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# EXPLAINING THE IMPORTANCE OF PUBLIC CHOICE FOR LAW

*D. Daniel Sokol\**

PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW. By *Maxwell L. Stearns & Todd J. Zywicki*. St. Paul: West. 2009. Pp. liv, 601. \$70.

## INTRODUCTION

Many top elected and appointed federal officials can recall days of outlining for their 1L torts and contracts classes and being cold called in criminal law. JD holders include the president and vice president, as well as six of the fifteen cabinet members.<sup>1</sup> More than half of the current members of the US Senate hold law degrees, as do more than a third of the members of the House of Representatives.<sup>2</sup> Many more lawyers (or former lawyers) head administrative agencies.<sup>3</sup> At the state level, many governors and state legislators also have legal backgrounds.<sup>4</sup> Though members of the judiciary are not required to hold law degrees, nearly all do at the state and federal levels.<sup>5</sup> These decision makers play an important role in the function of law within society.

Law is dynamic, as law shapes behavior. Behavior also shapes law. Public choice can help us to understand this dynamic behavior. At its core, public choice is the use of economics to understand political science. Public choice thus addresses various opportunities for and constraints on behavior in public life in a manner akin to how economics does so in private life (the market). Public choice also assumes rational actors who maximize their

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\* Assistant Professor of Law, University of Florida. I want to thank Fred McChesney, Bill Page, Max Stearns, and Todd Zywicki for helpful comments.

1. Hillary Rodham Clinton, Eric H. Holder, Jr., Ken Salazar, Tom Vilsack, Gary Locke, and Janet Napolitano.

2. American Bar Association, Lawyers in the 111th Congress—Senate, <http://new.abanet.org/calendar/ABADay/Documents/LawyersCongressSenate2010.pdf> (last visited Aug. 20, 2010); American Bar Association, Lawyers in the 111th Congress—House of Representatives, <http://new.abanet.org/calendar/ABADay/Documents/LawyersCongressHouse2010.pdf> (last visited Aug. 20, 2010).

3. See USA.gov, A-Z Index of Government Departments and Agencies, <http://www.usa.gov> (follow “Site Index” hyperlink and then the “A-Z Agency Index” hyperlink) (last visited Aug. 20, 2010).

4. National Conference of State Legislatures, 2009 State Legislator Education Levels, <http://www.ncsl.org/default.aspx?tabid=19823>; see NATIONAL GOVERNORS ASSOCIATION, GOVERNORS OF THE AMERICAN STATES, COMMONWEALTHS AND TERRITORIES (2010), <http://www.nga.org/Files/pdf/BIOBOOK.pdf>.

5. See Federal Judicial Center, Biographical Directory of Federal Judges, <http://www.fjc.gov/history/judges.html>; National Center for State Courts, State Court Web sites, [http://www.ncsc.org/Web%20Document%20Library/IR\\_CourtSites.aspx](http://www.ncsc.org/Web%20Document%20Library/IR_CourtSites.aspx).

utility. Since the 1960s, the use of public choice has had a profound impact in the academic study of law by both those inside and outside of law schools.<sup>6</sup> Given the importance of policy to the law, it is rather odd that the study of public choice has not been a staple of the law school curriculum.

Students are likely to be introduced to public choice in classes that specialize in legislation. Yet, outside of administrative law and legislation, most statutory classes (commercial, corporations, environmental, and tax to name just a few) do not use public choice as a major explanatory tool for policy choices in a given area of law. In common law classes, public choice may often be overlooked altogether.

The next generation of government officials, business leaders, and members of civil society likely will draw from the current pool of law school students. These students often lack a foundation of the theoretical and analytical tools necessary to understand law's interplay with government. This highlights the importance of public choice analysis. By framing issues through a public choice lens, these students will learn the dynamics of effective decision making within various institutional settings. Filling the void of how to explain the decision-making process of institutional actors in legal settings is *Public Choice Concepts and Applications in Law* by Maxwell Stearns<sup>7</sup> and Todd Zywicki.<sup>8</sup>

Normally, casebooks are not endeavors worthy of a book review. Mainly, they collect cases and provide introductory and concluding comments that provide context and analysis of cases. In sharp contrast, Stearns and Zywicki provide a research tool and resource for students and faculty to understand public choice and law. *Public Choice Concepts* is a book that focuses on theory, analysis, and case studies rather than edited versions of cases as its primary pedagogical device. This alone should excite students who have read enough cases and yearn for class materials that allow them to begin to apply analysis of their own.

Because of its analytic depth, *Public Choice Concepts* is likely to be recognized as the leading work on the subject for some time. Stearns and Zywicki's contribution to public choice scholarship is important and compelling. Part I of this Review addresses common misperceptions about public choice, provides a descriptive summary of the book, explains its important implications, and suggests some limitations. Part II takes issue with Stearns and Zywicki on one important ground—their failure to adequately consider public choice issues in an international context. A number of issues of international importance, such as trade and environmental, and financial

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6. See, e.g., JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997) (expressing ambivalence to public choice); DENNIS C. MUELLER, PUBLIC CHOICE III (2003) (providing an overview of the public choice literature to date); RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (offering insights into the current state of public choice legal issues).

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regulation, have become daily staples in policy debates. This Part describes how an understanding of public choice can offer insights into international antitrust.

## I. PUBLIC CHOICE AND LAW

### A. *Misguided Perceptions About Public Choice*

Public choice is not the sole method of analysis of a given legal problem. However, it can serve to enrich the analytical framework of law and legal institutions. Some features of law that seem puzzling to traditional analytical approaches can be explained by public choice analysis. Unfortunately, legal academics oftentimes do not understand public choice and hold a caricatured view of what it embraces.

