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Law and Public Choice: A Critical Introduction

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LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION. By *Daniel A. Farber* and *Philip P. Frickey*. Chicago: The University of Chicago Press. 1991. Pp. ix, 159. Cloth \$34.95; paper, \$13.95.

During the 1980s, concerned scientists warned that global warming would cause irreparable environmental damage unless the world community took immediate and massive corrective action.¹ Despite such dire predictions, U.S. policy has reflected the views of other, more cautious experts.² Recent administrations have refused to initiate government action to prevent global warming until scientists develop consistent conclusions through continued study of the problem. Advocates of this approach assert that while global warming might have severe environmental consequences, a hasty overreaction to the threat could have even higher costs to society.³

In *Law and Public Choice: A Critical Introduction*, Professors Daniel A. Farber and Philip P. Frickey⁴ advocate a similar "wait and see" response to public choice theory, a scholarly movement with equally troubling implications. Public choice theory is "the application of economics to political science."⁵ George Mason University's James M. Buchanan received the 1986 Nobel Prize in Economics for his pioneering work in the area.⁶ Buchanan's Nobel Prize increased the awareness of public choice theory among legal scholars. Consequently, since 1986, public choice scholarship has exploded within the legal community,⁷ raising a host of questions about the efficacy of

1. See, e.g., Philip Shabecoff, *Global Warming Has Begun, Expert Tells Senate*, N.Y. TIMES, June 24, 1988, at A1 [hereinafter Shabecoff, *Global Warming*]; Philip Shabecoff, *The Heat Is On — Calculating the Consequences of a Warmer Planet Earth*, N.Y. TIMES, June 26, 1988, § 4, at 1. See generally MICHAEL OPPENHEIMER & ROBERT H. BOYLE, *DEAD HEAT* (1990) (providing an overview of the global warming problem).

2. See Shabecoff, *Global Warming*, *supra* note 1. Note that scientists still debate the expected magnitude of the greenhouse effect today. See Bob Davis, *In Rio, They're Eyeing Greenhouse Two-Step*, WALL ST. J., Apr. 20, 1992, at A1 ("[W]hether temperatures will rise that much and when are the subject of brawls at scientific conferences.").

3. See Philip Shabecoff, *Bush Asks Cautious Response to Threat of Global Warming*, N.Y. TIMES, Feb. 6, 1990, at A1; see also OPPENHEIMER & BOYLE, *supra* note 1, at 62.

4. Professors Farber and Frickey both teach at the University of Minnesota Law School. *Law and Public Choice: A Critical Introduction* draws heavily on three previous collaborative articles by the authors. See Daniel A. Farber & Philip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEXAS L. REV. 1013 (1988); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873 (1987); Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

5. P. 7 (quoting DENNIS C. MUELLER, *PUBLIC CHOICE II* 1 (1989)).

6. Buchanan coauthored perhaps the seminal work in the field, JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962). See Robert D. Tollison, *Public Choice and Legislation*, 74 VA. L. REV. 339, 340-41 (1988).

7. See, e.g., *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988). It is not surprising that legal scholars, especially those with a law and economics bent, have pursued public choice with a vengeance. In a recent article, Professor Robert Ellickson suggested that

American government.⁸

The book's subtitle — *A Critical Introduction* — accurately portrays what Farber and Frickey intend to accomplish. In a format accessible to readers unfamiliar with the intricacies of political economy, the book concisely introduces the two major strands of public choice theory.⁹ At the same time, it critically assesses the theory and the applications of the theory to public law proposed by the existing scholarship. The authors reject the claim that the results of preliminary public choice research justify making dramatic shifts in government policy. Instead, they argue that if continued inquiry confirms the preliminary findings, public choice theory might, in time, lead to some promising applications (p. 6).

I. PUBLIC CHOICE THEORY

As developed in Chapter One, the first and foremost tenet of public choice theory challenges the traditional assumption that government operates in the public interest. Instead, public choice theory views the policymaking process as a battlefield where legislators, bureaucrats, interest groups, and individual voters compete to maximize their own private interests.

