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FROM CYNICISM TO POSITIVE THEORY IN PUBLIC CHOICE

Saul Levmore†

INTRODUCTION

Public choice theory need not be either threatening or depressing, but academics can make it so. It is not, to be sure, a field that imparts good news wherever it grows. It offers incoherent majorities, aggregation impossibilities, and most famously—though perhaps unfortunately—self-serving, overachieving interest groups that are busy imposing external costs on less-organized citizens and generating rent-seeking costs in many subtle ways. This is the stuff of public choice.

It is easy to dip into the public choice literature and emerge only with distressing normative conclusions about that which emanates from legislatures, large electorates, bureaucracies, and even judiciaries. But public choice also yields insights about legal and political institutions and about precommitments that social groups make to avoid these problems. Public choice theory, as applied to legal institutions and rules, can be the study of how we do the best we can in the face of difficulties. It is also about sensible selection among rules and decisionmaking processes. It is, for example, about the Condorcet Jury Theorem, which describes the power of groups to reach better decisions than individuals, and suggests why we ought sometimes to be pleased to be on the losing end of a vote.¹ Quite generally, in the hands of positive, optimistic handlers, public choice theory is a means of understanding the genius, or at least the staying power, of many of our political, legal, and constitutional institutions.²

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¹ The idea is that a large number of observers will do better than any non-expert individuals, so that it is comforting to be part of a group because the group can correct the misimpressions of the individuals. Thus, few of us would want to serve as a jury of one entrusted to convict or acquit a defendant of a serious criminal charge. But if we can work with a number of fellow jurors, we might feel quite comfortable even with a decision that falls somewhat short of unanimity.

² I am mindful of the criticism that any such move is likely to make selective use of the tools of public choice. See Cynthia R. Farina, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109 (2000). I would say that critics of public choice as applied to law and other matters are often equally selective in their appeal to rationality assumptions and the like. Most progressive critics adore a good prisoner's dilemma, for instance, and yet this model makes little sense unless one buys into a set of razor-like assumptions. For further discussion, see Saul Levmore, *The Public Choice Threat*,

Even when interest group activity is concerned, it is possible to see legal rules as reflecting attempts to harness that which is good about interest groups and to minimize the rent-seeking and other damage that well-organized groups can inflict. That is something this Symposium might have explored but did not. My easy task is to say that it could be done, without doing it here. Public choice need not be depressing (and, therefore, perhaps greeted with hostility). The positive, optimistic version of public choice begins with an understanding of public choice as about much more than the reality, or threat, of interest group power. In any event, public choice is a serious field with serious implications for positive and normative theorizing about law.

I

PHENOMENOLOGY AND MAJORITY RULE

In some sense, and despite the title of the Symposium which this Comment grows out of, the Articles I comment on here by Professor Edward Rubin³ and Professor Jonathan Macey,⁴ are not about public choice and are not much informed by it. The Rubin paper, *Public Choice, Phenomenology, and the Meaning of the Modern State*,⁵ aims to remind us at every turn that a variety of experiences and influences give meaning to things. But this is mostly orthogonal to public choice. Public choice does not, or at least need not, claim to be the only game in town; it simply follows the common pattern found in the social sciences and sciences of making simplifying assumptions—beginning in this case with rational political actors. To criticize public choice by reminding us of the varied ways in which people give meaning to institutions and other things, is a bit like criticizing the link between tobacco consumption and health problems by pointing to an acquaintance who has lived a long and untroubled life despite regular tobacco use. Public choice might explain or inform a good many things, even as there are matters better explained or even only explained with some other tool, including the phenomenological approach.

In any event, I have no quarrel with the idea of explaining some things, or of giving them content, by considering the meaning given by those who experience the things in question. It is perhaps ironic

67 U. CHI. L. REV. 941 (2000). But Professor Farina's point about the selective use of tools, Farina, *supra* at 135, is a deep one and requires more than a footnote or comment in response.

³ 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 (2002).

⁴ Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280 (2002).

⁵ Rubin, *supra* note 3.

that these meanings may be given individually or collectively, and self-consciously or unwittingly, but no advocate of public choice theory need be threatened by any of these sources or explanations. Indeed, these resemble public choice theories in their mixing of individual and collective considerations and in their seamless combination of claims about human behavior that are hard to understand in evolutionary terms with claims or intuitions that are more easily seen as consciously or politically developed.⁶

Consider some examples of self-reflective meaning that are drawn from the stuff of collective choice. A group may vote on a question with a right answer, as when a jury votes to convict or acquit. Similarly, a court or an electorate may be asked to pass on an experimental plan involving school vouchers. In the first example, the group's judgment may itself give meaning to jury decisionmaking or, for that matter, to criminal law itself. And in the second example, the court or electorate's action, not to mention the manner in which it reaches its decision, may define the voucher plan (or at least its message) and even the nature of education. How we do things, and how we think we do them, can obviously affect the things themselves, although the importance of these derived meanings is another question.

