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SYMPOSIUM ON PUBLIC CHOICE AND THE JUDICIARY

Public Choice and the Judiciary: Introductory Notes

*William C. Mitchell and Randy T. Simmons**

I. INTRODUCING PUBLIC CHOICE

Because readers of this journal are likely to be lawyers, professors, law students, judges, and others closely related to the legal profession, many will have only limited acquaintance with "public choice" and its relationship to jurisprudence and the judiciary. This introductory essay is intended to acquaint such readers with historical developments in public choice and to show how public choice theorists have only recently become interested in the concerns of the legal profession.

Although public choice theorists have only recently focused their attention on the judicial branch of government, students of law have been intensely interested in both public choice and economics for two decades. This essay deals with this anomaly and takes account of the fact that many legal scholars are highly critical of how both economics and public choice have been applied—mostly by other legal scholars—to the law and courts. In his article printed in this volume, Richard A. Epstein forcefully captures the content and emotive flavor of much of this criti-

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cism.¹ Finally, although both of this essay's authors are public choice analysts and believe that law and the courts are subsumable under public choice, this introductory essay does not attempt to apply public choice to the judiciary; that daunting task is left to Peter Aranson.²

Public choice may be most simply defined as the application of economic reasoning or rational choice to the study of politics.³ A brief and very simplified explanation of how public choice theory traditionally has been applied to political processes may be helpful before surveying the historical developments of public choice. A basic premise of public choice theory is that individual actors in the political process are self-interested. Public choice analysts have concluded that self-interest causes political actors to make short-term, rather myopic decisions which lead to reelection (or other self-interested ends). The short-term mentality of political decisions leads to inefficiencies in government. This mentality is a cause for concern because just as economists recognize that inefficiencies can cause markets to fail, public choice analysts recognize that inefficiencies can cause governments to fail.⁴ Public choice advocates believe that properly structured political rules can direct the self-interest of individual actors toward increased efficiencies that will benefit society as a whole.

The subject matter of public choice theory comes from political science, while most of the analytical and conceptual tools are taken from economics, mathematics, and game theory. Modern public choice literature resembles a text in economics, replete with such words as utility, marginal benefits and costs, maximization, pareto optimality, equity, preferences, and other terminology suggestive of the marketplace. Public choice analysts contend that use of economic concepts, assumptions, and methods of analysis greatly clarifies the messy processes of politics and puts our understanding of political behavior on the same

1. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827.

2. Aranson, *Models of Judicial Choice as Allocation and Distribution in Constitutional Law*, 1990 B.Y.U. L. REV. 745.

3. This is the definition used by Dennis C. Mueller in his book, *Public Choice II*. D. MUELLER, *PUBLIC CHOICE II* (1989). His book contains the best available review of the main topics addressed by public choice literature, including both positive and normative issues.

4. For one of the earliest essays on the topic of government failure, see Buchanan, *Social Choice, Democracy, and Free Markets*, 62 J. POL. ECON. 114 (1954).

footing with our more sophisticated understanding of market choices and outcomes. The fact that several winners of the Nobel prize in economics have been accorded the honor in recognition of their contributions to public choice confirms the increasing importance and progress of public choice theory.⁵

Major journals of both economics and political science routinely publish articles on public choice topics. Even sociologists and psychologists have recently paid attention to the field.⁶ Some economists—notably, Gary Becker⁷—are widely known for extending rational choice theories to behavior more often considered as non-rational or irrational. For instance, public choice theorists have applied rational choice theories to such topics as crime, love, revolutions, mental aberrations, and compulsive or addictive behavior.⁸

The historical development of public choice may be discussed in terms of demand-side and supply-side analyses of political processes. As discussed in section II, public choice analysts have traditionally applied economic concepts to the “demanders” of political “goods,” namely voters. More recently, public choice theory has been extended to include analysis of political “suppliers,” such as politicians and bureaucrats. Section III addresses this supply-side analysis. Finally, section IV explains how supply-side analysis has led to the topic addressed by Professors Aranson and Epstein—whether public choice concepts may be properly applied to a particular supplier, the judiciary.