A common method of public choice analysis is to hold constant the behavior of three of these competing groups and then to consider the incentives influencing the remaining group's maneuvers. For example, some public choice scholars have focused on welfare maximization of legislators by holding the behavior of the other political actors constant. Farber and Frickey recognize that politicians need to raise money and remain popular to keep their jobs and thus accept the public choice argument that the pursuit of reelection exerts a strong influence on legislative decisionmaking (p. 24).

A legislator may stay popular by providing two distinct services to her constituents (p. 22). First, she can tailor her voting behavior to the wishes of the majority of her constituents.¹⁰ Similarly, she can introduce legislation to protect and promote her constituents' general interests. Second, she can act as a liaison between individual constituents and federal agencies. She — or more correctly her staff — might, for example, intervene with the Social Security Administration to assist a constituent in receiving his check.

law and economics research has begun to reach a point of diminishing returns. Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23, 26 (1989).

8. The authors might have put this recent history in perspective by including a brief discussion of the historical development of public choice theory. Tollison, *supra* note 6, at 339-41, includes such a discussion.

9. In fact, a reader with a strong background in political economy or in legal process might not find the book very useful. The authors did not address the book to this audience.

10. More precisely, she can vote in a way that will maximize her expected number of votes.

Underlying this view of the behavior of legislators is the assumption that constituents will perceive continuation of these services to be in their own economic interest and will rationally respond by voting accordingly. However, Farber and Frickey assert that actual voting behavior is not entirely consistent with this assumption and that voters do not always act rationally in their own self-interest. In fact, truly rational self-interested citizens would not vote at all because voting is costly and, according to the authors, produces no visible benefits (p. 26). It poses a free-rider problem (p. 24), and, after all, no election is ever decided by a single vote. The authors propose instead that civic duty motivates citizens to vote (p. 27).

Note, though, that two arguments support the view, dismissed by the authors, that voting is consistent with the rational self-interest model. First, as stated by Professor Dwight R. Lee,

[P]eople receive satisfaction from participating in processes they feel are important, from supporting things they believe are good, and from opposing things they believe are bad. People are motivated to go to the polls and vote for much the same reason they are motivated to go to the sports arena and cheer.¹¹

Second, even if one accepts the authors' view that ideology plays a role in voting (p. 27), one can argue that voting based on ideology is consistent with public choice. As Professor Lee suggests, voting provides constituents with a cheap way to express their preferences.¹² Voters will express their preference based on their knowledge about a candidate, which can be extremely limited. Consequently, they will vote for a candidate based on ideology and demeanor, which serve as readily discernible signals predicting how the candidate will act if elected.

In addition to or in lieu of serving her constituents, our legislator may also maintain her popularity through political advertising and promotion. Such activities, and the political consultants engaged to coordinate them, do not come cheap. Thus, legislators feel compelled to raise a great deal of money and at the same time avoid negative publicity. Special interest groups can provide legislators with money and with publicity (both good and bad). Consequently, public choice scholars ascribe great power to these groups.

Farber and Frickey do not subscribe to the dominant public choice view that the power of interest groups *necessarily* results in inefficient political outcomes out of sync with the public interest. Rather, they adopt a more cautious view that rent-seeking by interest groups poses a potential problem (pp. 33-37). Rent-seeking occurs when an interest group pursues an outcome which is economically beneficial to it but

11. Dwight R. Lee, *Politics, Ideology, and the Power of Public Choice*, 74 VA. L. REV. 191, 193 (1988).

12. *Id.* at 194-95.

will result in a net cost to society as a whole.¹³ A classic example of rent-seeking by special interest groups occurs when domestic producers seek trade protection from foreign goods.¹⁴ Such protection is economically inefficient because the costs incurred by consumers and others as a result of the protection exceed the economic gains to the domestic producers.¹⁵ In addition, the costly rent-seeking behavior itself generally serves no useful function.¹⁶

Farber and Frickey question the public choice premise that rent-seeking is necessarily undesirable because it is inefficient (p. 34). They argue that an economically efficient outcome is not necessarily socially desirable. For example, equity concerns might conflict with efficiency. Accordingly, the authors believe that "rent-seeking can be justified when it advances other social values."¹⁷

Farber and Frickey omit significant discussion of the public choice view of bureaucracy. Under this view, as advanced by George Stigler and others, bureaucrats build empires, maximize budgets, and take actions that protect their receipt of lucrative post-government employment.¹⁸ With the rise of the regulatory state, bureaucrats play an increasingly important role in developing and interpreting our public law. Consequently, even in the context of a concise introduction, Farber and Frickey's failure to include some discussion of the relationship between public choice and the bureaucracy weakens their work.

