede,

“Those who are in small constituencies have an advantage over those who are in larger ones. Nevertheless, the device does, to some extent, improve the operating characteristics of a system of representative government.” (Buchanan and Tullock, 1999 [1962], p. 246)

This point is made even more directly when Buchanan and Tullock compare numbers diversity to their preferred solution of arrangement diversity. They warn,

“Two chambers differing from each other only in this way [numbers diversity] offer much less of a safeguard against the imposition of excessive ‘external costs’ on the citizen than organization in accordance with what we have called ‘arrangement’ diversity. Further, if the number of constituents varies from ‘senator’ to ‘senator,’ it may introduce an element of discrimination among the voters.” (Buchanan and Tullock, 1999 [1962], p. 246)

Thus, while *The Calculus of Consent*’s efficiency argument in favor of malapportionment is clearly articulated, it is not enthusiastically promoted in the book. Buchanan and Tullock also point out that discrimination is not “intrinsic” to numbers diversity because “it is easy to conceive of a system under which area A elects 5 representatives to the ‘House’ and 1 to the ‘Senate’ while area B elects 1 representative to the ‘House’ and 5 to the ‘Senate’” (Buchanan and Tullock, 1999 [1962], p. 244). In this hypothetical case, the malapportionment of the House would be perfectly equipoised against the malapportionment of the Senate to ensure there is no net discrimination against any voter.¹⁴

While the book as a whole was received with interest (if not always with agreement) by social scientists (Medema, 2009), its technical arguments about the efficiency of malapportionment were generally ignored. During the period that the reapportionment cases were decided and the chapter sixteen was most directly relevant, Charles Hagan (1962), Sidney Ulmer (1963), and Wallace Rudolph (1964) clearly appreciated the significance of the book for

¹⁴ This solution of course abstracts from any special privileges of the House (e.g., originating revenue bills) or the Senate (e.g., approving presidential appointments).

the reapportionment question, but did not engage with its efficiency case for malapportionment. Instead, they highlighted the importance of diverse bases of representation more generically. Subsequent citations to *The Calculus of Consent* in the reapportionment literature were even less focused on the book’s malapportionment arguments.

Buchanan and Tullock returned to the question of reapportionment after the publication of *The Calculus of Consent* and expressed more direct interest in the Supreme Court decisions. Quite in contrast with the book’s tepid defense of malapportionment, both authors later wrote about the reapportionment cases in scathing terms. Tullock drafted chapter sixteen, so we might suspect that he would be more invested in the reapportionment decisions than Buchanan. However, Buchanan quickly engaged the issue independent of Tullock by writing a letter to no less than a respected former governor of Virginia. In the weeks following *Reynolds v. Sims*, Buchanan wrote to former Virginia governor (1942 – 1946) Colgate Darden. He had been close to Darden since his time as president of the University of Virginia (1947 – 1959).¹⁵ Darden had recently delivered a speech at the university that piqued Buchanan’s interest because of how forcefully it addressed what Darden characterized as deteriorating federal-state relations. Buchanan was unable to attend the speech, but enthusiastically wrote to Darden that,

“The newspaper reports of your address indicated that I had missed an opportunity to hear you say some things that desperately need saying. The dangers that you spoke about seem especially to have become more urgent since the reapportionment decision” (Buchanan to Darden, 24 June, 1964).¹⁶

Buchanan notes in his letter that he was only familiar with newspaper accounts of Darden’s speech. This is significant since the local daily, the *Charlottesville Daily Progress*, neglected to mention in its reporting that Darden’s speech was more positively disposed towards

¹⁵ As University president, Darden heard Buchanan’s 1956 pitch for the new Thomas Jefferson Center and his embrace of the enterprise was “immediate and favorable” (Buchanan, 2006, p. 37). The pitch documents for the center appear in Darden’s files and Darden served on the Center’s advisory committee (see MacLean (2017) for additional details). Although Darden challenged the state’s extremist response to school desegregation, he was still a member in good standing of Virginia Senator Harry Byrd’s powerful political machine. See Smith (2002) and Friddell (1978) for details on Darden’s membership in the Byrd Organization and his occasional clashes with the organization.

¹⁶James M. Buchanan Papers, Folder Correspondence “D” (2 of 2), 1956-1968.

reapportionment than Buchanan realized. Although not quoted in *Daily Progress* reporting, Darden declared in his speech to the assembled students that,

“We are no longer an agrarian society even though not infrequently the political influence of a small rural population outweighs substantially the influence of a much larger number of urban dwellers owing to improper apportionment. One of the products of this – a situation almost inevitable in a changing society – is that the States are encountering no little difficulty in responding to the legitimate demands of their citizens.”¹⁷

This was not exactly a rousing reformist call to arms, but Darden did criticize Virginia’s apportionment as “improper” because it did not align legislative power with the distribution of the population. Instead of reporting on this passage of the speech, the *Daily Progress* focused on Darden’s more emphatic and long-winded warnings about the waning power of state governments relative to the federal government. Not surprisingly, Buchanan incorrectly inferred from newspaper accounts (and his own history with the man) that Darden was an ally in the fight against the “one person, one vote” decisions.