II. PUBLIC CHOICE: HISTORICAL DEVELOPMENTS ON THE DEMAND SIDE

A. *Arrow and Black—The Building Blocks of Public Choice*

Public choice was first advanced through the application of symbolic logic and economic terms to elections, voting, and indi-

5. The Nobel prize in economics was awarded to Kenneth Arrow (along with Sir John Hicks of Great Britain) in 1972 and to James M. Buchanan in 1986.

6. See, e.g., J. COLEMAN, *FOUNDATIONS OF SOCIAL THEORY* (1990); J. ELSTER & A. HYLLAND, *FOUNDATIONS OF SOCIAL CHOICE THEORY: STUDIES IN RATIONALITY AND SOCIAL CHANGE* (1986).

7. See G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976).

8. A recent book successfully shows how to apply public choice to these kinds of issues. R. MCKENZIE & G. TULLOCK, *THE NEW WORLD OF ECONOMICS: EXPLORATION INTO THE HUMAN EXPERIENCE* (4th ed. 1985).

vidual preferences. The works of Duncan Black,⁹ the British philosopher-economist, and Kenneth Arrow¹⁰ became foundation stones for the eventual creation of public choice theory. Of course, these theorists did not know where their advances would lead during the subsequent forty years.

Arrow's work dealt a severe blow to welfare economics¹¹ and its policy pretensions. He dispelled the widespread notion that majority rule, through each individual's vote, is somehow a sacred means of advancing the welfare of citizens whose preferences diverge. In particular, Arrow showed that when voters have at least three alternatives to choose from, each voter may preferentially order the alternatives in such a way that no alternative emerges as victor because each alternative could be defeated by at least one other.¹² Arrow's discovery shows that social outcomes may not be consistent with cumulative individual preferences even when each voter is, herself, consistent. The fact that Arrow's monograph of but 120 pages has spawned several thousand articles, papers, and books, confirms the enormity of his finding.¹³ Yet, despite the outpouring of material critical of his work, Arrow's claim still stands as a fundamental theorem of public choice.

Black's contribution to the unfolding anatomy of electoral failure was similar, but a bit less pessimistic. In his analysis of committee decision-making, Black discovered that under majority rule, it was possible for voters to make a decision that would be most preferred by the median voter.¹⁴ He showed that such a choice is optimal because no other choice generates as much social utility; however, the optimal choice is possible only if an im-

9. D. BLACK, *THE THEORY OF COMMITTEES AND ELECTIONS* (1958); Black, *On the Rationale of Group Decision-Making*, 56 J. POL. ECON. 23 (1948); Black, *The Decisions of a Committee Using a Special Majority*, 16 *ECONOMETRICA* 245 (1948).

10. K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951).

11. Welfare economics is the study of market imperfections or failures. A basic tenet of welfare economics is that market failures can and ought to be solved by government.

12. K. ARROW, *supra* note 10, at 3.

13. Perhaps the best elementary exposition of Arrow-type social choice theory is J. BONNER, *INTRODUCTION TO THE THEORY OF SOCIAL CHOICE* (1986). See also J. KELLY, *ARROW IMPOSSIBILITY THEOREMS* (1978); A. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970); Plott, *Axiomatic Social Choice Theory: An Overview and Interpretation*, 20 *AM. J. POL. SCIENCE* 511 (1976); Sen, *Social Choice Theory: A Re-examination*, 45 *ECONOMETRICA* 53 (1977).

14. For an excellent introduction to and summary of work derived from Black's spatial or median voter theory, see G. STROM, *THE LOGIC OF LAWMAKING: A SPATIAL THEORY APPROACH* (1990).

portant condition is met, namely the presence of preferences that are "single-peaked." What he meant is really quite simple: a preference-ordering is single-peaked if, among three choices pertaining to the same property, the chooser opts for an ordering that logically prioritizes the choices in a way that maximizes the chooser's preferences. Thus a voter who places a high value on educational expenditures will choose as his first choice the option which has the greatest educational expenditures, and as his last choice the option offering the least educational expenditures, while placing the choice with an intermediate amount of educational expenditures between the two. If a voter prefers the lowest educational expenditure, he will arrange his choices in the opposite order. However, a voter may prefer the two extremes over the intermediate quantity and would therefore be illogical or "intransitive" with respect to educational expenditures. Such an illogical preference would prevent the median voter from dominating the outcome of how much is spent on education. Black's theorem is now considered somewhat controversial, but remains a major focus of public choice research.