Public choice comes in a number of different varieties. Interest group theory is often treated as shorthand for public choice. However, public choice theory also incorporates social choice theory, game theory, and other subfields. Because some of the economic theory-of-regulation public choice literature originated among Chicago School economists, many mistakenly presume that public choice is a right wing deregulatory ideological movement. In fact, public choice has been embraced by political scientists, economists, and law professors of the left and the right. Users of public choice include Daniel Farber,<sup>9</sup> Phil Frickey,<sup>10</sup> Jerry Mashaw,<sup>11</sup> Cass Sunstein,<sup>12</sup> Stephen Breyer,<sup>13</sup> and William Eskridge.<sup>14</sup> Indeed, *Public Choice Concepts* is a collaboration between a left-leaning public-law scholar (Stearns) and a right-leaning public-private-interface scholar (Zywicki).<sup>15</sup>

Another misperception about public choice is that it is overly pessimistic about politics. Merrill goes so far as to suggest that public choice serves to “encourage cynicism about governmental institutions, and to promote hostility toward any invocation of the coercive powers of the state.”<sup>16</sup> This concern suggests that the spread of public choice may create self-interested behavior that public choice scholars claim is merely a fact of the world. If selfishness

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9. DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* (1991).

10. *Id.*

11. MASHAW, *supra* note 6.

12. See CASS R. SUNSTEIN ET AL., *ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY* (2006) (examining the degree to which judges act according to their own interests).

13. See STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

14. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

15. See Posting of Todd Zywicki to The Volokh Conspiracy, The Further Left You Are the Less You Know About Economics, <http://volokh.com/2010/05/06/the-further-left-you-are-the-less-you-know-about-economics/> (May 6, 2010, 8:23 PM).

16. Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1070 (1997).

exists naturally and public choice accurately describes this selfishness, then cynicism will set in on the part of political actors. The very study of public choice reduces cooperation and destroys traditional social understandings among its students.<sup>17</sup> Such a critique has its origins in the Marxist argument that capitalism creates selfishness.<sup>18</sup>

A response to this critique is that public choice does not claim that increased selfishness is a good thing. Public choice theorists want constitutional arrangements that maximize general interest in order to better combat selfishness. For Stearns and Zywicki, the purpose of the book and of public choice is to serve a more positive and descriptive function. Understanding public choice allows actors in the legal and political systems to better understand policy tradeoffs and implications.<sup>19</sup> With this knowledge, such actors can make decisions more likely to maximize social welfare.

In creating new institutional arrangements to maximize social welfare, public choice has normative implications, rather than merely a descriptive function.<sup>20</sup> *Public Choice Concepts* identifies these normative implications throughout the book, although it does so implicitly. The book explores how an understanding of public choice suggests tools to help institutions overcome some of the flaws that public choice identifies.

### B. *The Contribution of Public Choice Concepts and Applications in Law*

Understanding the value of *Public Choice Concepts* requires an understanding of what distinguishes it from other works in the field. *Public Choice Concepts* is not akin in its depth and breadth to the comprehensive survey of theoretical and empirical work found in *Public Choice III*.<sup>21</sup> Nor is the textbook akin to the excellent *Research Handbook on Public Choice and Public Law*,<sup>22</sup> which provides a survey of the latest theory and applications of public choice across a number of different thematic and substantive areas of law. Instead, the importance of Stearns and Zywicki's contribution is two-fold. First, it is a textbook that serves as a primer for those who are unfamiliar with the importance of public choice, whether they are scholars who focus their academic work on legal institutions or students who learn about these institutions for careers in law, business, or government. As a

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17. Lionel Orchard & Hugh Stretton, *Public choice*, CAMBRIDGE J. ECON., May 1997, at 409, 423.

18. See KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (English Edition 1888), reprinted in BASIC WRITINGS ON POLITICS AND PHILOSOPHY 1, 9 (Lewis S. Feuer ed., 1959).

19. Pp. ix–x. They are not the first to note that public choice is not dismal in nature. See MASHAW, *supra* note 6, at 31.

20. Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State*, 96 MICH. L. REV. 1746, 1774 (1998) (reviewing MASHAW, *supra* note 6).

21. MUELLER, *supra* note 6.

22. Pp. vii–viii; RESEARCH HANDBOOK IN PUBLIC CHOICE AND PUBLIC LAW, *supra* note 6.

result, *Public Choice Concepts* serves as an effective tool for teaching key concepts of public choice law to both students and professors. It is far less technical and more accessible than *Public Choice III*. Second, *Public Choice Concepts* informs those social scientists and law professors who understand public choice but not necessarily its applications to different areas of law.

The book's first part is an overview of the core concepts in public choice. These include collective decision making, interest group theory, rent seeking, social choice theory, and game theory. The second part focuses on institutional issues, and in particular collective decision-making areas: legislatures, the executive branch and administrative agencies, and the judiciary. It also addresses constitutional structure. Online supplements in part three of the book provide additional depth in other areas of law's intersection with policy, such as antitrust, bankruptcy, the Commerce Clause, corporate law, environmental law, and corruption.

Chapter One discusses how institutions affect decision making. The authors note that behavior by rational actors will vary based on the institutional structure in which actors find themselves (p. 10). Stearns and Zywicki simplify what they mean by an institution, using the well-known work of Nobel laureate Douglass North.<sup>23</sup> In fact, institutional analysis is quite complex and what one means by an institution may vary. Using an oversimplified definition of institutions might distort one's understanding of how institutions affect behavior.<sup>24</sup> Pedagogically, the use of simple models early on allows for the development of greater complexity later. However, an explicit revisiting of the nature of institutions would strengthen the book.

Once they define an institution, Stearns and Zywicki provide an easy-to-follow example to illustrate the importance of institutional design: they examine the differences in the behavior of appointed and elected judges (pp. 11–12). Appointed judges face voter anger if they decide a case in an unpopular way. Thus, these judges will be more likely to conform to voter preferences. In contrast, appointed judges have less pressure from voters because of their relative insulation from voter preferences. Yet, appointed judges are subject to their own public choice concerns. They still care about the reception of their decisions and face a number of other issues that shape their judicial behavior, such as desires for income, leisure relative to private-sector lawyers, and job satisfaction.<sup>25</sup>

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23. P. 11 (citing Douglass C. North, *Economic Performance Through Time*, 84 AM. ECON. REV. 359, 360 (1994)).

24. Cf. AVNER GREIF, INSTITUTIONS AND THE PATH TO THE MODERN ECONOMY 29–54 (2006) (spending an entire chapter analyzing what is meant by the term “institution”).

25. Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 302 (1997) (noting that “a judge may receive satisfaction from ‘having performed his duty’”); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 1–2 (1993) (noting that judicial utility function includes income and leisure); Stephen J. Choi et al., *Professionals or Politicians?: The Uncertain Empirical Case for an Elected Rather than Appointed Judiciary*, 4 (Univ. Chi. Law Sch. John M Olin Law & Econ. Working Paper No. 357, 2007), available at

In their chapter on the economic theory of regulation, Stearns and Zywicki draw heavily upon Chicago theorists (Chapter Two). They begin with Stigler, whose seminal work suggested that what drives the political process is private, rather than public, interest. Interest groups seek rents for their benefit at the expense of society at large.<sup>26</sup> They also discuss how Peltzman and Becker refined the Stigler model (p. 51). The former addressed the issue of group size in the influence of interest groups, in which well-organized, smaller groups can seek redistribution through the regulatory process.<sup>27</sup> The latter explored how competition might lead to the more efficient transfer of rents because a vote-maximizing government official has to make tradeoffs across a number of interests.<sup>28</sup> These insights into the nature of regulation have important policy implications.

*Public Choice Concepts* provides an application of regulation and interest group theory that has particular salience and interest to law school students: the licensing of attorneys via the bar exam (pp. 52–53). As Stearns and Zywicki explain, there is a tradeoff for using the bar exam to regulate the provision of lawyers (p. 52). On the one hand, the bar exam creates a barrier to entry into competition for the provision of legal services (and therefore creates upward price pressure for legal services). On the other hand, the bar exam serves as a check on quality. It weeds out potential lawyers who lack the basic understanding and competency necessary to advise potential clients.

The form of the bar exam suggests a public choice explanation. The bar passage rate correlates with the number of applicants who take the bar exam. If the bar exam merely existed as a floor to measure quality, the passage rate would vary from exam to exam in a given year based on the number of students who attained a sufficient level of knowledge. Nevertheless, the overall bar passage rates hold constant.

Public choice explains this outcome and its consequences. Existing lawyers who run the accreditation process want to keep the total supply of lawyers down in order to keep legal fees high. Such rent seeking has consequences for consumers of legal services. Some consumers will be priced out of legal services and attempt to undertake legal representation on their own or employ other nonlawyer providers to advise them on legal issues (accounting firms, consultants, etc.).

*Public Choice Concepts* next addresses the work of Mancur Olson (pp. 55–56). Olson's seminal work analyzed the nature of political mobiliza-

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[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1008989](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008989)) ("Appointed judges . . . labor to write opinions that will be admired.")

26. Pp. 49–51; George J. Stigler, *The theory of economic regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

27. Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976).

28. Gary Becker, Comment, 19 J.L. & ECON. 245 (1976) (responding to Peltzman, *supra* note 27).

tion of interest groups.<sup>29</sup> Among his contributions was to note that if all members of a group benefit from a given policy, some group members will be able to free ride off of other group members who work to enact the policy. Therefore, each member of the group has an incentive to shirk his responsibility to enact the change of policy. To solve the free-rider problem, successful groups exclude free riders from group benefits. In this vein, some groups are more effective than others based upon the size of the group. A smaller group with fewer members who each have a larger individual stake will be more effective than a larger group whose members have smaller individual stakes in the policy.

To illustrate Olson's insights in application, *Public Choice Concepts* uses the example of the imposition of steel tariffs by the George W. Bush Administration (pp. 53–57). The US steel industry lobbied for protection from lower cost steel imports. This small and organized group extracted rents from the Bush Administration and limited free-rider problems through targeted subsidies.

In the next chapter, Stearns and Zywicki explain social choice theory (Chapter Three). Social choice focuses on voting arrangements for collective decision making. Its premise is that majoritarian voting is not merely a collection of individual interests to reach a collective result.<sup>30</sup> Rather, each actor has his own agenda in setting group decisions (pp. 94–95). Social choice thereby suggests limitations to the idea of majority rule based on individual interests. *Public Choice Concepts* explores two important theoretical contributions to social choice theory. The first is the Marquis de Condorcet's binary voting paradox.<sup>31</sup> What makes voting a paradox is that collective preferences in voting are cyclic (a majority of the voters prefer candidate A to candidate B, a majority prefer B to C, and a majority prefer C to A) and hence majority preferences might oppose each other.

The second building block is Arrow's Impossibility Theorem, which is an attempt to explain majoritarian voting.<sup>32</sup> According to the theorem, individual preferences in voting may not translate into a collective preference. No voting system can satisfy four basic conditions: universal domain, Pareto optimality, independence of irrelevant alternatives, and nondictatorship.<sup>33</sup> Put differently, no voting system meant to overcome cycling can comply

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29. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965).

30. There are a number of different implications for social choice as it relates to legal institutions, which are not limited merely to voting. See, e.g., William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 108–22 (1988); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1611 (1999).

31. Pp. 101–05. *Public Choice Concepts* suggests Condorcet as one of the founders of social choice. P. 94. Yet, the intellectual origins go as far back as Pliny the Younger and include a number of other contributions prior to Condorcet. WULF GAERTNER, *A PRIMER IN SOCIAL CHOICE THEORY* 3–4 (2006).

32. Pp. 138–43. KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 46–60 (2d ed. 1963).

33. WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* 115–20 (Waveland Press 1988).

with all of the above conditions given possible preference orders. The theory explains the fundamental tension that collective decision making faces in creating rational outcomes that are also fair.