As we have seen, the first strand of public choice theory, the battlefield model, suggests that political outcomes may reflect private rather than public interests. In Chapter Two, the authors develop a second strand of public choice theory known as Arrow's Theorem, which suggests that political outcomes may not reflect dominant political preferences at all. Instead, political outcomes may be distorted by strategic behavior and the filtering of combinations of voter preferences through agenda-setting rules (pp. 38-40). As a result, outcomes may seem in-

13. Note that only some legislation is influenced by rent-seeking. If the cost of influence is greater than the perceived benefit, the interest group will not act. The degree to which rent-seeking pervades the legislative process is unclear. The authors take the position that "in presuming that statutes are normally the result of self-serving influence, the rent-seeking model is too cynical about the legislative process." P. 68.

14. ROBERT J. BARRO, *MACROECONOMICS* 530-31 (1984).

15. *Id.*

16. Special interest groups, however, may lower the cost to the legislator of gathering information upon which to base their legislative decisions. The interest groups presumably have an incentive to tell legislators at least partial truths in order to avoid discrediting themselves and losing any chance of influencing future legislation.

17. P. 35; see also Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 226 (1988).

18. See, e.g., DWIGHT R. LEE, *FISCAL POLLUTION AND THE CASE FOR CONGRESSIONAL TERM LIMITS 7* (Center for the Study of American Business Contemporary Issue Series No. 51, 1992) (discussing role of bureaucracy in promoting the growth of government spending); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

coherent. Farber and Frickey do a superb job of clearly communicating the intuition behind this complex material.

Notwithstanding the incoherence that Arrow's Theorem predicts for a democracy, American government exhibits some degree of both coherence and stability. The authors conclude, therefore, that classic republicanism creates a countervailing influence on our political system. They assert that, "[a]s compared with public choice, republicanism views the role of government as far more creative. Rather than mechanically processing preferences, government involves an intellectual search for the morally correct answer" (p. 44). Farber and Frickey seem to believe that neither public choice theory nor classic republicanism offers a complete description of the political process. Nevertheless, they conclude that several features of the political system's structure limit the incidence of the behavior predicted by Arrow's Theorem. For example, our strong two-party system facilitates preference accumulation through coalition building (p. 49). In addition, the separation of powers promotes stability. Ultimately, the authors reject the Arrovian view of democracy as a black box intended to produce strict majority rule. In sum, they state, "a viable democracy requires that preferences be shaped by public discourse and processed by political institutions so that meaningful decisions can emerge. Given this richer understanding of democracy, Arrow's theory holds fewer terrors" (pp. 61-62).

II. APPLICATIONS OF PUBLIC CHOICE

The second part of *Law and Public Choice* applies public choice theory both to identify defects in the American political system and to develop solutions to them. In Chapters Three and Four, Farber and Frickey discuss and largely reject sweeping reform proposals suggested by public choice scholars. Chapter Three responds to an argument made by Professor Richard Epstein and others that public choice theory provides persuasive justification for a return to active judicial review of federal and state economic regulation. Inherent in Epstein's argument is the public choice belief that government regulation cannot be presumed to further the public interest. Consequently, where a court can identify rent-seeking regulation, which by definition is economically harmful, it should strike down the regulation in order to protect the public interest (p. 67).

Farber and Frickey reject the revival of vigorous judicial review of economic regulation on three primary grounds. First, they find fault with the idea that rent-seeking behavior by interest groups is so pervasive and successful as to dictate political outcomes (p. 68). The authors believe that (1) rent-seeking occurs only where the cost of influence is less than the benefit, and (2) the cost to the interest group of exerting countermajoritarian influence increases as the cost to the

legislator of ignoring voter preferences increases.¹⁹ Consequently, in many situations, voter preferences rather than interest group preferences (as advanced through rent-seeking behavior) will predominate. As an example, the authors cite recent deregulation of several major industries as inconsistent with a pure rent-seeking model. In each episode of deregulation, the interests of diffuse consumers in increased competition prevailed over the special interests of the regulatory monopolists (p. 68).