B. *Anthony Downs—A Deductive Explanation of Democratic Systems*

About five years after the publication of Arrow's book, Anthony Downs published *An Economic Theory of Democracy*,¹⁵ which took a rather different direction than the works of Arrow and Black. Arrow and Black focused on formal properties of elections and individual preferences—a kind of electoral mathematics; whereas Downs, employing a non-mathematical economic analysis, produced the first and still most impressive deductive attempt to explain how a democratic system functions. Virtually all subsequent public choice analysis has followed the Downs example, whereas modern social choice analysis has pursued the Arrow-Black model. Only now are we witnessing a concerted effort to amalgamate the two strands of thought.¹⁶

According to Downs' analytical model, a democracy consists of only two groups of decision-makers—voters and political parties. There are no interest groups, no bureaucrats, and no judiciary. The objective of Downs' model is to explain how voters

15. A. DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

16. See D. MUELLER, *supra* note 3.

choose politicians and how politicians, through parties, compete for votes.

In Downs' democracy, dominated by simple majority rule, civic interaction produces both obvious and non-obvious behavior. For example, voters pursuing their own utility have a strong tendency to remain uninformed and to inconsistently participate in elections. Voters, Downs said, are "rationally ignorant."¹⁷ Parties, on the other hand, formulate policies not for their intrinsic worth, but to obtain majority positions in legislative bodies and to hold individual offices. Stated in terms of Black's model, a party will establish policies that tend to satisfy the median voter. As a result, in two-party systems these policies are often vague, similar to those of the opposing party, and less directly related to ideology. In multi-party systems, on the other hand, coalitions are short-lived and less able to deal forcefully with social problems because each party's policies tend to represent an extreme position. Notwithstanding these differences, governments in both settings tend to redistribute wealth and income from the rich to the poor and to favor producers over consumers. And over time, parties try to carry out their promises and to maintain consistent platforms.

Although all of these propositions had been advanced previously by countless political scientists, Downs was the first to tie them all together through the use of economic analysis. Starting only with the basic assumption that humans are self-interested and rational, he was able to deduce these and several other important observations about political behavior. To his credit, the weight of evidence since has supported many of his major propositions.¹⁸

Later, Downs developed a less spectacular theory of bureaucratic behavior.¹⁹ He also developed an influential theory of government expenditure, his chief contention being that most governmental budgets are "too small."²⁰ This claim was based on a theory of information in which, among other things, taxpayer

17. Downs' basic notion is that because acquiring information and voting are costly activities, voters follow the economic calculus of equating benefits and costs at the margin. If marginal benefits exceed marginal costs, the voter gathers information until the value of the last unit of information gathered equals the cost of obtaining it. See A. DOWNS, *supra* note 15, at 207-19.

18. See generally D. MUELLER, *supra* note 3.

19. A. DOWNS, *INSIDE BUREAUCRACY* (1967).

20. DOWNS, *Why the Government Budget is Too Small in a Democracy*, 12 *WORLD POL.* 541 (1960).

perceptions of their tax burdens outweigh perceptions of their benefits. James M. Buchanan later challenged this particular proposition, arguing that the relationship of perceived costs and benefits was exactly the opposite. Fiscal illusions, he argued, are far more prominent in the polity than in the market.²¹ As to this last point, Downs would agree.

