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Public Choice

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The Coase Lecture Series

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As everyone here probably knows, the point of this lecture series is to explore the many ways that economics has reshaped the fields in which we work. Within the series, my assigned topic is "public choice." If you think of this as the political science analogue to law and economics, you won't be that far off. Just as some scholars have been using economic models to understand legal phenomena for over three decades, others have been applying them relentlessly to political phenomena.

Thinking of the subject as the economic analysis of politics should also clarify just how intractable a topic this is. Essentially, it's as large as law and economics itself—and my job is to explain it all to you in 40 minutes. That being silly, I won't pretend to do the topic justice. Instead, I'll simply outline a few of its more important implications for legal work. If an issue doesn't relate fairly directly to the law, I'll ignore it. And if I ignore points fundamental to political science—well if political scientists don't like it they can fund their own lecture series.

Let me make three basic points, and a series of digressions. First—and most basically—in modern democracies, politicians must work to compete in electoral markets or they do not stay politicians. As a result, there's a market constraint to politics. Second, because of this constraint, when constituents don't much care about an issue, rational politicians will likely trade their vote on it for a vote on something their constituents do care about. There's simply no such thing as a free vote. Last (a subtheme throughout this lecture), institutions decisively shape the way voter preferences get mapped onto legislation. Often, the institutional structure of the electoral market itself determines what becomes law.

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THESIS I: THERE IS A MARKET CONSTRAINT TO POLITICS.

The central observation of public choice is simple: politicians in modern democracies operate within the constraints of a competitive electoral market. Many of you will protest that you knew this. And as a profession we have indeed collectively known it, and known it for decades. But we've known it in the same way that before law and economics we claimed to know that firms competed in economic markets. We knew it. And we blew it. We blithely proceeded to theorize in ways that ignored the point entirely.

More than anything else, politicians need to win elections. Granted, if we surveyed them most probably would not volunteer that they consciously try to maximize their chance of reelection. But what they tell us they do is beside the point. For whatever they say they do, those that don't work to maximize their odds of reelection will less likely stay in office. As two scholars recently put it, "legislators who indulge their preferences at the expense of their constituents' preferences put themselves at a competitive electoral disadvantage."[1] According to an enormous array of empirical studies, legislators who change the way they vote and ignore their constituents' preferences regularly lose their jobs.

To illustrate some of the consequences of this for legal scholarship, let me give an example. Lest anyone take it personally, let me pick on someone who teaches somewhere else. Recently, a visiting scholar argued here that legislators should deliberate more about constitutional matters. When they want to decide whether to pass a bill, said he, they should talk about whether it's constitutional. Courts should not be the only voice on whether something is constitutional. Instead, our legislators should discuss the constitutionality of what they do, and only do things they think constitutional.

Is this a good idea? Sure. And so is Santa Claus. The world might indeed be a better place if legislators honestly debated the constitutionality of statutes, but the question is whether we have any reason to think that real-world legislators would hold those debates. Restated, the question is whether we have any reason to think that legislators who conscientiously debate the constitutionality of

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[1] Bruce Bender & John R. Lott, Jr., Legislator Voting and Shirking: A Critical Review, Public Choice (forthcoming 1995).

statutes increase their odds of reelection. Because unless we do, this entire proposal is yet another professorial mind game of no real-world significance.

Digression 1: What do voters really want?

All this raises the first digression: what, as Freud would have put it had he studied public choice, do voters really want? If voters in fact valued constitutional deliberation, then our visitor's proposal might indeed have some significance. And at the level of unhelpful abstraction, the answer is relatively clear: voters want a mix of private and public goods. On the one hand, they want some private goods. They want assets and services (like wealth and pork) that they can enjoy to the exclusion of others. Routinely, they reward legislators who redistribute wealth to their districts. On the other hand, any model that relies exclusively on pork-maximizing politicians will miss much of real-world politics. Voters don't just want pork. They also want an broad portfolio of public goods—policies (like low taxes and a stable currency) whose benefits extend beyond them and their own districts.

The question here is whether voters also care about constitutional deliberation. To my knowledge, no one has directly studied the issue. But there is a fairly direct market test. To be sure (as noted later), because institutions mediate voter preferences we have no reason to think political outcomes necessarily track voter preferences. Yet if voters highly valued constitutional deliberation, one would think at least some legislators would find such deliberation advantageous. Notwithstanding, few do. In turn, that fact itself suggests that constitutional deliberation would not help them in the ballot box.