A second problem is that this form of judicial review is potentially overbroad, reaching "legislation involving tariffs, defense contracts, public work projects, direct subsidies, [and] government loans" (p. 68). It would require substantive review of virtually all regulation and force the judiciary to function as a superlegislature. "[I]f taken seriously, [such review] would require much broader judicial review than even the *Lochner* Court ever contemplated" (p. 68).

Finally, Farber and Frickey argue that facilitating economic efficiency is not the only legitimate goal of government (p. 69). Government may also promote societal values such as "environmentalism, racial equality, [and] redistribution of income" (p. 69). Consequently, the authors suggest that effectuating other public values may justify inefficient legislation produced by rent-seeking behavior.

Chapter Four addresses the extent to which judges should rely on legislative history to interpret statutes. Traditionally, legislative history has been viewed as reflecting the intent of the enacting legislature. Public choice rejects the existence of such coherent intent. Justice Scalia and Judge Easterbrook argue that legislative history should play a very limited role in statutory interpretation. In most cases, they believe the language of the statute alone should control its interpretation (p. 90).

The authors concede that statutory language should often control, but they disagree with Scalia and Easterbrook's premise that courts should generally disregard legislative history (p. 102). They argue that sometimes one *can* divine a coherent legislative intent underlying a statute. In these instances, judges may find such intent useful in resolving statutory ambiguities. Farber and Frickey also reject the opposite extreme exemplified by judicial opinions that appear to treat committee reports (often prepared by youthful congressional staff members) as meriting the same weight of authority as the statutory language itself (pp. 98, 102).

The remainder of the book describes Farber and Frickey's views

19. The cost of ignoring voter preferences increases when the voters perceive legislation as important. For example, voters may have difficulty perceiving the importance of small changes in the tax code, and such changes are very susceptible to special interest group maneuvering. In contrast, a special interest group is less likely to prevail in areas where voter interest and understanding are high.

on the proper application of public choice to public law and identifies some modest reforms that could be implemented immediately. Finding that "what we do know about the legislative process is that ideology, economic interest, and legislative structures all play roles," but that "their relative importance is unclear and probably quite variable" (p. 116), Farber and Frickey are unwilling to embrace any theory which posits a consistently dominant role for any one of these elements. Instead, like many of the public choice theorists themselves,²⁰ they seek to employ the stabilizing aspects of public choice theory to facilitate the political system's ability to formulate responsive public policy (p. 117).

The authors want courts to enforce "structural and procedural constraints on those aspects of the democratic process that public choice suggests are most vulnerable to malfunction" (p. 117). To achieve this goal, Chapter Five suggests first that Congress should restrict the power of special interest groups by limiting campaign expenditures (p. 132) and strengthening political parties (p. 135). Second, courts should police delegation of legal authority to special interest groups (p. 136).

Finally, when interpreting the meaning of a statute, courts should use public choice theory to assist in determining the proper scope of legislative intent (p. 142). For example, public choice could help identify the likely institutional influences present at the time a statute was enacted. In turn, this could enable the court to determine whether the legislature considered a particular issue at that time or failed to because the parties affected lacked representation.

CONCLUSION

Law and Public Choice presents a thoughtful introduction to public choice theory. The reader will take away an understanding of most of public choice's major theoretical underpinnings. The second part of the book, in which the authors discuss how public law might incorporate the insights of public choice theory, is equally accessible. Public choice holds great promise for understanding and perfecting the polit-

20. See, e.g., Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179 (1988). Professors Brennan and Buchanan argue that critics have gone too far in criticizing public choice's results and that further academic inquiry should not focus on extreme results but rather on "the normative exercise of investigating the incentive structures embodied in various institutional forms." *Id.* at 180. Rather than embracing the view that economic motives dominate political actors, public choice theorists, according to Brennan and Buchanan, reject the view that "political agents can be satisfactorily modeled as motivated solely to promote the 'public interest,' somehow conceived." *Id.* at 181. For an example of a critic who attacks public choice theory by setting up such a straw man, see Abner J. Mikva, *Foreword to Symposium on The Theory of Public Choice*, 74 VA. L. REV. 167 (1988).

ical process; however, Farber and Frickey make perfectly clear that we have a great deal to learn before drastic action is warranted.

— *William Dubinsky*