C. Riker's Challenge to Downs' Views

Downs' view of democratic politics faced more challenges, especially with respect to his basic assumptions about politicians' incentives. Downs assumed that politicians wish to maximize their vote majorities by maximizing membership in the legislative body.²² Applying game theory,²³ William H. Riker²⁴ disputed this claim and maintained that in situations involving zero-sum outcomes,²⁵ politicians instead form coalitions of the least or minimal winning size.²⁶ His point was based on a simple economic calculation: acquiring larger coalitions would entail more costs than needed to win, and larger numbers of participants in a coalition would necessarily mean smaller shares of the benefits of majority rule for each participant.²⁷

Riker's logic is impeccable; what is less defensible is that zero-sum games are sufficiently representative of the political process to warrant the assumption of least-size coalitions. Much of political bargaining takes place under conditions of positive sum outcomes so that, instead of conflict, there are exchange possibilities that achieve win-win compromises—a point long advanced by James M. Buchanan.²⁸ Given the possibility of posi-

21. J. BUCHANAN, *PUBLIC FINANCE IN DEMOCRATIC PROCESS* 126-43 (1967).

22. This assumption was not consistently maintained throughout the book. See A. DOWNS, *supra* note 15, at 31 ("each party seeks to receive more votes than any other"), and at 51 (each party seeks to receive "the maximum of votes").

23. Game theory purports to explain social situations in which decision makers, pursuing their self-interest, are confronted by others having partially or completely conflicting goals. How these conflicts are handled depends on the type of game and strategies available to the participants. The analyses of game theorists are frequently highly mathematical.

24. W. RIKER, *THE THEORY OF POLITICAL COALITIONS* (1962).

25. A "zero-sum outcome" is one in which the gains of the victor(s) are equalled by the losses of the loser(s).

26. W. RIKER, *supra* note 24, at 33.

27. *Id.*

28. Two of Buchanan's recent collections reflect on this and other related themes. J. BUCHANAN, *LIBERTY, MARKET AND THE STATE* (1986); J. BUCHANAN, *ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY* (1987).

tive-sum outcomes, politicians often seek and achieve more than simple majorities.

Many Supreme Court and appellate court decisions appear to be prime examples of non-zero-sum situations. The larger the majority on a particular case, the more readily all concerned will accept the decision and the less likely litigants and judges will challenge the decision in future cases. Surely Chief Justice Warren must have understood this well when he lobbied his colleagues to unanimously decide *Brown v. Board of Education*.²⁹

D. Buchanan and Tullock

Whereas Downs built his model on an assumed set of constitutional provisions, Buchanan and Tullock raised the fundamental issue of *which* constitutional rules should be and would be adopted. Their book, *The Calculus of Consent*,³⁰ is in many ways a modern restatement of the *Federalist Papers*. Although students of law might find the book turgid, it is probably more relevant to their concerns than works by Downs and others we have noted. According to Buchanan and Tullock, constitutional issues matter most because constitutions establish the basic rules of the "political game."³¹ These basic rules are extremely important in determining policy outcomes, strategies of participants, and the legitimacy of any political undertaking. Because a constitution's wording may have many far-reaching and even unforeseen ramifications, the rational choice of constitutional provisions is of utmost significance.

The major argument set forth in *The Calculus of Consent* relates to the basic premise of majority rule in a democracy. Buchanan and Tullock contend that in making choices, rational decision makers will seek to minimize interdependency costs. Interdependency costs involve two components: the costs of arranging agreements and the unintended external costs resulting from their decisions. In order to minimize these costs, the minimal number of people required to enact legislation or regulations should be chosen. Super-majority requirements should be used for important constitutional rules, while less demanding majorities are appropriate for less crucial and transitory decisions. These lower decision-making standards could even include plu-

29. 347 U.S. 483 (1954). *But see* Aranson, *supra* note 2.

30. J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962).

31. *Id.* at 4-5.

ralities or a choice by a single individual, depending on the subjective costs caused by the choice.

The analysis set forth by Buchanan and Tullock was strongly influenced by their admiration for the unanimity rule, that is, agreement by both buyer and seller in market transactions. While the unanimity rule guarantees pareto optimal results,³² it poses enormous decision costs whenever large numbers of people are participating in the decision process. Therefore, it is not likely that the rule would be used by groups of larger than, for example, twelve jurors dealing with the most serious cases. Less than unanimous choices mean, of course, that losses and losers are permanent features of collective choice. But, losers can accept their losses if they have the impression that they are not permanent losers. "Win one, lose one" outcomes may turn out to balance overall gains and losses in the long run.