A year later, Buchanan returned to the reapportionment decisions in a detailed four-page letter to Congressman Charles Goodell (R – NY). The letter was solicited by Goodell and enumerated Buchanan’s recommendations to Congressional Republicans for the 1966 session, including recommendations on exchange rate, tax, and transportation policy. Buchanan concludes his letter with a suggestion on reapportionment, writing that he would “strongly suggest that the Republican leadership continue to support some constitutional amendment aimed at allowing states to select one house on a non-population basis.”¹⁸ By advocating that Congressional Republicans “continue to support” such an amendment, Buchanan was clearly referencing the ongoing battle in Congress over Everett Dirksen’s (R – IL) constitutional

¹⁷ For Darden’s speech, see pp. 14757-14759 of the Congressional Record – Senate, June 23rd, 1964. NB: in Darden’s reply, also available in the Buchanan Papers, he directs Buchanan to the Congressional Record for a transcript of his speech and provides the correct date, but an inaccurate page number. For *Daily Progress* reporting on the speech, see Donich (1964).

¹⁸ Buchanan to Goodell, June 30, 1965, James M. Buchanan Papers, Folder Correspondence “G”, 1955-1967. Note that Buchanan did not insist that the lower house of the legislature be apportioned to be perfectly equiposed with the upper house to avoid discrimination, as proposed in Buchanan and Tullock (1999 [1962], p. 244). When providing policy advice to Congressional Republicans, Buchanan proposed a discriminatory version of “numbers diversity.”

amendment to allow states to apportion one house of their legislature on a non-population basis. The amendment Dirksen was promoting in the summer of 1965 was his second of three attempts to overturn the “one person, one vote” decision. The fight over Dirksen’s amendments was intense, drawing in business interests, unions, and civil rights and social organizations. The amendment being considered in June, when Buchanan wrote to Goodell, was defeated in August. Although Dirksen persuaded a majority of Senators, he still fell short of the two-thirds majority required for amendments (Smith, 2014).

The same year that Buchanan was pressing Congressional Republicans to amend the Constitution to overturn the “one person, one vote” decisions, Gordon Tullock was criticizing the decisions in the *New Individualist Review*, a publication featuring libertarian and conservative thinkers with a short but influential publication run. Tullock’s subject was “constitutional mythologies,” specifically the danger of the almost universally accepted “myth” of *Marbury v. Madison* that the Supreme Court is the final arbiter of the Constitution. For most of American history, Tullock argues, this myth was not abused by the Court, which generally accepted its status as a coequal branch. While Tullock never names Earl Warren as a culprit, he complains about “the recent outburst of judicial activism, which contrasts so strongly with the restraint characterizing previous courts” (Tullock, 1965 p. 16). The outcomes of “most of the civil rights cases and the reapportionment decisions” (p. 16) were among the few cases explicitly highlighted for criticism by Tullock.¹⁹ Tullock alleges that the Supreme Court “now acts as though it were a sort of superior legislature, not only imposing new laws, but also actually changing the Constitution by its decisions” (p. 16). It is always difficult to analyze individual authors on the basis of their joint work, but Tullock’s article in the *New Individualist Review* and Buchanan’s letters demonstrate that in the year after *Reynolds v. Sims* both men became increasingly critical of reapportionment. Neither man was as moderate in their opinions on the decisions themselves as they were in the more academic pages of *The Calculus of Consent*.

Buchanan revisited the “one person, one vote” decisions in his 1968 article “Student Revolts, Academic Liberalism, and Constitutional Attitudes.” Working in a similar vein as Tullock’s “Constitutional Mythology” article, Buchanan comments on what he considers to be a weakening of a range of constitutional norms during the 1960s. This erosion of norms was

¹⁹ Contrast with Everett Dirksen who opposed the reapportionment decisions but supported civil rights legislation.

exemplified by the reapportionment decisions. Rather than focusing on the increased efficiency of diverse bases of representation, as he had in *The Calculus of Consent*, Buchanan (1968) accuses the Warren Court of “an extremely naïve interpretation of the one-man-one-vote principle of democratic process” (Buchanan, 1968, p. 677). He specifically notes the Court’s “extremely naïve” views on “the short-term citizenship of the Arlington bureaucrat who temporarily resides in Virginia” (p. 677), cavalierly dismissing the claims to equal representation by the plaintiffs. Arlington County was a northern Virginia suburb of Washington DC and home to two of the four plaintiffs in the 1964 *Davis v. Mann* reapportionment case.²⁰ Northern Virginians were considerably more liberal than the rest of the commonwealth, and they were underrepresented in the General Assembly. Underrepresentation caused constant friction between Northern Virginia and the conservative governing Byrd Organization over everything from school desegregation to transportation spending and taxes (Wilkinson, 1968). Buchanan’s “Arlington bureaucrat who temporarily resides in Virginia” references the fact that many federal employees lived in Arlington and other Washington suburbs, and often migrated to Northern Virginia from outside the region.