Digression 2: Pork is endogenous.

As a second digression, note that the amount of pork one observes is endogenous to the system: the equilibrium ratio of public to private goods dispensed in any political environment will depend on the institutional structure of the electoral market. More simply, how one structures electoral incentives will determine the amount of pork (or anything else) that politicians provide. Take a polar example from Japan.[2]

Under the post-war Japanese electoral system for the national Lower House, voters cast ballots (a single non-transferable vote, SNTV) for individual candidates (not for parties), but elected several representatives from each district (multi-member districts, MMD). Consider the problem that this posed for a party that hoped to amass a legislative majority. Because it needed to elect several candidates from most districts, it didn't just need to maximize the votes it obtained. It also needed to divide those votes evenly among several candidates in most districts. Ironically, if instead it ran a fabulously popular candidate, that candidate could take votes away from other candidates in the party and thereby reduce the total number of party candidates elected.

An ideal system for dividing such votes would have been cheap and predictable. Suppose party leaders thought they had enough support in a district to elect two representatives. Ideally, they might have told their supporters to vote for candidate *A* if their telephone number ended in an even digit, and for *B* if it ended in an odd. Unfortunately, such mechanical schemes work only if voters are willing to follow instructions from party headquarters. During the post-war decades, voters of the long-ruling Liberal Democratic Party (LDP) were seldom that loyal.

Under a more intuitively obvious system, party candidates would have competed against each other on ideological grounds. If party leaders thought they could field two representatives in a district, they would have fielded both a relatively left-ish candidate and a relatively right-ish one. Relatively left-ish supporters would have voted for the first. The more right-ish would have voted for the second. Unfortunately again, the scheme raised basic problems. First, it was inherently unpredictable. As lines go, the one between "left-ish" and "right-ish" is hardly the cleanest. Second, when they compete on ideological lines, candidates depreciate the value of the party label itself (as American parties routinely find during presidential primaries). One of the more valuable things a political party can provide is a standard portfolio of public goods for which its

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[2] Drawn from J. Mark Ramseyer & Frances McCall Rosenbluth, Japan's Political Marketplace ch. 2 (Cambridge: Harvard University Press, 1993).

candidates stand. By disputing the contents of that portfolio, candidates reduce the value of the ideological label that the party would otherwise provide them.

Instead, the LDP divided its supporters through candidate-specific support groups. To build those groups, its candidates dispensed an elaborate array of private goods. To their supporters, they gave pork galore: from sewers and train stations to vacation packages and cash. Through their money machines, they amassed voters who were loyal to them personally. And through that personalized loyalty, party leaders divided the vote.

Two points: First, the amount of pork the LDP dispensed was neither a historical accident nor a cultural artifact. Instead, it was a predictable and rational response to the institutional structure of the electoral market. Indeed, scholars have told much the same story of 19th Century Britain. During the course of the century, Britain gradually eliminated multi-member districts. And as district magnitudes fell, so too did the relative electoral importance of pork. Second—and more basically—legislative outcomes don't just track voter preferences. Instead, they reflect the institutional design of the market through which those preferences get transformed into policies.

Digression 3: Interest groups are endogenous.

Much the same logic applies to the influence interest groups wield. One of the earliest accomplishments of public choice was to show how interest groups often had an influence all out of proportion to the number of their members.[3] The reason was simple: smaller groups (i) generally could organize more cheaply than larger ones, and (ii) often cared more deeply about certain issues than the larger groups did. Milk producers had a larger impact on dairy policy than milk consumers, for example, even though more voters drank milk than produced it and even though cows didn't vote. Producers had a larger impact because they could organize more cheaply and because they cared more deeply about milk prices than did consumers.

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[3] See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (Cambridge: Harvard University Press, 1965).

The interesting point is that the influence that interest groups wield depends—again—on the institutional structure of the electoral market. In effect, early public choice scholars modeled the demand for statutes. Institutional analysis helps us understand the supply.[4] The basic logic is simple: Interest groups will provide legislators with money, and legislators will then use that money to buy (usually figuratively) votes. Because the ability of a legislator to use money to buy votes depends on the institutional structure of the electoral market, so the influence of the groups which provide that money will depend on that structure as well.