III. PUBLIC CHOICE: RECENT DEVELOPMENTS ON THE SUPPLY SIDE

In the late 1960s and early 1970s, public choice analysts shifted attention away from elections and voting and began to analyze what may be termed the "supply side" of collective choice. Just as determinate results in the market cannot be obtained with demand curves alone, determinate political outcomes cannot be achieved without suppliers and a supply function. An insight that took economists more than a hundred years to achieve was recognized within a decade or so by public choice analysts. Still, the works of Arrow, Black, Downs, and even Buchanan and Tullock were primarily demand-driven. Riker's efforts to study coalition size shifted the emphasis to the supply-side, but not until Niskanen's influential work on bureaucracy³³ was the supply side explicitly recognized. Although few have recognized it as such, Niskanen's theory of bureaucracy provides a foundation for public choice analysis of the judiciary because the judiciary is somewhat like a bureaucracy in that many of the judiciary's decision-makers, like bureaucrats, are not elected.³⁴

32. Pareto optimality is obtained when any change in the status quo makes at least one person better off while putting no one in a worse position.

33. W. NISKANEN, *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

34. Whereas federal judges are not elected, many state court judges are. However, there is often little competition for the state judicial positions.

Based on this extension of Niskanen's theories, public choice can be applied to non-democracies such as the judiciary.

Those who examine the nature of public supplies and suppliers do not base their major assertions on the guidance and constraints which voters place on politicians and bureaucrats; rather, their focus is on the range of independence politicians and agencies enjoy in the political process. One need not be a Machiavellian to appreciate that officials possess enormous resources to shape the results of the electoral process and that they exercise much independence during the inter-election period. Public choice analysts have found that both politicians and bureaucrats favor excessive budgets, public spending, deficit financing, overstaffed bureaucracies, inefficient market intervention policies, and practices that disguise both spending and revenue gathering.³⁵ Both types of officials prefer myopic rather than long-run decisions and understand that redistribution from one citizen to another, rather than the provision of public goods benefiting all, makes for tenure in office. Political barriers to entry, especially in legislatures, are of prime concern to public choice analysts. Because of the excessive power of officials, public choice theorists have taken a position similar to John K. Galbraith, who believes that in the marketplace suppliers have power over consumers.³⁶ In addition, public choice theorists also stress that political suppliers have power over market suppliers, a position rejected by the critics of imperfect markets.³⁷

Concomitant with the attention paid to the supply side was a continuing development of what Buchanan has called "constitutional economics," a development within public choice for which he can claim a paramount role.³⁸ *The Calculus of Consent*³⁹ provides a foundation for the field. As Buchanan has noted, the writing of constitutional provisions or at least the formulation of appropriate constitutional principles, as is done rou-

35. See Mitchell, *Fiscal Behavior of the Modern Democratic State: Public Choice Perspectives and Contributions*, in *POLITICAL ECONOMY: RECENT REVIEWS* (L. Wade ed. 1983).

36. See J. GALBRAITH, *THE AFFLUENT SOCIETY* 221-38 (2d ed. 1971).

37. See Mitchell, *supra* note 35.

38. Ostrom's article in this volume is one example of constitutional economics. Ostrom, *Courts and Collectivities*, 1990 B.Y.U. L. REV. 857. He, like Buchanan, is concerned with the design of constitutions, incentives, institutional failure, the ordering of power relationships, and appropriate principles for the establishment and maintenance of government.

39. J. BUCHANAN & G. TULLOCK, *supra* note 30.

tinely by the judiciary, is a throwback to traditional political science as well as to nineteenth century political economics.⁴⁰ Buchanan's unique contribution has been his advocacy of the search for agreement—that is, devising rules that enable conflicting persons and groups to work out accommodations favorable to all involved. Buchanan drew upon both Pareto⁴¹ and Wicksell⁴² for inspiration as well as analytical tools.