I do not mean any of this to be controversial or disagreeable, but it may be worth pausing to say something positive on behalf of public choice. By sliding quickly into the language and nature of meaning, there is the danger that we miss some of what is intriguing about a process. In the case of public choice, and especially for an audience that is trained to see public choice as a source of cynicism (because of the fixation legal academics suffer regarding overachieving interest groups), there is the danger that the audience will see rational-actor analysis as useless. This is because few people describe their own actions in these terms, if only because the very act of participation in politics may seem irrational—or simply may seem to be the source of the cynicism. In the case of intellectuals, it is also because they enjoy pointing to paradoxes that are most easily dealt with by concluding that the rational-actor assumption is wrongheaded.⁷ In fact, much of

⁶ Thus, a phenomenologically inclined observer will sometimes point to meanings that people themselves attach to things (as in Professor Rubin's observation that people say they expect government to solve their problems, Rubin, *supra* note 3, at 347–48, but sometimes draw attention to meanings that might be subconsciously held and that we might not have perceived had they not been pointed out (as in Rubin's intriguing suggestion that government is a structure of meaning which citizens share intersubjectively, *see id.* at 346–47).

⁷ Compare Don Herzog, *Externalities and Other Parasites*, 67 U. CHI. L. REV. 895 (2000) (discussing the paradox of voter participation where there is no legal sanction and no plausible chance of affecting the outcome with a single vote), with Levmore, *supra* note 2 (suggesting that the puzzle of voter participation is an unwise starting point for thinking about public choice).

the charm of public choice lies in its ability to find good news, or at least interesting news, despite a simplifying assumption of selfishness. Much as microeconomic theory is able to produce some optimism, in the form of efficiency claims, out of a world of selfish, rational actors, public choice theory is also able to see a bright side after making similar assumptions of selfishness and rationality about voters, elected officials, and appointed citizens.

Knowledgeable readers will know that I have already begun one illustration and that it draws on the Condorcet Jury Theorem.⁸ Even if individuals are completely self-regarding, a group of individuals, each of whom is only barely likely to be right about something, may by majority vote reach stunningly accurate conclusions. One way to think about legal systems is to ask whether majority rule is deployed when the optimism about majority decisionmaking is well-founded because the Condorcet Jury Theorem's assumptions are plausible. If so, then we should be quite impressed that many constitutions and much spontaneous law can achieve good results even when individuals are entirely self-regarding, strategic, and so forth.

A more sophisticated, but similarly optimistic, claim might be that a clever thing about majority rule (and some jury verdicts and popular voting rules) is that it offers no incentive for dissembling. If a member of a jury sees that the group is poised to offer a plaintiff $\$x$ in damages, but this juror individually thinks that $\$3x$ is correct or preferable, the juror gains nothing (or at least is unlikely to gain anything) by voting against the majority or against the plaintiff altogether. Destructive strategic behavior, in the sense of behavior that might generate perverse results, may well be minimized by many of our legal rules and voting practices.

This is an occasion to suggest rather than to advance these claims. I mean only to point out that plausible, useful theories, built on public choice foundations, have little to do with attached and derived meanings. Very few jurors or voters know the first thing about one jury theorem or another, and yet they may in combined fashion do important work without realizing why their services are more valuable in some circumstances than in others. Similarly, those who draft constitutions, design voting systems for popular elections, fashion different voting rules for legislative assemblies, or construct rules for decisionmaking on judicial panels, and certainly those who live by these decisionmaking rules, may not always appreciate their subtle features.

⁸ For some background and further applications, see DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 158–59 (1996); Nicholas R. Miller, *Information, Electorates, and Democracy: Some Extensions and Interpretations of the Condorcet Jury Theorem*, in INFORMATION POOLING AND GROUP DECISION MAKING 173, 175–77 (Bernard Grofman & Guillermo Owen eds., 1986).

Even better, when we abide by norms as to how and when to vote in our daily affairs, most of us are unaware of the elegant, public choice “explanations” that might fit our practices.

The meanings that we might give to constitutions and voting practices should not steer us completely away from exploring the subtler and sometimes more heroic features of these institutions. As is probably apparent, I like an approach to law that searches for optimistic explanations about why we do things as we do, even when the evolution of these practices is a bit mysterious. I do not claim to understand how framers stumble upon rules that discourage strategic voting, or how groups know to choose among plurality voting, majority voting, and supermajority voting, and even markets in the very way that a public choice theorist might have suggested (but did not). But of course theories of meaning are also not known for their evolutionary stories.