Social choice serves as a prism through which to construct various proposals for institutional reform. Institutional structure can change by introducing various processes and mechanisms that constrain choices. Introducing greater political competition into electoral institutions could improve outcomes by preventing political actors from becoming entrenched in their positions through manipulating the voting system to benefit themselves.<sup>34</sup>

*Public Choice Concepts* provides an application of social choice cycling in the bankruptcy law context (pp. 165–67). Bankruptcy may change the nature of the preexisting property rights, and various voting strategies impact the allocation of these rights. Imagine a world with three creditors. The debtor owes each creditor \$500,000. The incentive of each creditor is to receive a full payout. Doing so would end the debtor's business as a going concern. Social choice helps us to determine the system of majority decision making to deal with the debtor's business. The problem of three equally situated creditors is easily apparent. Creditors A and B can form a coalition to split the \$500,000. However, complexity is introduced when Creditor C approaches Creditor B and proposes a coalition that would lead to a larger payoff for B (\$300,000 for B and \$200,000 for C). B would therefore abandon the coalition with A in favor of the coalition with C. Of course, A can play this game too. Creditor A can approach Creditor C and propose a coalition between A and C where A receives \$200,000 and C receives \$300,000. Not to be left out of the potential payoff, B might react and suggest to A that A receive a \$300,000 payoff and B receive a \$200,000 payoff. We do not have greater stability but we have a number of potential coalitions in bankruptcy of AB, BC, CA, and AB.

We can view the Bankruptcy Code as an attempt to solve the empty core and cycling problems that would be inherent in bankruptcy.<sup>35</sup> The code creates a system of priority of debt for creditors and a set of voting rules that create unequal bargaining positions among the creditors. This includes priority of distribution<sup>36</sup> and voting.<sup>37</sup> Inequality in bargaining position is also generated by "cramdown" rights.<sup>38</sup> Secured claims get paid present value in full over time. Priority claims get paid in full on the date of confirmation. Unsecured claims get at least what they would get in a liquidation.

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34. See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648–50 (1998).

35. Yet, the bankruptcy system does not solve all opportunities for strategic gaming. See Douglas G. Baird & Randal C. Picker, *A Simple Noncooperative Bargaining Model of Corporate Reorganizations*, 20 J. LEGAL STUD. 311 (1991).

36. See 11 U.S.C. §§ 507, 725 (2006).

37. See *id.* § 1126.

38. See *id.* § 1129(b). There are some limitations. For example, equity holders often get something in consensual plans that could not actually be crammed down because they violate absolute priority.

Chapter Four of *Public Choice Concepts* provides an easy-to-follow analysis of game theory. In addition to describing the basic games of game theory, the strength of *Public Choice Concepts* is that it explains that the prisoner's dilemma is not the only (or correct) solution to a collective action problem (pp. 173–75). Analyze a problem with the wrong game and the policy prescriptions that flow from the analysis will be flawed.

The chapter begins with an analysis of a single-period prisoner's dilemma (pp. 171–76). This allows for an explanation of the basic premises behind cooperation and defection strategies. The chapter then adds complexity by introducing a multiple-iteration prisoner's dilemma (pp. 176–95). The chapter then proceeds to explore games with multiple pure Nash strategy equilibria, including the driving game, the battle of the sexes game, and the game of chicken (pp. 196–224). It also introduces a game with no pure Nash strategy equilibrium (pp. 224–26). Stearns and Zywicki then apply the various games to substantive areas of law (pp. 226–42).

The final chapters discuss areas of law that have been the staple of much public choice legal literature—the legislative, executive, and judicial branches; administrative agencies; and constitution making. Chapter Six, regarding the executive branch and administrative agencies, is particularly good. Agency-cost problems exist between the legislature and administrative agencies. One common solution noted by the literature is to create law to better monitor administrative agencies. Monitoring allows for other actors (such as the courts) to protect the original legislative bargain and to lock in the policy preferences of the original bargain.<sup>39</sup> The highly proceduralized administrative law system, with judicial review and transparency requirements, is a policy tool to address agency costs.<sup>40</sup>

### C. Critiques

Stearns and Zywicki provide a few critiques of public choice. However, these critiques perhaps are too limited. Green and Shapiro's *Pathologies of Rational Choice*<sup>41</sup> receives only a single page of discussion (pp. 91–92). *Public Choice Concepts* focuses on Green and Shapiro's assertion that public choice theories may utilize claims not borne out by the empirical

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39. See Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987) (discussing oversight and administrative procedures as political controls on bureaucratic decision making); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) (further analyzing administrative structure, procedure, and oversight); McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999) (expounding the significance of procedural requirements considered by the Administrative Procedure Act of 1946).

40. Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement* in RESEARCH HANDBOOK IN PUBLIC LAW AND PUBLIC CHOICE, *supra* note 6 (manuscript at 11), available at <http://ssrn.com/abstract=1326613>.

41. DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994).

record.<sup>42</sup> In their defense, throughout the book, Stearns and Zywicki return to whether or not the claims of public choice exceed empirical results. Similarly, *Public Choice Concepts* gives Elhauge's critique of public choice's lack of a normative baseline<sup>43</sup> only two pages (pp. 89–91). The book could have built the case for public choice more forcefully by providing greater voice for the criticisms of public choice and comprehensively responding to these criticisms.

One might have addressed early on in the book a critique of public choice based on limits to the neoclassical rational actor model. The utility function that a rational actor maximizes may be impacted by a number of shortcomings in how people actually behave and the mental shortcuts that people take. A number of books and articles argue that people are not as predictable in certain scenarios as neoclassical economics assumes.<sup>44</sup> Instead, a number of behavioral heuristics lead to outcomes that may be at odds with rational choice.

The lack of focus on behavioral law-and-economics in the book is somewhat surprising. As Richard Epstein explains, “There is little doubt that the major new theoretical approach to law and economics in the past two decades does not come from either of these two fields. Instead it comes from the adjacent discipline of cognitive psychology, which has now morphed into behavioral economics.”<sup>45</sup> One limitation on rational actors is bounded rationality, in which people take mental shortcuts in their decision making. For example, the work of Kahneman and Tversky suggests that people's decision making will be biased by the availability heuristic.<sup>46</sup> People will predict the frequency of an event occurring based on how often they recall such events occurring. Events that receive disproportionate media coverage will be recalled more easily and thus overestimated. Therefore, people will overestimate the chance of being killed in a plane crash (because they are more likely to read about it in the news) and underestimate the chance of being killed by heart disease.<sup>47</sup>

The critique of public choice based on these behavioral insights is that, as a descriptive matter, public choice (as a subset of rational choice) might

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42. *Id.* at 11 (“Too often prescriptive conclusions . . . are floated on empirically dubious rational choice hypotheses . . .”).

43. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 49–52 (1991).

44. See, e.g., DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008) (describing common psychological departures from rational choice theory); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008) (making policy recommendations that attempt to minimize the impact of people's departures from neoclassical rationality).

45. Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 *MINN. L. REV.* 803, 803 (2008).

46. Amos Tversky & Daniel Kahneman, *Judgment under uncertainty: Heuristics and biases*, in *JUDGMENT UNDER UNCERTAINTY* 3, 11 (Daniel Kahneman et al. eds., 1982).

47. Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 *TEMP. L. REV.* 1, 20 (2003).

not be particularly good in explaining human behavior. As a normative matter, laws informed by public choice might be similarly shortsighted.<sup>48</sup> Based on such public choice limitations, some scholars suggest that government should draft paternalistic policies to yield improvements in individuals' welfare.<sup>49</sup> However, behavioral critiques of public choice cannot have it both ways. If it is possible for individuals to make misguided policy choices, then it is also possible for government actors to have the same behavioral biases in creating policy.<sup>50</sup>

A policy of paternalism may increase rather than decrease the costs of government decision making. A behavioral critique assumes that in making policy decisions, government policymakers are immune from interest group capture or their own self-interest. Paternalism assumes that people will be limited in their ability to learn the truth. Therefore, paternalism raises the payoff for successfully implementing a paternalistic government policy to benefit a particular interest group.<sup>51</sup> Paternalism is also subject to public choice concerns on the part of government decision makers. Government actors might take various heuristical shortcuts in their decision making but still be prone to self-interested behavior.

One might question some of the assumptions behind public choice because rationality in politics might be different than rationality in the market. Maybe people are less selfish in politics than they are elsewhere.<sup>52</sup> If we assume people are sometimes irrational, we need to ask, where are they more likely to be rational? It is more likely that people will behave rationally ignorant in politics than in the market.<sup>53</sup> In politics, there is significant voter ignorance. Because you know that the chance your vote will affect the outcome of an election or of any given policy debate will be small, you will be

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48. We also might want people (and government) to make mistakes because it allows actors to learn from them. Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620 (2006) (making the case for self-debiasing).

49. E.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211 (2003) ("To the extent that errors identified by behavioral research lead people not to behave in their own best interest, paternalism may prove useful."); Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) ("We urge that [libertarian paternalistic] rules should be chosen with the explicit goal of improving the welfare of the people affected by them.")

50. Russell Korobkin, *Libertarian Welfarism*, 97 CALIF. L. REV. 1651, 1652 (2009) ("If I can't figure out whether I would be better off owning a car equipped with expensive airbags or a slightly more dangerous (and cheaper) automobile and the concomitant ability to purchase some other goods and services, why should I be confident that a state functionary can do any better?")

51. See Edward L. Glaeser, *Paternalism and Psychology*, 73 U. CHI. L. REV. 133, 134, 145–46 (2006).

52. See generally BEYOND SELF-INTEREST (Jane J. Mansbridge ed., 1990) (collection of essays arguing against the idea that human behavior is rooted in a narrowly conceived definition of self-interest).

53. See Glaeser, *supra* note 51, at 144–45 ("Consumers face stronger incentives to correct errors that directly impact their well-being than do government bureaucrats.")

less likely to inform yourself about the issues.<sup>54</sup> With your money and your purchases, however, you have more incentive to get information because you will benefit from making a better decision. In sum, markets reward rational behavior and punish bad behavior.<sup>55</sup>

Another critique of *Public Choice Concepts* is that Stearns and Zywicki use a broad understanding of “self-interest” for rational actors. They do so to counter the perception that public choice is only about the private interests of actors. Politicians value more than just reelection.<sup>56</sup> An overly broad generalization about rationality has its limits.<sup>57</sup> If self-interest can mean just about anything, then it is not constraining the analysis. Under such a theory Mother Teresa is just as self-interested as Bernie Madoff; the only difference is that she was self-interested to do social good and he was self-interested to do good for himself and not his investors.

Public choice relies not just on the assumption of selfishness, but on selection effects. For example, maybe a congressman or bureaucrat does not care about survival in office and just wants to advance the public good. But such people will not stay in power for long unless they act selfishly. Selfish leaders or those who merely act selfishly will push out the altruistic ones over time, just as profit-maximizing firms in the market will tend to out-compete those that are indifferent to profit.<sup>58</sup>

Stearns and Zywicki do better when it comes to expressing critiques of the limitations and disagreements that exist across a number of different public choice models. Public choice theoretical models have become more complex. Early models became refined with better theories and better empirical analysis to guide them.<sup>59</sup> *Public Choice Concepts* does a good job of exploring the limitations of early models and exploring the refinements and alternative public choice that have arisen in the study of public choice. It also presents the empirical work in the area and makes a good effort at not drawing overly broad inferences from the empirical literature.

## II. THE GROWING IMPORTANCE OF PUBLIC CHOICE IN INTERNATIONAL LAW

The primary limitation of the otherwise excellent *Public Choice Concepts* is its coverage, or lack thereof, of international issues. Global issues

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54. Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1290–96 (2004) (providing a summary of the voter ignorance literature).

55. ILYA SOMIN, DEMOCRACY AND POLITICAL IGNORANCE (forthcoming).

56. Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw Out That Baby*, 87 CORNELL L. REV. 309, 322 (2002).

57. Jeffrey L. Harrison, *Piercing Pareto Superiority: Real People and the Obligations of Legal Theory*, 39 ARIZ. L. REV. 1, 2 (1997).

58. D. Daniel Sokol, *Competition Policy and Comparative Corporate Governance of State-Owned Enterprises*, 2009 BYU L. REV. 1713, 1727–31.