Compared to modernized versions of Rousseauian communal theories of democracy in which formal rules are discouraged, constitutional economics demonstrates the power and social utility of rules. In the forceful language of Buchanan and others,⁴³ government and the political process are so potentially dangerous that a democracy left unconstrained will destroy itself. According to this view, the political process is less an agreement-seeking means than a generator of conflict and irresponsibility. Not only are officials tempted to abuse their offices and exploit the citizenry, but citizens also exploit each other. Whereas the marketplace forces buyers and sellers to take account of one another, the political process fails by divorcing costs from benefits and by depending on majorities, rather than unanimity, to make choices. This often leaves the minority unaccounted for. One result is the proliferation of rent-seeking⁴⁴ special interest groups that ultimately lead to the diminution of everyone's welfare.

Constitutional economists, therefore, have not shied away from proposing constitutional reforms designed to constrain opportunities for exploitation. Among others, their proposed constitutional amendments include the following: efforts to require federal governments to balance their budgets; limiting growth in

40. See J. BUCHANAN, *EXPLORATIONS INTO CONSTITUTIONAL ECONOMICS* (1989); *CONSTITUTIONAL POLITICAL ECONOMY* (a new journal published by the Center for Study of Public Choice at George Mason University).

41. V. PARETO, *MANUAL OF POLITICAL ECONOMY* (1971).

42. Wicksell, *A New Principle of Just Taxation*, in *CLASSICS IN THE THEORY OF PUBLIC FINANCE* 72 (R. Musgrave & A. Peacock eds. 1958). Wicksell viewed government as a quid pro quo process of exchange between citizens. He further assumed that government activity is justified only if it benefits all citizens. Therefore, he advocated the unanimity rule.

43. For an especially good, brief, non-technical exposition, see D. LEE, *THE POLITICAL ECONOMY OF SOCIAL CONFLICT OR MALICE IN PLUNDERLAND* (1982). A more extensive treatment may be found in D. LEE & R. MCKENZIE, *REGULATING GOVERNMENT: A PREFACE TO CONSTITUTIONAL ECONOMICS* (1987).

44. "Rent seeking" is a term used by economists to classify actions taken by individuals and interest groups to change public policy in a manner that will redistribute more income to themselves.

government by tying proposed expenditures to tax collections; restricting the growth of the money supply; and returning economic powers to state and local units.

Buchanan and his colleagues are reviving an old Federalist theme: political power is best constrained not by creating more altruists or by giving them more leeway, but by protecting us from those who would harm us most.⁴⁵ Politics seems to bring out both the best and the worst in us. Thus, prudence suggests that constitutions organize power just as provided by the Founding Fathers, who created built-in competition through federalism, separation of powers, and a bill of individual rights against government. Nevertheless, a constitution's purpose should be to enable citizens to arrange mutually agreeable exchanges rather than to foster one-way exchanges from benevolent leaders or, even worse, to promote coerced tributes to dictators.

IV. ECONOMIC ANALYSIS OF LAW AND THE JUDICIARY

Our thumbnail discussion of public choice has made relatively little reference to the judiciary, the law, and lawyers. The reason is simple: public choice has had little to say about these topics. Perhaps one reason for this "omission" is the prominence of economists in public choice. Except for those working on the economics of industrial organizations, few economists confront problems raised by the choice and administration of law. Further, economists probably have assumed that a theory of democracy should focus on those who decide laws—voters and politicians—and not on the courts, judges, and lawyers who administer laws. After all, the federal judiciary is not an elective body responsible to the electorate; indeed, its distinguishing feature is its presumed independence from transitory political influences. The unique role of the judiciary and its powerful history of intellectual concerns have set it apart from activities normally studied by public choice scholars.

