Exchange on Public Choice

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Herbert Hovenkamp's recent article, Legislation, Well-Being, and Public Choice, asks the wrong question and answers it well. Criticizing the public choice movement, he takes issue with the claim that "failure in [private] markets is rare while failure in political markets is common." In part, he argues that public choice writers and others in the "Chicago School" have applied a double standard, tirelessly seeking efficient explanations in private markets while shunning such explanations in political markets. Here I find him persuasive. He also argues that political markets (probably?) work better than private markets. Here I am skeptical, not because I believe the reverse but because I think the comparison is sterile and futile—lacking a generally true answer, unprovable even if there were such an answer, and tending to cheapen and oversimplify our understanding of both of the objects being compared. Whether political or private markets are worse is the great "so's your old man" debate between contemporary American liberals and conservatives, and its chief effect is to commit each camp to a panglossian view of its favored sector, at the expense of balance and understanding. Hovenkamp did not start this debate but it seems to have taught him entirely the wrong lesson: that panglossianism should be applied to both.

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1 Herbert Hovenkamp, Legislation, Well-Being, and Public Choice, 57 U Chi L Rev 63, 99 (1990) ("Hovenkamp"). All parenthetical page references are to this piece.

Hovenkamp uses the term "economic markets" instead of "private markets," but I prefer my terminology because it sidesteps the tedious semantic question of whether non-wealth-maximizing behavior is "economic."

2 Hovenkamp does not commit himself irrevocably to this claim, asserting only that "there are many reasons" for thinking political markets work better and "no obvious reason" for thinking the reverse. (p 100) I should clarify that both Hovenkamp and I use the term "political markets" as a metaphor for the political process. We are not debating whether a centralized command economy run by political bureaucrats would work better than a capitalist private market economy.

3 See id ("A unified approach to economic and political markets should prompt scholars to look hard for efficiency explanations for practices that they do not understand in political markets, just as they look—very hard and often very patiently—for efficiency explanations for similar practices in economic markets."). Some might argue that scholarship is better served by seeking explanation, rather than rationalization.
Hovenkamp offers six reasons why political markets work better than private markets. While I do not care to join in the comparison, I think his arguments are worth addressing in turn, in order to bring out what seems to me their lack of realism about the political process.

First, Hovenkamp argues that “the principal thing traded on political markets is policy and information, and the costs of distributing these are very low.” (p 100) This is drastically over-optimistic. As even a cursory examination of media coverage of political campaigns should make clear, information about proposed policies and their likely effects is not the “principal thing traded.” Instead, we tend to see “horse race” journalism, ten-second sound bites, meaningless photo opportunities, and unenlightening “it-is-it isn’t” exchanges. While it is tautological that information in some sense is being traded, that information seems weakly related to the likely policy ramifications of electing different candidates.

Even more importantly, the cost of distributing accurate information and correct understanding (to the extent these exist) is often extremely high, not low. Mark Kelman, also a critic of public choice theory, has noted that people often lack “more than a vague notion about the actual . . . impact of the bulk of discrete political decisions . . . [Even] econometricians . . . seem to do quite abysmally.” Consider, for example, the question of how significantly (if at all) minimum wage laws affect aggregate employment—a question that has failed utterly to yield an expert consensus, much less a clear public understanding on either side. Or consider the questions of the likely effect of stiffer sentencing rules on violent crime, of the budget deficit on our economy, and of the present and likely future consequences of Japanese investment in the United States. In some cases, even if there is a technically correct answer, the public may not understand or accept it. For example, imagine trying to argue in a Presidential campaign in favor of legalizing cer-

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4 See, for example, Austin Ranney, Channels of Power 81 (Basic Books, 1983); and Fox Butterfield, Dukakis Tells of Major Errors in Race, NY Times A 20 (April 22, 1980).