59. For example, Farber and Frickey introduced greater nuance and complexity to the relationship between interest groups and legislators. FARBER & FRICKEY, *supra* note 9, at 17–21.

involving complex regulation—from climate change to financial regulation—play an increasingly large role in US policymaking. If public choice can explain the behavior of actors on national issues, it also provides important insights into international organizations. Indeed, there is an increasing literature devoted to various public choice international issues.<sup>60</sup>

*Public Choice Concepts* would have added value by explaining how the assumptions of public choice at the domestic level may be challenged in their applications with multiple levels of actors at subnational, national, and international levels. The interplay of public choice at these levels creates particularly complex dynamics that require examination. Institutional design for addressing global problems in areas of complex regulation is at the forefront in many substantive areas of law and policy. Some types of institutional design seem to be more effective than others in reaching better outcomes. This Part uses public choice to explain the current dynamics of international antitrust law. The Part discusses how public-choice-related institutional design flaws impeded a World Trade Organization (“WTO”) “hard law” solution, and instead led to the creation of “soft law” institutional alternative: the International Competition Network (“ICN”).

#### A. *International Antitrust and Hard Law*

As a result of the complexity of globalization and overlapping regulation, one fundamental issue in the international sphere is the amount and nature of coordination needed across jurisdictions. The form of coordination, both as a positive and normative matter, may determine the effectiveness of such coordination. In some cases, weak coordination may not lead to optimal results. Instead, there may need to be a deeper integration of systems based upon a global standard.<sup>61</sup>

Hard law is a formalized governance model that relies upon formal rules to bind countries and their subunits. Increased hard law governance, meant to lock in present domestic decision makers’ policy preferences for future decision makers, represents one type of mechanism that facilitates more deeply integrated standards. Hard law governance has more formality and is more binding than soft law agreements, which are based more on informal norms. Harder agreements are produced with greater transaction costs precisely because they are “hard.” More people spend more time negotiating such agreements. Moreover, such agreements are harder to change.<sup>62</sup>

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60. See, e.g., John O. McGinnis & Mark L. Movsesian, *Against Global Governance in the WTO*, 45 HARV. INT’L L.J. 353 (2004); Paul B. Stephan III, *Barbarians Inside the Gate: Public Choice Theory and International Economic Law*, 10 AM. U. J. INT’L L. & POL’Y 745 (1995); Alan O. Sykes, *Protectionism as a “Safeguard”*: A Positive Analysis of the GATT “Escape Clause” with Normative Speculations, 58 U. CHI. L. REV. 255 (1991).

61. See Maxwell L. Stearns, *The New Commerce Clause Doctrine in Game Theoretical Perspective*, 60 VAND. L. REV. 1, 9 (2007) (addressing similar tradeoffs in the Commerce Clause context).

62. Andrew T. Guzman, *Public Choice and International Regulatory Competition*, 90 GEO. L.J. 971, 980–81 (2002).

Hard law agreements, such as WTO agreements, can take the form of a stand-alone governance structure that reaches a number of different areas of regulation.<sup>63</sup> Some stand-alone organizations built along a single issue may not achieve their intended goals because single-issue organizations may be more easily captured by interest groups. In public international law, such as human rights law, organizational design flaws may leave the very actors that should be constrained in their behavior unconstrained. Indeed, these actors can to some degree control the content of the law and make things worse than they were before.<sup>64</sup>

An example of the growing movement towards greater cooperation and coordination in an area of complex regulation is antitrust. There are more than one hundred jurisdictions with antitrust enforcement.<sup>65</sup> Antitrust must address a growing set of international problems due to increasing globalization. Globalization has both positive and negative effects on a given country's market. On the one hand, globalization allows for either potential or actual entry in tradable sectors. This puts a downward pressure on price. Consumers benefit from this greater competition.<sup>66</sup> On the other hand, increased globalization allows for the spread of anticompetitive behavior across borders.<sup>67</sup>

Having so many antitrust jurisdictions creates coordination problems for antitrust agencies. From a business perspective, different rules across jurisdictions increase compliance costs in two ways. Different rules require businesses to develop policies to ensure compliance with the various standards, such as coordination of merger filings. Disparate standards also increase compliance costs because of the need for global companies to comply with different substantive standards, some of which, such as multi-product bundling, are more restrictive than others.

How much convergence is optimal in both procedural and substantive antitrust is an open question. Increased uniformity across jurisdictions may allow global capture. However, coordination costs or spillover costs of anticompetitive conduct may be a large enough problem that deeper global integration may overcome these concerns.

International anticompetitive behavior takes two forms. The first is a spillover of anticompetitive effects from one jurisdiction to another. For example, firms may collude in price fixing cartels across countries. Cartels

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63. Andrew T. Guzman, *Global Governance and the WTO*, 45 HARV. INT'L L.J. 303 (2004).

64. See John McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1765–68, 1775–79 (2009); John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1233–46 (2007) (discussing the limitations of international law compared to US law regarding foreign citizens).

65. International Competition Network, Member Directory, <http://www.internationalcompetitionnetwork.org> (follow "Members" hyperlink) (last visited Aug. 20, 2010).

66. D. Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter Into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHI.-KENT L. REV. 231, 238 (2008).

67. See Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 917 (2003).

hurt consumers by charging higher prices than the market would allow without collusion. The difficulty of detecting collusion may make it hard for any given jurisdiction to uncover the cartel. Documents may be hidden and meetings of cartel members may occur in third-party jurisdictions, both of which raise the cost of detection for any particular antitrust agency. Additionally, the effects of the cartel might not be apparent to a given antitrust agency. Moreover, a cartel can punish a noncompliant member in a third jurisdiction to enforce the cartel.

Spillover effects might also include the impact of substantive antitrust rules in an important jurisdiction (the United States or the European Union) upon the global operations of a firm. When one of the major powers in antitrust has an overly restrictive antitrust policy, this standard becomes the global standard. With stricter antitrust in one of the major antitrust jurisdictions, competitors might arbitrage the differences in enforcement posture and lobby the stricter enforcer to bring cases against its competitor in order to affect the competitor's global business.<sup>68</sup>

A second issue emerges from globalization. When countries create various barriers to entry to foreign products and services, sometimes this may be to protect domestic constituencies that have lobbied for protection. Protection takes the form of legislation that creates immunity from antitrust. The immunity prevents antitrust from correcting for market failures such as monopolization.<sup>69</sup>

Harmonization of procedures or substantive standards across jurisdictions can remove unnecessary costs of doing business caused by overlapping or contradictory approaches. For example, jurisdictions might have different reporting requirements for premerger notification. This might include how much and what sort of information to include with a merger filing, the timing of the merger review, the transparency of the merger review process, and the confidentiality of information, among other issues. Procedural issues in international law tend not to have the same political salience as substantive issues because there is not a strong enough interest group that will push for optimal procedural changes globally.<sup>70</sup> Yet, international cooperation in antitrust in most settings will be welfare-improving on purely procedural matters. Coordination will yield a better flow of information, less redundancy in the use of antitrust agency resources, and less delay and uncertainty for businesses.