While public choice analysts were indifferent to the law and the judiciary, many students of law were not indifferent to economics. Although legal scholars ignored public choice, they analyzed law and the judiciary in a manner parallel to and consistent with public choice analysis. One of the first full-scale statements of the economic analysis of law was Judge Richard Posner's book appropriately entitled *The Economic Analysis of*

45. See generally J. BUCHANAN, *FREEDOM IN CONSTITUTIONAL CONTRACT* (1977).

Law.⁴⁶ The three editions of Posner's book include few citations to the public choice authors cited in this essay. Posner was less interested in how and why legislators and voters choose the "laws" they enact than in the economic implications of whatever laws they select. As a judge, he was also deeply concerned, of course, with judge-made law and its evolution. Posner's revolutionary point of departure from traditional legal scholarship was a concept long revered by economists—efficiency.

Posner has challenged skeptics and opponents to clarify their own thinking about the law and its institutions. His challenge has succeeded beyond all expectations. Radical leftists and conservative students of the law, alike, have agreed that there is something they intensely dislike about Posner's views.⁴⁷ Regardless, this exchange of views has resulted in twenty years of intellectual excitement and an enormous body of literature on virtually every aspect of law and the courts. Furthermore, the law and economics school of thought has succeeded in creating sweeping changes in the way law is viewed and taught. As a result, centers have been founded for training in law and economics,⁴⁸ economists have been hired by law schools,⁴⁹ and George Mason University Law School dedicates itself to teaching and applying an economic orientation to law.

In addition to their assumption that exclusive focus should be on those who decide laws, public choice analysts' indifference to the judiciary may also be explained by the fact that the judiciary is commonly thought to be so organized that public choice principles are not applicable. Most judges are not elected; once on the bench, they enjoy long, often life-time, terms. In addition, judges are constrained in ways unfamiliar to politicians and voters. A judge's role is sharply demarcated by custom, common law, intellectual traditions, and specific rules for interpretation that seem to permit only minimal room for self-interest and ideology. A judge's professional role rests on considerable trust and

46. R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* (3d ed. 1985).

47. See, e.g., Farber & Frickey, *The Jurisprudence of Public Choice*, 65 *TEX. L. REV.* 873 (1987).

48. Two of the best-known law and economics centers are at George Mason University and at the University of Miami.

49. Some of the Ph.D economists who currently teach at law schools include Fred McChesney at Emory University, Henry Butler and Steven Crofton at George Mason University, Charles Goetz at the University of Virginia, Victor Goldberg at Columbia University, David Haddock at Northwestern University, and William Landes at the University of Chicago.

even non-rational regard. In short, although judges are mostly free from voter scrutiny, they are not free to "be themselves." Thus, while public choice has little difficulty assuming that voters, politicians, bureaucrats, and interest groups maximize their behavior, what judges maximize is still debated. The same is true for juries, and perhaps less so for lawyers, both government and defense. Epstein addresses all of these doubts quite clearly in his paper later in this volume.⁵⁰

Despite the public choice field's lack of analysis of the judiciary, economic analysis does shed a great deal of light on a broad range of topics involving law and judicial activities. An early example involved a matter which political scientists never addressed, namely the survival power of legislation once it is enacted. Students of legislatures have occasionally noticed but never explained why legislatures rarely overturn the work of their predecessors. Landes' and Posner's pioneering answer⁵¹ was couched in basic economic terms: interest groups do not bid as high for a law that is likely to be short-lived as they bid for one that is likely to be long-lived. Both interest groups and legislators have legitimate reasons to stabilize laws based on good public choice reasoning. Because incumbent legislators are usually re-elected, legislatures are soon dominated by long-tenured members who perpetuate laws they have formerly enacted. Yet in their study of the independent judiciary, Landes and Posner failed to identify an incentive for judges to support the demands of interest groups and legislators. However, Tollison and his co-workers recognized such an incentive by noting that judicial budgets and salaries are decided by legislatures.⁵² They found that legislatures which provide larger judicial budgets tend to have their laws confirmed more often by judges.⁵³ In short, many people concerned in the legislative process have plausible self-interests that serve to perpetuate longstanding laws.

The fact that the judiciary is surrounded by much pomp and ceremony and is protected from bias does not lessen the applicability of economics and public choice to its processes. In

50. Epstein, *supra* note 1.

51. Landes & Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975).

52. See G. Anderson, W. Shugart, & R. Tollison, *There's No Such Thing as a Free Judge* (Aug. 1987) (an unpublished paper on file with the Virginia Law Review Association).