Again, Japan provides a polar case. Because LDP politicians needed to cultivate large personal support groups to compete under the SNTV-MMD electoral system, they needed huge amounts of money. Because interest groups could provide that money, they had a relatively greater impact in Japan than they have had in most other functioning democracies.

In effect, politicians face a trade-off: They can (a) give policies to their constituents for votes, or (b) give policies to interest groups for money, and use that money to obtain votes. Rational politicians will sell policies for money to interest groups, up to the point at which the votes they lose from catering to such interest groups equal the votes they can acquire with the money the interest groups pay them. In turn, the amount of legislation they sell to interest groups will depend on (i) how much (stated in terms of legislative favors) an interest group charges for its support, (ii) how much (stated in terms of private goods) voters demand for their votes, and (iii) how much an interest-group-biased statute outrages voters. The answers to those questions, however, depend crucially on the institutional structure of the electoral market.

THESIS II: THE ELECTORAL MARKET CONSTRAINT LEADS TO VOTE TRADING.

Consider now a basic consequence of competition in the electoral market: vote trading. When a legislator's constituents don't care intensely about issue *A*, a vote-maximizing legislator won't vote

[4] See Kenneth Shepsle, Congress Is a "They," Not an "It": Legislative Intent as an Oxymoron, 12 International Review of Law and Economics 239 (1992).

his principles on *A*. Instead, he'll find an issue *B* that his constituents do care about, and trade his vote on *A* for another legislator's vote on *B*.

Again, take the proposal that legislators deliberate about the constitutionality of bills. When asked whether electoral market constraints would allow legislators to indulge in such principled exercises, our visitor said something like this: "Well, sure. Sometimes legislators won't have the leeway to do it. But there's a lot of room for principles, because most of the stuff legislators vote on are issues that their constituents don't care about." The point is true. And horribly misleading.

To explore the impact of constituent apathy more fully, take an issue of *real* national importance—whether *Casablanca* should be declared a National Historical Treasure on the order of Robie House, such that colorizing it would be a felony. I'd think the interest in this issue would be regional. Somewhere in southern California, somewhere in Burbank, there's probably an army of people with green eyeshades and tiny brushes, painting Ilsa's dress blue, frame after frame. "Sure, the Burbank legislator will have to vote the self-interest of his voters," our visitor might have argued. "But most other legislators can be principled. They ought to be able to debate the constitutionality of declaring *Casablanca* a National Treasure."

Suppose, though, that you're a legislator from a district where voters don't much care about the color of Ilsa's dress, but do care about school prayer. Will you vote your principles on *Casablanca*? Maybe, but the market constraints are that if you do you throw away a chance to raise your reelection odds. If you do care about your reelection, you'll instead go to your Burbank friend and cut a deal. "I'll vote your way on colorization," you'll say, "if you vote my way on school prayer." In doing so you increase the welfare of your constituents. In the process, you also increase your odds of winning the next election. The key here is that voters in different districts often care intensely about different issues. Burbank voters care intensely about colorization; voters elsewhere care intensely about other things. Given this disparity, a trade necessarily can make voters in both places better off; a politician who negotiates such a trade necessarily endears himself to them.

Digression 1: So what did legislators really want?

The possibility of these trades takes us to a discussion of "legislative intent." Although a few sophisticated commentators use the phrase to refer to the vote trades that the legislators thought they had negotiated,[5] most scholars and judges use the phrase to mean something very different: What policies did the legislators think would be best? What programs did they want to see implemented? Were their intentions pure, or somehow illegitimate? Consider the implications of vote trading for such questions.

Suppose there are four legislators in a legislature (if you want to be more realistic, suppose there are four roughly equal coalitions of legislators). Legislator *A* is from Burbank. He wants a statute declaring movie studios free to paint all movies any way they wish. He calls it the Colorization Liberty Act (CLA).

Legislator *B* opposes colorization. He thinks Casablanca should be a National Treasure, and should forever remain black and white. Did Ilsa really wear blue the day the Germans marched into Paris? He thinks the visual text ambiguous, and would leave that ambiguity ambiguous. *C* and *D* agree with *B*.

What can *A* do? Can he get the CLA passed, when *B*, *C*, and *D* think it a travesty? The answer is "maybe." Maybe, because he may be able to cut a deal with *B* and *C*, and leave *D* rotting with Ugarte in a north African jail. Suppose *B* comes from an district with fertile but dry land. *A* will promise him support for an expensive hydroelectric dam. Suppose *C* comes from a retirement community. A will promise her a vote for higher Medicare payments.