Public choice can help to explain the various institutional arrangements that international antitrust has taken. It also helps to explain why certain antitrust issues have been addressed internationally through soft law rather

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68. See Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Overregulation of Competitive Behavior*, 10 *CHI. J. INT'L L.* 189, 192 (2009).

69. D. Daniel Sokol, *Limiting AntiCompetitive Government Interventions That Benefit Special Interests*, 17 *GEO. MASON L. REV.* 119 (2009) (discussing negative impacts of antitrust immunity).

70. Erin Ann O'Hara, *Economics, Public Choice, and the Perennial Conflict of Laws*, 90 *GEO. L.J.* 941, 950 (2002).

than at the domestic level or via hard law. There is an emerging literature that examines rational choice theory and public choice implications in soft law.<sup>71</sup> To date, this has not been extended extensively to the area of international antitrust.<sup>72</sup> A public choice analysis of international antitrust has been lacking, although analysis of US antitrust is well-developed.<sup>73</sup>

In 1996, the WTO Singapore Ministerial officially put the intersection of trade and antitrust on the negotiating table in WTO negotiations. Initial ideas of the potential for WTO antitrust regulation were far-ranging. They included proposals for a worldwide merger authority. They also included increased WTO powers to address international cartels, international monopolization, and other activities that previously had been within the purview of domestic antitrust authorities. Antitrust authorities recognized that should the WTO have such power, it would come at the expense of domestic antitrust agencies.<sup>74</sup>

A number of antitrust agencies were concerned that trade negotiators did not understand antitrust economics and that trade negotiation was much more of a tradeoff among interest groups. Therefore, trade negotiators would be far more willing to create a series of antitrust standards that might be overly tolerant of anticompetitive behavior, because optimal antitrust enforcement could be traded-off for a reduction in agriculture tariffs or lower phytosanitary standards. Such logrolling in an international agreement could reduce global welfare.

Antitrust agencies enjoyed having a monopoly over setting antitrust standards for their respective jurisdictions. A global standard would be an imposition from above. It would reduce antitrust prosecutorial discretion.<sup>75</sup> Even what seemed like relatively harmless issues in the WTO talks, such as transparency, nondiscrimination, procedural fairness, voluntary cooperation, and capacity building, became somewhat contentious. The reason for this concern was that coordination, if through the WTO, would occur through an organization that was based on negotiations at the country-to-country level. Antitrust agency officials would not have had final say on the nature or form of coordination. Particularly, the US antitrust agencies were worried about the implications of giving up too much sovereignty in a process that they

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71. See, e.g., Tim Büthe & Walter Mattli, *International Standards and Standard-Setting Bodies*, in THE OXFORD HANDBOOK OF BUSINESS AND GOVERNMENT 440, 440–71 (David Coen et al. eds., 2010) (reviewing the literature on standard-setting international organizations); DAVID ANDREW SINGER, *REGULATING CAPITAL: SETTING STANDARDS FOR THE INTERNATIONAL FINANCIAL SYSTEM* (2007) (describing public choice concerns in IOSCO and Basel Accords).

72. But see ANDREW GUZMAN, *COOPERATION, COMITY AND COMPETITION POLICY* (forthcoming 2010).

73. See, e.g., FRED S. MCCHESENEY & WILLIAM F. SHUGHART II, *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* (1995).

74. See D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 50–51 (2007); Joel I. Klein, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, Address to The Royal Institute of International Affairs: A Note of Caution with Respect to a WTO Agenda on Competition Policy (Nov. 18, 1996), available at <http://www.justice.gov/atr/public/speeches/0998.pdf>.

75. Klein, *supra* note 74.

could not control once the new institution was created. Antitrust enforcers were concerned that this sort of cooperation would somehow “politicize” antitrust, which antitrust practitioners believe is not political (even though public choice teaches that antitrust agencies can and do behave politically).<sup>76</sup>

Some developing-world antitrust agencies were concerned that a global standard allowing for competition would enable developed-world multinationals to exploit the developing world.<sup>77</sup> In the context of public choice, these developing-world negotiators worried that by creating competition among the most efficient producers, foreign firms might drive out inefficient domestic firms, which would lead to a potentially severe political backlash.

The emerging institutional structure affected the positions of the United States and increasingly the European Union. Once a binding global competition system would be established, the institutional structure would limit the choices of the United States and the European Union. WTO dispute resolution might be used against the US or EU on dubious competition grounds but still result in trade liability.<sup>78</sup> Because WTO judges are inexpert on competition matters, an adverse ruling might create suboptimal antitrust enforcement.<sup>79</sup>

### B. *International Antitrust and Soft Law*

Soft law lacks the formal binding force of hard law. This results in lower-stakes bargaining among soft law participants. Soft law is an institutional choice that a domestic level agency may implement, whereas hard law involves adjudication. In spite of being “soft,” soft law may encourage more cooperation among parties that have divergent interests and various levels of power. Additionally, its flexibility allows for soft law to change more rapidly than hard law, given changing circumstances.

A soft law approach suggests a coordination game based on voluntary global standards.<sup>80</sup> It may be optimal to allow this sort of country-level tinkering in doctrine and economic approaches in antitrust. From this tinkering, better practices can emerge. This approach requires an institution that allows for bottom-up norm creation.