II

PESSIMISM AND OPTIMISM IN PUBLIC CHOICE

I might take the same approach to the Macey Article, *Cynicism and Trust in Politics and Constitutional Theory*.⁹ It focuses more on interest groups than on voting, and on agency problems rather than on the ways in which legal and political institutions might anticipate or generate these problems. It is about public *choice* only in the sense that we think of interest groups as important examples of collective action (or not, as the case may be). I think we can find optimistic things to say about interest groups and the ways in which our legal institutions handle them, not to mention Macey’s politicians and bureaucrats. But there is no need to rehearse this cheery view.

In an unkind but consistent moment, Professor Macey might react to my optimistic injections—including the idea that majority rule is selectively and cleverly employed, or that our rules combat strategic behavior—with the observation that I take this sort of approach because it advances my career to do so. If political actors are elegantly (in the sense of simple theorizing) understood to be selfish, then why not academic ones as well? Meanwhile, Professor Rubin might say that my impressions and tastes give meaning to my existence and to my feelings. These are serious points, although they will seem preposterous to many readers if only because there is no end to this sort of thinking. Macey’s own idea may be best understood through some single-variable unattractive behavioral norm, and the meanings we give to Rubin’s meanings send us down another spiraling path. I do not pursue these matters here, because the task at hand is to comment

⁹ Macey, *supra* note 4.

not on my own relatively optimistic views but rather on those in the main papers. In this context it bears noting that each paper, while by its terms applying to public choice theory, could apply just as well to academic theories, to scientific theories, and to most social science research.

III

THE CONSCIOUS (AND OTHER) MEANINGS WE ATTACH

What should we make of Rubin's idea that a government is a structure of meaning which citizens share intersubjectively?¹⁰ Rubin is obviously correct when he observes that most people look to government to solve their problems, and so it is fair to say that when they give meaning to government and to its laws, the meaning itself builds on this conception of what government is expected to accomplish.¹¹ But of course we might ask people whether they think that governments really do solve their problems, and put this way it is not entirely clear that what people think an institution ought to do reveals much about the meaning they give the institution. People might think that an army ought to defend them and bring peace, but their experiences with the horror of warfare or with large investments in standing peacetime armies might cause them to give a very different meaning to armies and military service.¹²

Moreover, there are many things that people want that are inconsistent with Rubin's implicit conclusion, that we be sympathetic to progressive politics because most people look to government to solve their problems. Thus, most people want tax cuts and most people do not want the government interfering in their own private lives. Most people may prefer capital punishment and decry foreign aid. Politicians do, after all, have some incentive to give people what they think they want, so that it is unclear where the structure of meaning will take us.

In all these cases, framing is terribly important. Most people look to government to solve their problems even as they might look to individual inspiration or entrepreneurial skill (in a deregulated environment) to solve the same problems. All of us know of the literature on framing effects,¹³ and we could have anticipated the importance of

¹⁰ See Rubin, *supra* note 3, at 346–47.

¹¹ See *id.* at 347–48.

¹² The new meaning need not be cynical or skeptical. People might have thought that their army ought to bring peace, but they might come to attach new meanings in the form of believing that the army successfully advanced the cause of social equality or promoted a full employment economy.

¹³ See, e.g., Jeffrey J. Rachlinski, *The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters*, 85 CORNELL L. REV. 739 (2000); Cass R. Sunstein, *How Law Constructs Preferences*, 86 GEO. L.J. 2637 (1998).

framing in ascertaining “what people want” and what meanings they give to governments. I find it counterproductive or even a bit misleading, therefore, for Professor Rubin to appeal so regularly in his work to the observation that people seek meaning and governmental solutions to the problems around them.¹⁴ These same people seek many things that are not so convenient to a phenomenological view, and readers would feel in safer hands if guided through this morass of conflicting wants and meanings. Instead, the article adopts a kind of debater’s perspective, scoring points with the selective use of illustrations. “Transcendental” phenomenology may be an intriguing notion and I think it can be a useful one as well.¹⁵ But it is more useful if it confronts our uncertainties and confusion, and it is less useful when it is used immediately to serve an ideological rather than methodological purpose.