If *A* can put together the package, the legislature will then pass three statutes: the CLA, a dam in *B*'s district, and enhanced Medicare. The incomes of voters in *A*, *B*, and *C*'s districts will rise. Faced with funding dams and Medicare programs that disproportionately benefit voters elsewhere, the incomes of voters in *D*'s district will fall. Faced with badly painted movies, even their utility from cinematic leisure will decline.

Now suppose that the new CLA is ambiguous. In interpreting its terms, what should a court do? Traditionally, commentators and judges urged courts to explore the "legislative intent" behind the

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[5] E.g., Richard A. Posner, The Problems of Jurisprudence ch. 9 (Cambridge: Harvard University Press, 1990).

statute. If by that intent, they mean the deal that *A*, *B*, and *C* thought they were cutting, fine (although even that will often be ambiguous). Yet most commentators and judges use "legislative intent" to ask what legislators thought would be good policy. In our example, though, a majority of the legislators thought the statute terrible policy. *A* thought it was a good idea, but *B*, *C*, and *D* detested it. They voted for it anyway because they were bought. In exchange for statutes that redistributed wealth to their districts, they voted for what they thought was a bad bill.

Note two points about such exchanges. First, sometimes you won't have a clue that they occur. Legislators don't register their deals in the *Congressional Record*. Second, they're perfectly legal. You may think they stink, and courts may too. Tough cookies. Courts don't have the option of striking down a statute on the grounds that most of the legislators thought it outrageous but voted for it because some of them got money routed to their district. At root, vote trades are not a subversion of democracy. They follow directly from competitive elections.

Digression 2: Political parties facilitate vote trades.

This discussion suggests a new perspective on political parties. For one of the major functions that parties perform is to provide a forum where legislators can arrange these trades.[6] Parties can facilitate vote trades for two reasons. First, transactions costs are generally lower for intra-party trades. Because of the repeated nature to intra-party negotiations, legislators will generally find it cheaper to cut deals within the party than without.

Second, the default risk is lower for intra-party trades than for others. In part, this results (again) from the repeated nature of intra-party transactions. As scholars in law and economics have shown time and again, most people more readily honor trades with people with whom they regularly cut deals than with those whom they do not know. In part too, it results from the resources that party leaders control. In most modern democracies, those leaders control access to

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[6] Keith T. Poole & Howard Rosenthal, Congress and Railroad Regulation: 1874 to 1877, in Claudia Goldin & Gary D. Libecap, eds., The Regulated Economy: A Historical Approach to Political Economy (Chicago: University of Chicago Press, 1994).

a wide variety of resources (like wealth) that the rank and file need. By using their control strategically, they can help ensure that the rank and file honor the promises they make.

All this has implications for how we understand party-line votes. Typically, we argue that such votes show that the party holds the issue dear. In fact, they show no such thing. Instead, they may simply show that the party has organized a log-roll, and convinced party members to keep their bargains. Even where a majority party has organized a straight party-line vote, in other words, it's possible that only a small minority within the party supports the bill.

Digression 3: Preferences can cycle.

This analysis of vote trading suggests that congressional votes need not reflect congressional preferences about the policy at issue. Instead, the votes may reflect the trades the legislators organized to pass a larger package of statutes—and a majority of legislators may have opposed every component statute within that package. Yet the opacity of legislative votes is more basic: even absent trades, legislative votes may not represent legislative preference. Instead, under plausible conditions, there may be no proposal that a legislative majority prefers to all other proposals. Legislative preferences may "cycle," such that for every proposal there is another proposal that a majority prefers to it.[7]

This is tough to see in the abstract, so let's take another north African example. It is a dark and stormy night. The pilot of the Lisbon-bound plane has started the engines, but our three lonely people are still on the runway trying to decide who will get on. As it actually happened, of course, Richard acted as autocrat. He recited that marvelous speech that Real Men everywhere dream of giving, and ordered Victor and Ilsa on. Suppose, though, that the threesome decided instead to vote (after all, they were doing this To Defend Democracy). Suppose that they had three options: Richard and Ilsa board the plane, Victor and Ilsa board it, and Ilsa boards it alone. Suppose that they will vote the first two options against each other, and then the winner against the third. And suppose, finally, that they hold the preferences that appear on Table 1.