Public choice provides an analytical framework to explain the use of soft law in antitrust and its implementation. When the US and the EU are behind

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76. See Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983) (finding substantial evidence of congressional influence over Federal Trade Commission decisions); Timothy J. Muris, *Regulatory Policymaking at the Federal Trade Commission: The Extent of Congressional Control*, 94 J. POL. ECON. 884 (1986) (criticizing Weingast and Moran’s method but finding influence on other grounds).

77. DAVID J. GERBER, *GLOBAL COMPETITION: LAW, MARKETS AND GLOBALIZATION* 106–07 (2010).

78. See Sokol, *supra* note 69, at 164–74.

79. *Id.* at 164–65.

80. Duncan Snidal, *Coordination versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, 941 (1985).

soft law norms, this has a powerful bandwaggoning effect. Other countries want to be seen as part of the club. They also rely on the EU and US for technical assistance and capacity building, and the US and EU experts will push this agenda.<sup>81</sup> Aid may be contingent on implementing these norms.

Public choice explains why the ICN was formed and made the primary institution for global antitrust coordination and substantive convergence. Other global institutions had greater public choice concerns. Until roughly the time of the creation of the ICN, the Organization for Economic Cooperation and Development (“OECD”) focused on discussions of specific issues and had not created significant convergence on procedural or substantive issues. The OECD was at the time less flexible and had its own bureaucracy as an interest group in addition to the smaller set of countries deciding policy. It also required greater sign-off by political units other than the antitrust agencies involved in international affairs.<sup>82</sup>

The US responded to the weaknesses of the OECD and WTO by formulating an alternative institutional structure. The new structure would allow for greater control by the domestic antitrust agencies.<sup>83</sup> From the public choice perspective, it also embedded the policy preferences of the largest and most powerful agencies since they were the ones that had the most resources that could be used in the ICN. The ICN was established in 2001. Its members include all of the world’s antitrust agencies regardless of size or level of economic development.<sup>84</sup> The ICN has its origins in two key developments. First, it is the intellectual brainchild of the important International Competition Policy Advisory Committee (“ICPAC”) report of 2000, which contemplated a bottom-up, agency-to-agency soft law approach.<sup>85</sup> The second development was significant disagreement between the US and the European Commission on the GE/Honeywell proposed merger. As a result of this disagreement, healing the rift across the Atlantic took on new importance.<sup>86</sup>

Initially, the ICN focused on mergers. It quickly expanded into cartels, regulated areas, capacity building, and unilateral conduct. Perhaps there was some mission creep or perhaps the ICN was seen as less political and therefore a better forum for increased cooperation. The ICN has had an important impact in creating change (both perceived and more directly measurable) in the implementation of benchmarked better practices across a number of dif-

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81. D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. 1081, 1086–87 (2009).

82. Sokol, *supra* note 74, at 99.

83. *Id.* at 51–52.

84. *See id.* at 105–15 (providing details of the ICN).

85. INT’L COMPETITION POLICY ADVISORY COMM. ANTITRUST DIV., FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, 286–87 (2000), available at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (proposing an international mediation forum for competition disputes).

86. Abbott B. Lipsky, Jr., *Managing Antitrust Compliance Through the Continuing Surge in Global Enforcement*, 75 ANTITRUST L.J. 965, 972–73 (2009).

ferent areas, both procedural and substantive. There are two reasons that explain the success of the ICN: (1) institutional design and (2) a modest agenda that began with issues in which it would be possible to measure success relatively easily and quickly.

In terms of its institutional structure, the ICN is unlike other international antitrust institutions. First, the ICN is transnational (interactions across national boundaries with state and nonstate actors) rather than trans-governmental (interactions across national boundaries with state actors only). It has active involvement from academics, private-sector attorneys with in-house and law firm backgrounds, economists from consulting firms, and civil society groups. This participation spans both developing- and developed-world nongovernmental actors. The ICN is a virtual institution without any headquarters or permanent staff. Normally, a bureaucracy might create opportunities for free riding by antitrust agency leadership and staff. With no such staff, there are more limited opportunities for free riding at the ICN. The virtual nature also prevents bureaucratic creep by ICN officials who might try to expand the mission of the network. Indeed, the current theme within the ICN is to do fewer things but to better implement them.

The private sector (mostly defense-side European and North American law firms) supported the ICN because the ICN allowed it to lobby in a central location for conforming procedural rules and cooperation that would benefit it. Increased coordination on procedural issues would reduce business costs. International business could also use better access to lobby on more substantive issues that might emerge. It has incentives to volunteer in the various working groups because it can advantage its positions by setting up best practices that allow for more of a pro-defense position. There might be some overlap between public and private good because the standard that business pushes internationally might also be the optimal standard for procedural and substantive antitrust. The institutional design of the ICN allows for better alignment of public and private good. Where there is pushback by countries in certain areas, it is often a combination of government and business interests.

Antitrust lawyers have incentive to make a transnational organization like the ICN succeed. Because of the highly technical nature of antitrust, such an organization allows them to leverage their expertise to maximize their own wealth and their clients' interests. The more technical antitrust coordination and cooperation becomes, the more important antitrust lawyers become to making the system a success.<sup>87</sup>

A number of academics are involved in the ICN. One might believe that academics are involved merely for altruistic reasons. However, they might have additional public-choice-related reasons for their involvement in the organization. They might want to further their own academic careers. They also might be willing to become involved to better establish themselves for future consulting opportunities as experts for law firms, antitrust agencies,

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87. Cf. Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 MICH. L. REV. 2016, 2023 (2003) (providing a similar public choice analysis in bankruptcy).

or international antitrust organizations. The ICN also provides an opportunity to meet future collaborators from around the world.

International antitrust exemplifies the two tugs of *Public Choice Concepts*. Public choice provides a positive description of international antitrust developments. It also provides the background for normative analysis to make international antitrust institutions more effective.

#### CONCLUSION

*Public Choice Concepts* makes an important contribution to the understanding of public choice in law. The book has insights that make it an important basis for both a stand-alone class and to enrich the understanding of existing classes. An interesting experiment will be to track whether greater awareness of public choice issues will lead to better outcomes in terms of the design of policy by the next generation of decision makers, or if public choice will remain merely a descriptive analytical tool.