Buchanan misleadingly alleges that “the Court held that Virginia’s argument based on the short-term residence of the bureaucrat was wholly inappropriate in allocating legislative seats” (Buchanan, 1968, p. 677). The state’s oral arguments in the *Davis v. Mann* case identified several categories it considered reasonable to exclude from apportionment calculations, including non-Virginians in the military stationed in Virginia, the institutionalized population, and “aliens.” However, the state *did not* argue that federal employees were an excludable population in apportionment planning. Federal employees were almost exclusively permanent Virginia residents, not residents of other states who maintained a temporary residence in Virginia. Contrary to Buchanan’s portrayal of the aggrieved Arlingtonians as footloose federal bureaucrats, all four named plaintiffs in the *Davis v. Mann* case lived out the rest of their lives, died, and were buried in Northern Virginia. Ironically, before Buchanan’s article was even published, he had left Virginia for sunny California. Although Buchanan’s account of the state of

²⁰ The Arlington plaintiffs were Kathryn Stone and C. Harrison Mann, who represented Arlington in the General Assembly. Their lawyer, Edmund Campbell, was also from Arlington and had been involved in earlier Virginia desegregation cases. Mann had actually corresponded with Buchanan a few years earlier to share his enthusiasm for Buchanan and Warren Nutter’s plan for private school vouchers in the early years of Virginia school desegregation. See Kuehn (2018) for details of the correspondence.

Virginia’s arguments before the court are misleading, it is not surprising that he focuses on the difficulties posed by interstate mobility and “short-term citizenship” for apportionment plans. These problems preoccupied Buchanan in much of his early work on public finance under federalism.²¹

By 1969, Buchanan began to give up hope that the reapportionment decisions could be overturned. In his introduction to the edited volume *State and Local Tax Problems*,²² he laments that “the pragmatists are more numerous than ever before. The episodic 1964 attempt of Senator Goldwater to force a national discussion on principles was swamped in irrelevancy.” Buchanan continues that “the few faint signs of an awakened public awareness of the federal principle that the radically irresponsible reapportionment decisions aroused have long since faded into nothingness.” Unconvinced by the “federal principle,” the ever more numerous pragmatist “has not been impressed by modern-day Calhouns” (Buchanan, 1969, p. 4).²³ To some of Buchanan’s readers, the complaint about reapportionment seemed shoehorned into a volume on public finance. Marian Krzyzaniak’s (1970) review of the book skeptically notes that “Buchanan manages to tell that he is against ‘the radically irresponsible reapportionment decisions,’ as if government by delegates of ‘rotten boroughs [sic]’ was a better way to enhance the welfare of the governed” (p. 476). Even if we bracket off his dramatic language about “radically irresponsible reapportionment decisions” and “modern-day Calhouns,” the introduction to *State and Local Tax Problems* situates Buchanan’s concerns in a much richer context than *The Calculus of Consent*’s efficiency arguments alone. “One person, one vote” had broader implications for federalism and federal intrusions on state political matters, echoing his letter to

²¹ See Buchanan (1965) and Buchanan and Wagner (1970) for some of the most prominent examples. Boettke and Marciano (2017) have an excellent discussion of this strain of Buchanan’s work on federalism and its relation to Tiebout competition. Boettke and Marciano (2017) are more skeptical than most scholars about the commensurability of Buchanan and Tiebout.

²² *State and Local Tax Problems* was published as a festschrift for Charles White, one of the early Tennessee-based influences on Buchanan discussed by Marciano (2019).