5 Mark Kelman, On Democracy-Bashing: A Skeptical Look at the Theoretical and “Empirical” Practice of the Public Choice Movement, 74 Va L Rev 199, 269-70 (1988). In the full quotation, Kelman says that people only vaguely perceive the personal financial impact of political decisions; it seems reasonable to infer, however, that they often know even less about, say, aggregate economic effects.
tain drugs or ending the death penalty, even if one’s position was strongly supported by empirical research.\footnote{This is not to say that a government by experts would do better overall, given both the maxim that power corrupts and the biases that experts no less than anyone else can be expected to have.}

Second, Hovenkamp argues that transactions costs among legislators and other political actors are low because they “can find each other quite easily.” (p 100) This facilitates legislation, but not necessarily good legislation. One cannot begin to celebrate this ease of communication until one knows something about legislators’ incentives and how these incentives affect legislation.\footnote{Hovenkamp at 88 n 56, 101 nn 91-92, very briefly describes the empirical evidence on legislators’ motives. But Hovenkamp does not analyze the effect of their motives, beyond stating conclusorily that legislators’ self-interest ought to advance voter welfare just as firms’ profit motives ostensibly advance consumer welfare. Id at 101.} Do we want more legislation rather than less?

Third, “information about political choices and about candidates’ records is readily available.” (p 100) Thus, presumably, voters’ frequent disinterest in politics should not prevent them from intelligently advancing their objectives (whatever they may be). But what if misinformation, or information irrelevant to what a candidate will do in office, is also readily available (consider President Bush’s meretricious 1988 general election campaign) and cannot be distinguished from good information at the relevant level of effort that most voters expend? Hovenkamp criticizes the claim that “reliable political information is more difficult for voters to obtain than reliable product information is for consumers to obtain.” (p 105) He compares this claim to naive overestimates of the power of advertising upon gullible consumers. (p 104) He fails to perceive the significance of voters’ low understanding of most issues and their remoteness from the governmental process, which enables politicians to manipulate them with potent emotional symbols (ranging from race to “competitiveness” to the flag) that often are only weakly related to underlying substance.\footnote{The classic work on the consequences of voters’ remoteness from governmental processes is Jacob Murray Edelman, The Symbolic Uses of Politics (U Illinois, 1964).}

Fourth, Hovenkamp argues that “there is no reason for assuming that people act intelligently in their self-interest when they purchase, but ignorantly or irrationally when they vote.” (p 100) What about different levels of information and experiential feedback? Word of mouth is far more likely to catch up with a breakdown-prone car model than with a politician who promotes what sophisticated empirical analysis would reveal to be misconceived
policies. Consumer products often can be assessed meaningfully through one’s own and others’ experiences, whereas in politics broad social effects generally must be assessed against the counterfactual world that would exist if a particular decision had not been made.9

Fifth, “although legislators may act principally in their self-interest, that assumption is no different from the assumption of neo-classical theory that business firms are profit-maximizers.” (p 100) Hovenkamp fails to consider the high agency costs of monitoring elected officials’ behavior.10 Low political information aside, consider the constraints on political competition: there are only two major parties, elections are relatively infrequent, and in most general elections voters can choose between only two comprehensive packages of positions on the myriad issues. Moreover, it is costly to “vote with one’s feet” in the political market, whereas consumers and investors can often cheaply change products or firms.

Sixth, “political failure . . . has never been shown to be more widespread in political markets than market failure . . . in [private] markets.” (p 100) Here again, while Hovenkamp focuses on relative efficiency, it is useful to consider absolute efficiency. Even granted widespread private market failure—for example, the sale of aerosol products leading to destruction of the ozone layer—political markets may also work poorly. Indeed, given Hovenkamp’s fourth and fifth arguments (which draw on similarities between political and private markets), he should agree that failure in one market suggests that failure in the other is likely.

