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# Introduction: A brief trajectory of public choice and public law

*Daniel A. Farber and Anne Joseph O'Connell*

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Public choice theory plays a critical role in public law, particularly for legal scholarship and to some extent for doctrine. To be sure, it is not the only game in town, but it is an important one.

We take broad views of both public choice and public law. Public choice theory, as the term is used in this volume, not only includes the classic application of economic principles to constitutional structure (as first articulated by James Buchanan and Gordon Tullock) but also the overlapping categories of social choice, rational choice, and positive political theory. In short, public choice theory captures the application of basic economic principles – including rationality and self-interest of participating actors – to any public institution, whether formally political or not. Public law here is also used broadly. For our purposes, it encompasses most formal and informal interactions with governmental institutions, such as those between legislators, or between lobbyists and a federal agency. These interactions may be entirely among governmental actors or may include connections between the state and private individuals.

This volume is part of a new series, *Research Handbooks in Law and Economics*, which has been developed under the direction of Judge Richard Posner and Professor Francesco Parisi. Each volume in the series aims to serve as a reference, providing helpful introductions to important topics, and as a provocation, suggesting weaknesses and important areas for further exploration.

This volume also emphasizes interdisciplinary and empirical approaches to public choice and public law, drawing from a range of social sciences and legal subjects. It is broken into four major segments: foundations, constitutional law and democracy, administrative design and action, and examples of specific statutory schemes. The contents are described in more detail below.

This introductory essay has several goals and audiences. To situate the novice, it starts by providing some cursory background on public choice theory, which the first part of the book covers in a more deliberate and stimulating manner. For the more sophisticated reader, it suggests that the field has shifted considerably in its aims and even its methods, comparing its origins to its current manifestations. For scholars engaged in this or related research, it then offers some lessons to consider as the field moves forward. Finally, for all readers, it summarizes the chapters contained in the volume.

One cautionary note should be made at the start. No component of the introduction or the book itself is meant to be all encompassing or conclusive. Rather, each hopefully stands as a helpful starting point to a much richer and more complex set of ideas in the extensive literature on public law and public choice.

### 1. Background assumptions

To simplify greatly, public choice theory rests on two key assumptions: rationality and self-interest. These assumptions are often collapsed into one, but they capture distinct concepts. Actors, whether public or private, are assumed to behave rationally. They make reasoned, consistent decisions based on their beliefs about the world. These actors are also assumed to have particular objectives that they try to achieve, within existing constraints. These objectives likely vary across individuals; they may encompass narrow economic goals or wider policy preferences. Together, therefore, actors behave reasonably and consistently in line with their objectives and their beliefs.

Choices by actors do not necessarily yield desired outcomes, of course. But their choices are presumed to be rational, given their expectations about the world and the objectives they are trying to achieve. Notably, then, behavioral economics, which seeks to incorporate insights from cognitive psychology about imperfect rationality, has not as yet had much impact on public choice. Nor are actors considered to practice non-instrumental forms of rationality such as Kantian reasoning or conforming their actions to religious prescriptions.

Like public choice theory, neoclassical economic theory is likewise grounded in decisions by individuals. Microeconomics, however, hones in on how the market shapes those decisions by consumers and producers in efficient ways. It also deals with market failures, but such failures are seen as aberrations. In sum, microeconomics generally is a narrative of collective success, at least in terms of total social welfare. Markets are successful institutions with problems, not pathology-prone institutions that can sometimes be cajoled into producing good results. By contrast, public choice theory is typically a story of collective pathology. In politics, unlike markets, theorists do not see an invisible hand that converts individual choices into desirable societal outcomes. Indeed, it is the role of government to act precisely when the invisible hand has failed.

Individual choices in the political sphere can create two core quandaries: lack of cooperation and problematic group decisions.<sup>1</sup> Both problems are endemic in any situation where coordinated action is required because uncoordinated individual actions are ineffective or destructive.