²³ Similarities between Calhoun’s social scientific thought and modern public choice theory have been emphasized by Downs (1957), Tullock (1975), Aranson (1991), Cowen and Tabarrok (1992), Kreider (2012), Salter (2015), MacLean (2017), and Jankovic (2018). Ordeshook (1992) more specifically draws parallels between the work of Calhoun and the public choice theorist William Riker. None of these authors suggest that Buchanan derived his views directly from Calhoun. Tullock (1975, p. 1295) and MacLean (2017, pp. 42–43) elaborate on Buchanan’s well-known Wicksellian roots. But Buchanan may only be one step removed from Calhoun. Kreider’s (2012) underappreciated research shows that Wicksell read Calhoun and was influenced by him at least indirectly through John Stuart Mill and Thomas Hare. Buchanan himself includes Calhoun’s *A Disquisition on Government* in the reference list of his 1948 dissertation, suggesting he read or was at least familiar with Calhoun at Chicago. However, there is no citation to Calhoun in the text of Buchanan’s dissertation, possibly indicating that a citation had been in an earlier draft but was removed.

Darden. These concerns were common among opponents of the decision. In the pro-states’ rights Virginia Commission on Constitutional Government’s (VCCG) pamphlet on *Baker v. Carr*, the VCCG worried that “[i]f today the Justices pronounce the States incompetent to deal with this problem, tomorrow they may pronounce the States incompetent to deal with State taxes, schools, highways, and courts of law.”

Buchanan offered a new argument against the reapportionment cases a decade after *Reynolds v. Sims* in his 1974 chapter, “Who Should Distribute What in a Federal System.” A key point of the chapter was that local and even state governments were constrained by the federal system because of the competitive pressures of migration, ensuring that “the distributional set of outcomes attainable within any single local unit is narrowly bounded” (Buchanan, 1974b, p. 28). If state policy was tightly constrained by the competitive pressures of migration, Buchanan argued that there was little cause for worrying about the distribution of voting power. Buchanan (1974b, p. 28) once again mentions E.H. Crump’s “effective dictatorship” in Tennessee in the context of making this point about redistributive policy and voting rules, noting that “these rules may range all the way from Wicksellian unanimity... to the effective dictatorship of Boss Crump,” but that in either case “these results do not depend in any way on the collective decision-making rules in local governments.” This “basic difference between the importance of decision rules at the central-government and local-government levels seems to have been wholly ignored in the Supreme Court reapportionment decisions, which were apparently based on bad economics as well as naïve political science” (Buchanan, 1974b, p. 41).

Over time, Buchanan and Tullock’s interest in reapportionment waned. After the states conformed to the “one person, one vote” standard, reapportionment faded from the headlines and the analysis of apportionment in chapter sixteen of *The Calculus of Consent* became less relevant to current problems than other parts of the book. By 1992, Tullock even seems to have reverted back to the indecisiveness of *The Calculus of Consent* on the advisability of malapportionment. In an obscure paper outlining a computerized scheme for direct voting on legislation, Tullock (1992, p. 62) referred to the malapportionment of the Senate, and noted that “[i]t is not obvious of course that this radically unequal weighting for voting power is desirable, but then again it is not obvious it isn’t, either (see [Buchanan and Tullock, 1962]).” Thus within three decades of *The Calculus of Consent*, Tullock came full circle on “one person, one vote,” from ambivalence

and scholarly efficiency arguments to indignant complaints about judicial usurpation of power, and back again to ambivalence.

IV. “Vanished Into The Memory Hole”? *The Calculus of Consent* in the Reapportionment Literature

In 1987, Gordon Tullock complained that *The Calculus of Consent*’s analysis of bicameral apportionment “vanished into the memory hole... without anybody, except myself” (Tullock, 1987, p. 315) realizing the efficiency reduction that was caused by the reapportionment decisions. This section assesses Tullock’s claim by reviewing the legal, economic, and political science literature between 1962 and 1987 that both cited *The Calculus of Consent* and discussed reapportionment. Literature that discussed Buchanan and Tullock’s analysis of the broader issue of bicameralism but which made no reference to the malapportionment problem is excluded from the review. The review presented here is probably not a complete census, but it is thorough. My personal impression is that it comes close to a complete census. The section is ordered thematically rather than chronologically.

Many scholars writing about reapportionment between 1962 and 1987 cited Buchanan and Tullock. Most of these references were brief and perfunctory, but some were more substantive. The books, papers, and book reviews published between 1962 and 1987 referencing both reapportionment and *The Calculus of Consent* evaluate many of Buchanan and Tullock’s contributions, including their application of methodological individualism to politics, logrolling, and qualified majority rule. Generally speaking, Tullock was correct that the book’s specific analysis of numbers diversity and apportionment was ignored in the reapportionment conversation, although a few authors came close to drawing the full connection between chapter sixteen and the Supreme Court decisions.