The aerosol example illustrates one of the principal reasons (aside from the disproportionate, but far from infinite, power of interest groups) for both political and private market failure. The example involves an externality that the market price for aerosol products fails to reflect. Politics, it sometimes seems, is ninety percent externalities. For entirely understandable reasons, voters respond superficially to issues and elect politicians based on factors that relate only distantly, if at all, to the politicians’ actual, substantive effects on society.

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9 To clarify that I still am not arguing that private markets work better than political markets, I should note that superiority in one particular respect (such as feedback) does not guarantee overall superiority.

At the risk of being overly anecdotal—since this is not the place for a systematic analysis—let us consider the experience of Senator Paul Tsongas, who became unusually frank in private interviews once he had decided not to run for reelection. Tsongas had found that in order to protect his political position, he had to seek constant television exposure at all costs, and specifically at the cost of being an effective full-time legislator. To his good fortune, he found that he “played” well on television. People were comfortable with him, although they generally did not remember what he had said. Tsongas’s account of his initial election to the Senate reveals a great deal about politics in the media age. He initially lagged in the polls because voters did not know his name or how to pronounce it. Tsongas later recalled:

What we did was put an ad on television of people mispronouncing my name . . . . The end of the ad is this boy who just obliterates my name and in frustration calls me “tickets.” That’s the best he could do. That ad became a classic. I’d be in a parade and people would call me “tickets.” Literally scores of people said they would be in the kitchen, hear the ad come on, and run into the living room to see it. You could not listen to that ad without smiling. That was the only ad anybody ever remembered. People would say, “I like the idea that you could laugh at yourself.” Here I think of myself as a very issue-oriented, very substantive person, and I know in my heart of hearts that I got elected to the Senate because my name wasn’t Smith.11

One could, of course, try to interpret this anecdote as evidence that people actually do choose between political alternatives on an intelligent basis. For example, perhaps many voters thought that a man who could laugh at himself would be good in other ways. Yet these voters may have overestimated the probative value of this information and ignored the influence of Tsongas’s media experts, who recognized and exploited the political value of self-effacing humor. More plausibly, one could say that the voters’ product preference was to “buy” a candidate with pleasing commercials. I agree with Hovenkamp that there is something to be said for taking consumer choice and voter sovereignty at face value (p 105); if this is what people want, so be it. The problem is that the election of a senator is laden with externalities, whether positive or nega-

tive—in other words, it has a range of actual consequences that voters know little about and do not fully consider. It is just like the case of an aerosol can, where one buys a pleasing product but some of the effects (when millions act the same way) are excluded from the decisional calculus.\(^\text{12}\)

One of Hovenkamp's ultimate points seems to be that, because public choice writers oversimplify and misdescribe politics,\(^\text{13}\) and because they confuse wealth maximization with aggregate social well-being (pp 68-74), we should adopt a sunny and optimistic view of politics. He is not the first critic of public choice theory to assume that if legislation is not just rent seeking by interest groups, it must be altruistic, socially beneficial, and a source of immense public satisfaction.\(^\text{14}\) This is the mirror image of the assumption by some public choice writers that if legislation does not infallibly promote the public interest, it must be for sale by unscrupulous politicians to interest groups.\(^\text{15}\)

Here the fault is not entirely Hovenkamp's—indeed, it is not at all his if he means to engage in a literature review rather than a freestanding evaluation of politics. The fault belongs instead to the extant legal and economic literature about the legislative process, which until now—in sharp contrast to the largely ignored political science literature—has largely failed to provide us with accounts richer than the stick figures of noble public interest and venal public choice. Substantially remedying this defect in the literature, and showing how we can enrich our understanding of politics by recognizing and systematically analyzing human motives beyond

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\(^{12}\) Technically, of course, the aerosol and political examples involve a collective action problem as well as an externality. In the aerosol example, one ignores the marginal effect of one's actions on the environment because considered in isolation, it is infinitesimal and thus outweighed by the pleasure of using the product. In the political example, for similar reasons, the marginal effect of one's vote on who wins can be ignored in favor of the symbolic or expressive pleasure derived from voting for a pleasing personality.