Indeed, the phenomenological approach, with more balanced examples of conflicting meanings and attachments, might mount a serious challenge to public choice. A centerpiece of public choice is the idea that while an individual is assumed to be coherent and rational, a collective of individuals may well be incoherent as it aggregates its preferences. (Note that I have moved away from group decisionmaking where there is a hunt for the correct answer. The present reference is to the famous problem of aggregating preferences, as opposed to attempts at discovering a right answer.) But a balanced phenomenological approach, as I have already suggested, raises the possibility that even a single individual may be conflicted and incoherent, after a fashion. Individual *X* may want the government to solve problems—but *X* may also want it to cut taxes and leave people alone, and so forth. This conflict among sentiments may itself give meaning to government, but for the moment the point is simply that the conflict is contrary to a basic assumption of the public choice literature. Rubin’s observation might have been that the phenomenological approach suggests that public choice theory begins with untenable assumptions about rational actors. In particular, if these actors are individually unable to rank preferences and to stick to those rankings, then the entire literature arising out of Arrow’s Impossibility Theorem¹⁶ will be much less important. More realistically, that part of public choice theory might need to add some initial conditions regarding the scope of the incoherence problem.¹⁷

¹⁴ See, e.g., Rubin, *supra* note 3, at 328–29, 332–34, 337, 345–46.

¹⁵ See *id.* at 350.

¹⁶ KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

¹⁷ Voting paradoxes might also seem less important in a world in which individuals were often thought of as inconsistent or incoherent in their preference orderings. Why get upset about paradoxes that are created by groups just because the individual members happen to be consistent with respect to this matter, but not many others?

IV
FROM RAZORS TO BRUSHES

The Macey and Rubin Articles exhibit dramatically different tastes in theory. Macey pursues elegance, in the sense of capitalizing on as few variables as possible, which is to say one—hence, the razor metaphor with which it engages the reader. The Macey piece is also self-conscious about the predictive power of theory and the value (and threat) of disconfirmation through empirical evidence and, perhaps, new theoretical insights. In contrast, the Rubin article reflects a taste for richness and indeterminacy, and it sets out a perspective or theory that is not subject to disconfirmation—or perhaps even to confirming evidence. Macey would enjoy predicting government reactions to various phenomena; Rubin might think such an exercise quite beside the point, at least with respect to phenomenology.

But it should be noted that even Macey is not offering a predictive theory. What, after all, does it mean to be the “most cynical explanation” of government action or inaction?¹⁸ We might observe a polity going to war, experimenting with school vouchers, or delivering health care in a particular manner. Cynicism might mean that in each case, we should look for a payoff to critical politicians. We should not imagine that a politician cares about the nation or about fairness or efficiency. Of course, the politician might be self-interested and care about his or her own reputation. Alternatively, we might be cynical about each voter, and then think of the government as the product of a difficult, collective attempt to design a system that minimized agency costs. Politicians are then just one piece of the larger cynical picture. None of these steps takes us very far, and perhaps that is why I find myself preferring that part of positive political theory that deals with such things as majority (and other) voting rules.

Even here, in these corners of public choice and the law, I do not claim to escape the extensive reach of our two authors. Macey might cynically say that when law or politics allows juries or voters to decide things, it is not because of the genius of majority rule but rather because powerful interests or agents are deflecting decisionmaking so as not to be blamed. Strictly speaking, this does no damage to the Condorcet Jury Theorem approach, but it should give some pause and it suggests an interesting approach to predicting when we use various voting rules. But that is not an idea I will pursue here.

Somewhat similarly, I have begun to hear Rubin’s voice everywhere I go. What I think of as the ingenious, if mysterious, selection among voting rules, for example, can be understood through the idea that voting and deliberation enhance meaning and facilitate shared

¹⁸ Macey, *supra* note 4, at 283.

meaning. Disparate voting rules might reflect different expectations about the meanings attached to various decisions. But I leave this project for those more enamored with the phenomenological approach. Positive political theory may attract them, albeit for different reasons than it has attracted those who are more comfortable with explorations that embark from the rational actor starting point.

CONCLUSION

If the implicit agenda of this Symposium is the question of what useful insights public choice might offer to administrative law, then it naturally draws our attention to such matters as markets versus political determinations, the value of a human life for cost-benefit and regulatory purposes, and so forth. These are the questions with which modern administrative lawyers must wrestle, and theory builders will be more valued the more they can help with these questions. Put this way, I do not see how either the Macey Article or the Rubin Article will help us very much. These are thoughtful rather than helpful articles. Their authors share a talent for producing provocative works, reflective of world views that are themselves clear and provocative, and they engage readers, or at least this reader, who will want to ask more questions before concluding that some theories are simply interesting rather than functional. But as for public choice and what it might offer to administrative law, I like to think that public choice offers suggestions of how and when groups will benefit by working toward decent solutions to hard problems. I also like to think that Professors Macey and Rubin will agree with this aim and that in future work they will address this common cause through the lenses they crafted here or, more likely, with different tools.