The modal reference to *The Calculus of Consent* in the reapportionment literature was simply a citation to the book as an important recent contribution to the analysis of constitutions that was innovative for its application of economics to politics. Examples of this type of generic reference include Hagan (1962), Freund (1964), Wagner (1966), Dixon (1968a, 1968b), Goldstein (1971), Michelman (1977), Shelley (1982), Durschlag (1982), and Denzau (1985). This genre of citation reflects a broader pattern in reviews of *The Calculus of Consent* that is

noted by Steve Medema (2009). Medema points out that in early reviews of the book, “the debate centered on the usefulness of economic/mathematical deductive method versus the more inductive approach of political science, and the extent to which the *homo economicus* assumption held promise for the analysis of the behavior of political agents” (Medema, 2009, p. 135).

Some of these generic references are more detailed and better informed about Buchanan and Tullock’s ideas than others. For example, Robert Dixon (1968a, 1968b) goes farther than most in defining methodological individualism and identifying the application of methodological individualism to politics as an important innovation. Another detailed discussion is provided by Frank Michelman (1977), who reviews *The Calculus of Consent* at length in his discussion of what he calls the “two models of legitimacy,” public choice and public interest. Michelman then raises the example of malapportionment, noting that

“[t]he precept of apportionment of district representatives by population – of “one person, one vote” within the framework of a geographically districted representation scheme (e.g. *Reynolds v. Sims*, 377 U.S. 533 (1963)) – seems easier to reconcile with the “public interest” view of the purpose of elections (choosing the best-qualified officials) than with the “public choice” view (making particular interests influential in proportion to their “weights” in the population)” (Michelman, 1977, p. 149).

Despite intuiting a tension between public choice theory and “one person, one vote,” Michelman (1977) fails to ground this intuition in Buchanan and Tullock’s chapter on bicameral legislatures or the efficiency properties of malapportionment.

Outside of the scholarly literature, *The Calculus of Consent* was acknowledged in a similar generic way by the states’ rights oriented VCCG in the reference material for its 1965 pamphlet, *One Man, One Vote*. James Jackson Kilpatrick, in his capacity as the Chairman of Publications for the VCCG, recommended the reference list “for the reader who wishes to pursue further the complex problems that the federal judiciary has created” (Kilpatrick, 1965, p. 6). Like Buchanan and Tullock, the VCCG opposed the reapportionment decisions, although Kilpatrick also recommended readings from both sides of the debate in his reference list. VCCG opposition to “one person, one vote” was not without controversy or consequence. Members of the VCCG

considered its opposition to reapportionment to be an important factor in the galvanization of opposition to the commission that finally lead to its abolition (Sweeney, 2013).

Other authors writing about reapportionment and citing *The Calculus of Consent* highlighted the book’s analysis of logrolling. Cantrall and Nagel (1973) cite logrolling to argue that reapportionment is not legislative destiny. Because intense minorities can still pass laws by logrolling, it can only be proven “that the better represented a group is, the more likely it is that legislation will be passed that is to its liking” (Cantrall and Nagel, 1973, p. 271). The institutionally authored *Harvard Law Review* note on the reapportionment decisions also cites *The Calculus of Consent* on logrolling and voter intensity, but does not discuss the book’s contributions on bicameralism or malapportionment (Reapportionment, 1966). In addition to his previously noted discussion of methodological individualism, Dixon (1968a) elaborates on Buchanan and Tullock’s analysis of voter intensity, which is closely related to the phenomenon of logrolling and also important to the chapter on bicameralism. But despite publishing prolifically in the 1960s on the “one person, one vote” issue, Dixon never mentions the *Calculus of Consent* chapter on bicameralism and appears to be unaware of its discussion of apportionment issues.

In one of the early reactions to the *Baker v. Carr* decision, Jerold Israel (1962) considered four possible approaches to establishing a standard for reapportionment. Israel’s article attracted considerable interest because it was published after the Supreme Court found that the reapportionment question was justiciable, but before the lower courts had a standard for judging the facts of other cases that carried the imprimatur of the Court. Royce Hanson (1966, p. 54) called this liminal period “jurisdiction without standards.” As he searched for a way out of jurisdiction without standards, Jerold Israel (1962) cited the recently published *Calculus of Consent* in a brief reference to its discussion of interest groups as a possible non-population based standard aligned against “one person, one vote.” However, he mentioned neither the book’s discussion of malapportionment itself nor its chapter on bicameralism.

Scholars looking at the reapportionment problem were also naturally interested in Buchanan and Tullock’s views on the principle of qualified majority rule and simple majoritarianism’s “insufficiency as an exclusive guide to fair representation” (Dixon, 1964, p. 230). Qualified majority rule was invoked by Dixon (1964) and Auerbach (1964) in their

discussions of reapportionment, with Auerbach commenting at length on *The Calculus of Consent*'s analysis of the problem.²⁴ Hochman and Rodgers (1977) and Durschlag (1982) both cite the book to inform their discussion of voting and income redistribution, but Hochman and Rodgers (1977) also discuss the analysis of minimum winning coalitions. They even note that the number of voters required to form a winning coalition will increase in a bicameral legislature, although they do not directly cite this point to Buchanan and Tullock's bicameralism chapter. Harold Hochman was a colleague of Buchanan and Tullock's at the University of Virginia in the 1960s and later edited the volume on redistribution where Buchanan (1974b) mentions the Crump “dictatorship” in Tennessee and the reapportionment decisions.