\(^{13}\) See, for example, Hovenkamp at 88 n 56 (noting empirical evidence contradicting public choice theory).

\(^{14}\) See id at 100-06; Steven Kelman, Why Public Ideas Matter, in Robert B. Reich, ed, The Power of Public Ideas 31, 35-39 (Ballinger, 1988). Hovenkamp is not entirely wrong in arguing that the high reelection rates for incumbents suggest public satisfaction with politics; but what about the evidence that, while people like their own senators and representatives, they distrust and dislike Congress as an institution?

\(^{15}\) See, for example, Fred S. McChesney, Regulation, Taxes, and Political Extortion, in Roger E. Meiners and Bruce Yandle, eds, Regulation and the Reagan Era: Politics, Bureaucracy, and the Public Interest 223 (Holmes & Meier, 1989).
Herbert Hovenkamp

Daniel Shaviro makes some good comments about a small portion of my recent article on legislation and public choice, but by looking at only a small part he mischaracterizes my work and misstates its conclusions. The same piece that Shaviro complains is overly optimistic about democratic voting examined different mechanisms for aggregating votes in a democratic system and concluded that the entire enterprise is calculated to yield haphazard and indeterminate results, unless aided by some purely normative guides. I am surprised that anyone who read my statements that (1) the selection of one democratic method for aggregating votes over another is arbitrary; (2) that democratic outcomes are indeterminate; and (3) that the voting process narrowly confines the range of possible individual choices and no system "comes close" to discerning the collective choice (p 80), would, as Professor Shaviro does, characterize my view of political markets as "panglossian," or as presenting "a sunny and optimistic view of politics."

I believe the section of my essay on which Shaviro comments was quite clear about its goals. They were not to present democratic markets as perfect, but rather to point out that many scholars studying political markets begin with a quite different set of assumptions than they do when they study economic markets, and

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16 By this point, the reader may not be surprised to learn that I am working on my own study of public choice theory and the legislative process. Daniel N. Shaviro, Beyond Public Choice and Public Interest: A Model of the Legislative Process as Illustrated by Tax Legislation in the 1980s (draft manuscript on file with the University of Chicago Law Review).

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1 Herbert Hovenkamp, Legislation, Well-Being, and Public Choice, 57 U Chi L Rev 63, 74-81 (1990) ("Hovenkamp"). All parenthetical page references are to this piece.

2 Professor Shaviro objects to my use of the term "economic" markets, and prefers "private" markets. I do not object to his term, but prefer my own, for it identifies the type of market that is the subject matter of traditional scholarship in economics. To be sure, political markets are "economic" in the sense that allocations made in them have an effect on people's wealth and on the economy in general. But on the other hand, no market, in-
that the differences are unwarranted. My point was that the dominant industrial organization theory of the 1970s and '80s assumes that ambiguous business practices are efficient, and is extremely reluctant to accept anecdotal evidence of inefficiency to undermine this assumption. But often the same scholars studying political markets do precisely the opposite. When they do not understand a practice they quickly proclaim it inefficient, sometimes on the thinnest anecdotal evidence. A unified approach to both political and traditional markets requires a level playing field. Judging from the tone of Professor Shaviro's letter, I do not believe he would disagree with that proposition.

Shaviro also suggests that I ask the wrong question by considering the claim that “failure in [private] markets is rare while failure in political markets is common.” What Shaviro apparently means by the “wrong question” is that this is not the question he would ask. But in fact others have addressed the question as I stated it, and it is the one that I was addressing.