53. *Id.* at 12.

fact, economics and public choice can help us understand why such pomp and protection exist and what consequences flow from the current system. Several factors can be identified as significant in shaping the judiciary: who pays whom; the length of and number of terms of office; whether judges are elected or enjoy lifetime tenure; and the fact that judges are allowed to make or shape common law.

Professor Aranson's contribution⁵⁴ in this volume neatly integrates and summarizes research on judicial behavior under the rubric of spatial theory,⁵⁵ one of the basic areas of public choice research. He presents work that is fundamentally collective choice, including the appointment process, assignments to write majority opinions, and coalition formation among justices. But he does more than cast political science studies in the language of public choice; he notes that legal studies actually are conducted under three different sets of assumptions, each of which leads to quite distinct positive and normative implications. The three orientations, labeled "conflicts of vision," are rent-seeking, rule-governed choice, and wealth maximization.⁵⁶ Although each "vision" itself has some analytical value, each is at least partially inconsistent with one or both of the other approaches. Despite these inconsistencies, Aranson maintains far more optimism about the contribution of public choice to our understanding of the judiciary than does Epstein. Epstein's article, "The Uses and Limitations of Public Choice Theory," emphasizes the limitations rather than the uses of public choice theory. His analysis is forecast in the article's first sentence: "The question, how do judges behave in deciding cases, seems to be peculiarly immune to the ordinary techniques of social science analysis."⁵⁷ Epstein seems to completely reject both the public choice and the economic analyses of the judiciary. What Aranson sees as a considerable achievement, Epstein sees as a "meager harvest."⁵⁸ Epstein also rejects the Landes-Posner contention that judges enforce deals among rent-seeking interest groups.⁵⁹

54. Aranson, *supra* note 2.

55. In its simplest form, spatial theory is based on the assumption that political opinion can be modeled as lying along a single liberal-conservative (left-right) dimension. More complex models add more dimensions and are multimodal. For an excellent review of applications of spatial theory, see G. STROM, *supra* note 14.

56. Aranson, *supra* note 2.

57. Epstein, *supra* note 1, at 827.

58. *Id.*

59. *Id.* at 828.

Although Professor Vincent Ostrom's paper⁶⁰ does not fit neatly into the debate about application of public choice to the judiciary, it does deal with an extremely interesting and important problem involving traditional analyses of both constitutional law and modern public choice. The basic unit of modern public choice analysis is the individual; but as Ostrom maintains, many of the most powerful decision-making units today are collectivities, both public and private. This raises the question of how to deal with collectivities within normative as well as positive analyses. Ostrom does not attempt to answer this important question; however, his diagnosis relies on linguistic questioning and a profound suspicion that the answers provided by the Warren Court were not helpful. However these collectivities issues might be considered in the future, there surely will be a need for continued public choice inquiry. We suggest that Posner's economics of law framework sheds light on how collective responsibilities might best be defined and what role the courts might play in the definition and its implementation.

V. CLOSING NOTES

Each paper in this volume is lengthy, detailed, and written with scholarly passion. The papers are far too subtle to be readily characterized or classified, but each raises significant questions and surveys complex bodies of literature. Although Epstein quite properly questions basic tenets of public choice, we believe that his analysis is basically consistent with a public choice and economic analysis that focuses on institutional restraints. To be sure, judicial constraints are different from constraints on legislative and administrative bodies, but these differences are exactly what sound economic analysis should point out in order to observe and explain the actions of different institutions.

Aranson, in his thorough survey of behavioral studies and public choice, shows how social science deepens our understanding of the judiciary. His paper is a useful counter to that of Epstein. On the other hand, we are inclined to believe that his use of behavioral material is sometimes strained and without the profundity achieved by Posner, Epstein, and Ostrom. Nevertheless, these papers offer a broad-ranging and highly competent survey of what has been going on at the nexus of public choice and its efforts to understand law and the judiciary.

60. Ostrom, *supra* note 38.