Shank (1969) consults *The Calculus of Consent* to understand the formation of coalitions in the New Jersey legislature's reapportionment deliberations, but finds little practical guidance for his task. Rae's (1971) analysis of the significance of the reapportionment decisions for democratic principles cites Buchanan and Tullock (1962) and Auerbach's (1964) discussion of the minimum winning coalition size and its dependence on the number of districts in a legislature. Following a by now familiar pattern, though, both Shank and Rae fail to cite the apportionment analysis in chapter sixteen. In the same year that Tullock made his anniversary remarks, Peter Schuck published an important article tracing the legal lineage of partisan gerrymandering (a problem that continues to be taken up by the courts to this day) back to the malapportionment problems of the mid-twentieth century. Schuck's (1987) article cites Buchanan and Tullock in several different capacities, but never mentions their analysis of legislative apportionment.

Even more notable than the muted reception of *The Calculus of Consent*'s reapportionment analysis by the predominantly legal and political science literature is the neglect of the book in work on reapportionment by scholars with closer ties to public choice theory. The literature on the related issue of weighted voting,²⁵ associated with Riker, Ordeshook, and Shapely, follows the same pattern as the literature discussed above: occasional citations to *The*

²⁴ Auerbach (1964) appears to have become familiar with Buchanan and Tullock through Freund's (1964) paper (Auerbach, 1964, n. 212), which only discusses the book in very general terms, as noted above.

²⁵ Under weighted voting arrangements, legislatures would not be reapportioned but individual legislators' votes would be weighted based on the population size of their districts. The practice of weighted voting is closely associated with municipal governments in New York state.

Calculus of Consent but no discussion of its analysis of the efficiency of malapportionment (Shapely and Grofman, 1984). Banzhaf’s (1966, 1967, 1968) multiple papers criticizing weighted voting solutions to the reapportionment mandate never cite Buchanan and Tullock. That these public choice and public choice-adjacent theorists themselves did not make the connection between chapter sixteen and reapportionment shows there were clearly barriers to appreciating the book’s “numbers diversity” discussion. The bicameral legislature chapter is buried near the end of the book and the analysis most relevant to reapportionment is buried at the end of that chapter. Since *The Calculus of Consent* was written before the reapportionment decisions, it did not use the terminology or references preferred in the literature after the decisions. All of these factors left readers without guideposts for connecting the book to the reapportionment debate.

If the book itself provided few guideposts for connecting chapter sixteen to the reapportionment debates, Buchanan and Tullock provided no guidance either in their public and private engagement with the “one person, one vote” decisions. None of the articles, book chapters, or letters by Buchanan or Tullock mentioning reapportionment between 1962 and 1987 ever referred to the diverse bases of representation analysis in *The Calculus of Consent*. The coauthors of *The Calculus* were not silent on reapportionment in these years; they publicly and passionately opposed the “one person, one vote” decisions. But they did not publish in the same outlets as most legal scholars and they did not direct their readers back to their chapter on bicameral legislatures. Instead, their opposition to “one person, one vote” was grounded in the federal principle (Buchanan to Darden, 24 June, 1964;²⁶ Buchanan, 1969), constitutional interpretation (Tullock, 1965; Buchanan, 1968), or a vague appeal to the Supreme Court’s “bad economics as well as naïve political science” (Buchanan, 1974b, p. 41). If *The Calculus*’s analysis of apportionment vanished into the memory hole, Buchanan and Tullock themselves may be partly to blame.

Although most of the literature referencing both reapportionment and *The Calculus of Consent* appear unaware of the book’s discussion of apportionment and bicameralism, a few authors came closer. Four papers in particular draw a direct connection between chapter sixteen of *The Calculus of Consent* and the reapportionment cases: Charles Hagan’s (1962) article on

²⁶James M. Buchanan Papers, Folder Correspondence “D” (2 of 2), 1956-1968.

bicameralism in state legislatures, Sidney Ulmer’s (1963) book review, Wallace Rudolph’s (1964) article on reapportionment, and Edwin Haefle’s (1971) utility theory of representative government. Of all of the literature that both discusses reapportionment and cites *The Calculus of Consent*, Sidney Ulmer’s brief book review is the most attentive to the chapter on bicameralism. He notes that the bicameralism chapter “may be of some interest to those presently pondering the problems of representation associated with the many legislative reapportionment cases” (Ulmer, 1963, p. 175). However, Ulmer only discusses the “diverse bases of representation” in general terms and fails to discuss the book’s account of numbers diversity. Rudolph (1964) and Haefle (1971) both quote Buchanan and Tullock at length on diverse bases of representation in a bicameral legislature, but also fail to mention the more directly relevant discussion of numbers diversity. Hagan (1962) mentions Buchanan and Tullock as defenders of bicameralism but provides even less detail than Haefle (1971), Ulmer (1963), or Rudolph (1964) on their arguments and – once again – no discussion at all of their analysis of numbers diversity.