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[7] Kenneth J. Arrow, Social Choice and Individual Values (New Haven: Yale University Press, 1951).

TABLE 1
Preference Rankings

	First Choice	Second Choice	Third Choice
Richard	Victor and Ilsa	Richard and Ilsa	Ilsa alone
Ilsa	Ilsa alone	Victor and Ilsa	Richard and Ilsa
Victor	Richard and Ilsa	Ilsa alone	Victor and Ilsa

We know Richard's first choice: being noble and courageous, he wants Ilsa on that plane with Victor. As a second choice, if Victor does not take her home he will. Even he isn't totally selfless. Under his last choice, Victor will stay and fight the Nazis, he will run off with Captain Renault, and she will fly home alone.

Quixotic as you may consider this, I think Ilsa wanted to ditch both men and head to Lisbon alone. Think about it. She's had these wimps whining over her all week. "Enough already," she says to herself. "I'm high-tailing it out of here alone. You clowns can deal with Major Strasser on your own." Her second choice is to return with Victor, and her last is to return with Richard. At least once she misses her first choice, virtue will triumph over love.

And Victor? Well, we can guess his preferences from his earlier conversation with Richard at the Cafe: he wants Richard to use the letters of transit and take Ilsa with him—"because I love her that much," he explains. His second choice is for Ilsa to return alone, and his last is to take her home himself.

Now as a matter of cinematic hermeneutics, you can plausibly question whether I properly understand the movie. But save those questions for my panel at the next MLA.[8] Assume, for our limited purposes, that these are indeed their real preferences. The interesting point is that Richard, Ilsa, and Victor cannot solve their problem by the vote we proposed. If they vote "Richard and Ilsa" against "Victor and Ilsa," Richard and Ilsa will both vote for the latter. If they then vote "Victor and Ilsa" against "Ilsa alone," Ilsa and Victor will vote for the latter. So "Ilsa alone" would seem to represent their preferred choice—except that if they vote "Ilsa alone" against "Richard and Ilsa," both Richard and Victor will vote for the latter. Effectively,

[8] "Ilsa's Choice: Gendered Rationality and the Cultural Construction of Mating Patterns in North African Cinematic Texts."

they will cycle over and over—and stand there voting on the runway until Major Strasser arrives and carts them all off to jail. For every outcome, it seems, there will be another that a majority prefers.

In turn, this point raises a basic puzzle: why do we seldom observe such cycling in actual legislatures? The question puzzled public choice scholars for much of the 1970s, but the answer seems to lie in institutions. Through what scholars call "gate-keeping rules," legislatures can prevent the chaotic cycling that might otherwise ensue. In the case of Richard, Victor, and Ilsa, a simple rule giving one of them the power to set the agenda (the number and order of votes to take) would resolve the issue. In American legislatures, the committee system performs the much the same function.[9]

As a result, when votes would otherwise cycle, relatively mechanical gate-keeping rules will effectively determine legislative outcomes. If so, however, then even without vote trading we have no assurance that legislative votes reflect any legislative preference. Instead, legislative votes may simply reflect the institutional rules that resolve voting cycles. In this regard, remember that those rules (the institutions that make the crucial difference) are often utterly arbitrary rules (like seniority) that bear no resemblance to majority preferences on any given issue. Yet those rules—not preferences—determine what becomes law.

CONCLUSIONS

Where does this leave us? It suggests, I think, three basic points. First, in modern democracies legislators face highly competitive electoral markets. Unless they maximize their reelection probabilities, they will not likely stay legislators. In politics as in economics, people face a fundamental market constraint.

Second, because of this market constraint legislators will often trade their votes. When a rational legislator faces a vote on an issue that his constituents don't much care about, he'll trade it for a vote on something about which they do intensely care. Consequently,

[9] Kenneth A. Shepsle & Barry R. Weingast, Structure Induced Equilibrium and Legislative Change, 37 Public Choice 503 (1981).

the votes one sees on a bill do not necessarily reflect legislative preferences about that bill. They may just reflect legislative trades.

Last, institutions matter. In many ways, legislative outcomes are artifacts—even arbitrary ones—of the institutional rules that structure electoral market competition. Even in a world without trades, the votes one sees on a bill may not reflect legislative preferences. They may just reflect the institutional rules by which legislators structure their votes.

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