Where Professor Shaviro and I do seem to disagree is about the efficacy of anecdotal evidence in supplying a generalized theory for either economic or political markets. He attacks both public choice scholarship and more optimistic Madisonian scholarship as presenting “stick figure” pictures of the democratic process. But every theory uses “stick figures” in the sense that it abstracts certain parts from the whole in order to produce a coherent, and hopefully even predictive, account. If adding flesh to these bones means telling lots of stories, I doubt that the result would be more coherent or predictive than what we already have. Critics of both economic markets and political markets could go on spinning yarns forever.

For example, Shaviro gives illustrations of political advertising that is not issue oriented, as in the Bush-Dukakis campaign. I agree that there is plenty of such advertising to be found. But if he is implying that this is in contrast to product advertising, I suggest that he watch more television. He suggests that many people have only a superficial understanding of the political process. I agree. But most people also have a superficial understanding of both corporate policy and manufacturing processes. Should we be up in arms about the fact that most people do not know which automobile is the safest, or which one gets the best gasoline mileage, or which is least damaging to the environment? The point is not that

including the single transaction made at the corner grocery, is purely "private." Neither term captures the differences between the two kinds of markets perfectly.
either type of market is perfect, but that ignorance about the workings of both is widespread. In neoclassical industrial organization theory, as I noted in my article (pp 101-02), the fact that people do not spend a great deal of time thinking about these questions or doing extensive product research before they purchase is considered to be evidence of consumer satisfaction. Neoclassical public choice theory, to be consistent, should begin with the same presumption.

I also believe Mr. Shaviro confuses the substance of technical questions that government policy addresses with the process of public choice. He notes, for example, that there is a great lack of consensus, even among experts, about such questions as whether "minimum wage laws affect aggregate employment" or "what effect stiffer sentencing rules would have on violent crime." He uses these as support for the proposition that distributing accurate and correct understandings of policy questions to voters is very costly. I certainly agree that determining the correct answer to these particular questions is difficult. But that is a public choice problem in roughly the same sense that developing a useful electric car is a market problem. It is essentially a technical one, only tangentially related to market mechanisms.

Shaviro's error in this case is not uncommon. It is easy to begin with the observation that policymaking is indeterminate, and conclude by finding fault with the democratic institutions or procedures that we use for making policy decisions. But often the failure is not in the institutions or procedures, but rather in our inability to produce objectively correct answers to policy questions. We will never know the answer to every technical question about policy, but that fact is not a democratic failure. Does Shaviro believe that the minimum wage and optimal sentencing problems would be any different in a society governed by an absolute dictator, whether benevolent or otherwise? The dictator would still have to decide whether to regulate wages or leave them to the market, and would still have to determine optimal sentences. If these problems would still be around, then they are probably not a function of legislative failure but rather of technical shortcomings in economics or one of the other social sciences. Of course, the market might still be relevant. Just as the economic market might create or fail to create the appropriate incentives for the development of the electric car, the structure of the political decisionmaking process might affect the rate of research into the optimal minimum wage policy or the optimal criminal sentencing policy. For example, even though the efficiency effects of a minimum wage law remain unknown, a properly
functioning political market would tend to pass such a law if more persons gained than lost utility from the statute.\(^3\)

Finally, I agree with Shaviro that there is not much mileage in comparing economic and political markets and deciding whether one works better than the other, although my reasons may differ from his. Economic markets and political markets should generally be viewed as complements rather than substitutes; so debating which works better is a little like debating whether pepper works better than salt, or left shoes better than right shoes. Modern democracies use both economic and political markets simultaneously. In most, many more resources continue to be allocated through private bargaining than by sovereign command.

The purpose of private trading is to yield Pareto optimal, or efficient, equilibria. The purpose of legislation is (1) to establish the market's working rules; (2) to correct market failures; and, most importantly, (3) to determine the distribution of entitlements from which trading begins. The most important question is not whether one works better than the other, but rather whether one can exist without the other. The problem that we face is that markets yield only partial social orderings. The remaining void must be filled by some other mode of decisionmaking.

\(^{3}\) See Hovenkamp 57 U Chi L Rev at 82-83 (cited in note 1).