Ulmer, Rudolph, Haefle, and Hagan were all closer to recognizing the significance of *The Calculus of Consent* for the reapportionment debate than the rest of the literature. Three of these authors (Ulmer, Rudolph, and Hagan) wrote in the early 1960s, when Buchanan and Tullock’s analysis of malapportionment was the most relevant to current events. These citations suggest that Tullock may have been too pessimistic when he declared that his analysis with James Buchanan went “into the memory hole.” Nevertheless, even these papers miss the central argument about numbers diversity, and they certainly failed to make a dent in the legal scholarship on the subject.

V. Was the Neglect of *The Calculus of Consent* Justified?

Buchanan and Tullock were emphatically opposed to the “one person, one vote” decisions, despite a relatively weak initial endorsement of malapportionment in *The Calculus of Consent*. A review of the contemporary literature on reapportionment demonstrates that Tullock (1987) more or less correctly characterized the academic disinterest in the book’s arguments about the “efficiency grounds” for malapportionment. This all raises a question: were Buchanan and Tullock’s views on malapportionment justifiably ignored by social scientists and legal scholars, or were their ideas deserving of more serious consideration? Was the neglect of *The Calculus of Consent* justified?

In “Good Economics, Bad Law,” Buchanan (1974a) provides a framework for thinking about when and how economic analysis should be applied in law. The article was Buchanan’s review of Richard Posner’s (1973) *Economic Analysis of Law*. While broadly sympathetic to the Law and Economics movement and to Posner himself, the thrust of Buchanan’s (1974a) review was that Posner went astray by ignoring the distinction between law and policy, and the importance of that distinction for sound application of efficiency arguments in law. Buchanan asks whether the judge should, “informed by economic principle, effectively change the basic law so as to promote efficiency?” He answers that “[i]t seems self-evident to me that the judge should not change the basic law because, in such behavior, he would be explicitly abandoning his role of jurist for that of legislator” (Buchanan, 1974a, p. 490).

Buchanan (1974a) acknowledges the value of Posner’s broader project of ensuring that “[g]ood economics, Chicago-style” (p. 484) is part of lawyers’ “professional equipment” (p. 483). Posner’s economics is “better than no economics or the bad economics picked up all too readily from the charlatans and the journalists” (p. 484). Buchanan’s criticism is that if “broader *philosophical* criteria are introduced, the law, itself, must be evaluated” (p. 484). These philosophical criteria include questions of justice, human rights, and constitutional institutions. In normal circumstances where no fundamental principles are at stake, the economists’ “pragmatic criteria are, of course, controlling” (p. 484). But when more fundamental principles are being decided, Posner’s “insistence on the relatively unlimited applicability of the maximum value or efficiency criterion” (p. 485) leads him badly astray.²⁷ Policy could be guided by Posner’s pragmatism to great effect, but pragmatism offered no proper guidance to questions about more fundamental principles.²⁸ The law, Buchanan argues, should only “adjudicate the conflicting claims made within this set of rights and rules” (p. 491), rather than apply an external efficiency norm. This is not merely Buchanan complaining about some “judicial activism” bugaboo. It is a recognition that broader principles than efficiency might be enshrined in the

²⁷ These distinctions are especially consonant with Buchanan’s two-stage constitutional economics, but they are not foreign to the legal community. Buchanan’s (1974a) criticism of Posner’s (1973) approach to efficiency and the law closely resembles Dworkin’s (1967) distinction between “principle” and “policy.” Buchanan (1974a) traces the distinction to Bruno Leoni rather than Dworkin. Dworkin (1967) argues that judges reconcile a decision in the best possible way with the totality of the relevant principles and precedents within the case law and the public policy goals announced by democratically elected legislatures.

²⁸ Posner’s philosophical pragmatism might even be said to deny fundamental principles, although here the distinction between colloquial and philosophical pragmatism is less important.

constitution, and that order and efficiency “emerges only from the process of voluntary exchange among the participating individuals” (Buchanan, 1982), rather than as an imposed “efficient” solution. Posnerian judges applying an efficiency norm to constitutional questions are naively attempting to impose order that can only emerge through politics-as-exchange.²⁹ Marciano (2007) argues that this distinction between Buchanan as an advocate of the exchange paradigm and Posner as an advocate of the value paradigm is a key difference between their respective projects.

Tullock’s (1987) complaint that the Supreme Court “sharply reduced the efficiency of the state legislatures” in the reapportionment decisions rings hollow when it is read through the lens of Buchanan’s critique of Posner. Tullock, like Posner, was guilty of “insistence on the relatively unlimited applicability of the maximum value or efficiency criterion” (Buchanan, 1974a, p. 485). Under Buchanan’s (1974a) framework, it would not have been the Warren Court’s responsibility to maximize the efficiency of state legislatures by applying the analysis of *The Calculus of Consent*, it was its responsibility to enforce existing constitutional rules. The court held that the constitutional guarantee of “one person, one vote” resides in the Fourteenth Amendment, which requires that the states be non-discriminatory. Non-discrimination may reduce the efficiency of the state legislatures on Tullock’s efficiency criteria, but so be it. Buchanan’s growing appreciation of the limits of efficiency as a guide for law may have even been a factor in his abandonment of the fight against “one person, one vote” by the mid-1970s, although of course this is speculative.

An alternative criticism Buchanan and Tullock might have raised against reapportionment is that while the constitutional principle behind “one person, one vote” was sound and superseded any efficiency argument, the reapportionment decisions went further in overturning established precedent than necessary. The Warren Court could have continued to provide relief for the worst abuses without enshrining “one person, one vote” as an overriding principle.³⁰ This might have been what Buchanan (1968, p. 677) had in mind when he referred to the Court’s “extremely naïve interpretation of the one-man-one-vote principle of democratic

²⁹ Cartwright (2016) argues that Buchanan (1974a) was not simply pointing out the dangers of inappropriately applying economic efficiency criteria to the law, but also the unique risks of equilibrium neoclassical economics.

³⁰ I thank David Glasner for this point.

process,” although that criticism is never developed as an argument for more incremental judicial relief.

VI. Conclusion

This paper describes Buchanan and Tullock’s views on the reapportionment decisions and demonstrates that their analysis of the issue was neglected in the twenty-five years after the publication of *The Calculus of Consent*. Both men were keenly aware of these cases and rightly saw them as an important turning point in American constitutional history. But rather than recognizing the decisions as a fulfillment of democratic aspirations, Buchanan considered the decisions “radically irresponsible” and the Warren Court “extremely naïve.” He went as far as advocating an amendment to the Constitution to overturn the decisions. Tullock highlighted the decisions as examples of the recent “outburst of judicial activism” and later dismissed them as a “cloth-headed thing to do from a constitutional standpoint.” Beneath all the bluster, Buchanan and Tullock did provide a formal economic argument against the “one person, one vote” standard. *The Calculus of Consent* argued that legislative apportionment on a non-population basis could increase the efficiency of a bicameral legislature by reducing the external costs imposed by collective action without substantially increasing decision making costs in the legislature. Looking back, Tullock (1987) feared that this efficiency argument was lost “into the memory hole,” and for the most part he was correct.

Buchanan and Tullock’s motivations for opposing the “one person, one vote” decisions varied over the years, ranging from scientific curiosity in *The Calculus of Consent* to an atavistic distrust of the Warren Court that was as unattractive as it was commonplace on the right in the 1960s, to concerns about the prospects of American federalism. In each case, their rejection of “one person, one vote” was a rejection of basic democratic principles and a society of “natural equals.” But Buchanan and Tullock’s views on apportionment do not exhaust what they had to say about democratic principle and procedure. It barely scratches the surface. Their rejection of the “one person, one vote” standard in the 1960s can be contrasted with Tullock’s (1967) enthusiasm for “one person, one vote” in his advocacy of proportional representation or Buchanan’s appeal to Rawlsian equality of liberty (Buchanan; 1976, 2003). Buchanan (1992, p. 156) insisted that he was a misunderstood scholar and that “[p]roperly understood, my position is both democratic and egalitarian.” David Levy and Sandra Peart (2020) have recently emphasized

these dimensions of Buchanan’s thought and argued that he was a proponent of an economics of “natural equals.” This paper shows that these are complicated and contestable claims, and that critics of the antidemocratic nature of Buchanan and Tullock’s extreme qualified majority rules are not simply confused. Despite their defense of democratic principles in other contexts, the arc of Buchanan and Tullock’s opposition to the “one person, one vote” decisions is a matter of history, exhibiting its own drama, tensions, and evolutions. The analysis of legislative apportionment in *The Calculus of Consent* is a neglected contribution of public choice theory that is important for understanding how economists have interacted with the history of democracy, voting rights, and civil rights in the United States.

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