The first difficulty centers on individuals deciding *not* to cooperate – either at the micro or more macro levels. In the classic scenario (called the Prisoners' Dilemma) with two individuals, each person may find it in her rational self-interest not to cooperate in a particular setting, even though if both people could credibly commit to cooperating, each would be better off.<sup>2</sup> Rational self-interest thus produces an undesirable outcome: what is individually rational is collectively irrational. All is not necessarily lost; repeated play or external institutions may encourage cooperation to develop in these bilateral interactions, though such mechanisms are not without their own difficulties. Successful institutions build on these mechanisms to create cooperative outcomes. And fortunately, some institutions do not pose these problems: if everyone else is driving on the right, it is in each individual's self-interest to cooperate and do so as well.

Society, of course, involves more than two people. When a larger number of individuals have to choose between cooperating or not to achieve some group goal, the problem of free riding can arise.<sup>3</sup> Here, cooperation functions as contributing to a shared objective in situations where (unlike the coordination of driving lanes) each individual does not have an incentive to adopt the cooperative institution.

The free rider problem is easy to explain. A person who is rational (in the sense that we have specified) would prefer to avoid investing in the production of a benefit if virtually the same benefit can be enjoyed without making the investment. This simple point has manifold implications in economics, ranging from the instability of cartels (because individual members of the cartel have an incentive to cheat) to the inadequate market supply for public goods such as clean air (because individuals prefer to enjoy the clean air without having to pay for devices that limit pollution).

The political sphere is rife with opportunities for free riding, and we all do so to some extent. Legislative enactments may benefit everyone in a group, perhaps everyone in society, but the statute's benefits can be enjoyed by everyone once the statute is passed even without having contributed to the lobbying effort. Hence, there is an incentive to free ride by letting other people pay the price of obtaining the new legislation.

The key is that if the objective is achieved, all individuals benefit whether they had contributed or not. The incentive to free ride off the efforts of others has to be weighed against the possibility that the goal might not be achieved at all. As with the bilateral interaction, demise is not inevitable. Institutional devices and other mechanisms can encourage groups to form and their members to work together. One topic for investigation is the nature of these mechanisms and their scope of effectiveness.

The second difficulty in collective action is the inherent messiness involved in the aggregating of individual preferences. Kenneth Arrow (1951) demonstrated that no voting method can aggregate rational individual preferences (that is, preferences that are complete and transitive at the individual level) in a minimally reasonable way (including, for example, that there be no single person who can dictate the group outcome). The most common manifestation of this inherent limitation on group decision-making is Condorcet's paradox, where transitive and complete individual preferences across three or more alternatives produce, when aggregated in paired majority votes, cycling group preferences. In other words, the group may prefer option *a* to option *b* and option *b* to option *c*, but then prefer option *c* to option *a*.

As the number of alternatives increases, or as the number of individuals voting increases, the chance of cycling, assuming randomly assigned preferences, mounts (Riker 1982, 122). Normatively, Arrow's Theorem tells us that politics must be judged by standards other than its ability to produce logically consistent outcomes. Descriptively, it tells us that political systems are constantly threatened by cycling.

In practice, however, we rarely see cycling. As with the difficulty in getting individuals to cooperate, there are mechanisms to mitigate some of the pathologies of group decision-making, most notably, by decreasing preference divergence among voters and by decreasing the number of alternatives presented for a vote. These mechanisms, such as the creation of single-peaked preferences, establishment of congressional committees, and operation of amendment rules, often yield stable outcomes. Thus, politics need not, and generally does not, devolve into interminable cycling between different policies. Stability may arise, however, at the price of disproportionate influence by one set of voters.

In short, public law provides a range of institutional structures to address the pathologies of bringing rational, self-interested individuals together. These structures help such individuals cooperate with each other and make coherent group decisions. But these structures are rarely neutral – they shape preferences and affect outcomes. They also can

be used by certain individuals to take advantage of others. Public choice and public law, as combined, therefore are not centered on optimal outcomes. They are instead focused on strategic behavior, mostly by individuals, and that behavior's repercussions at the macro level.

The earliest work in public choice tended to focus on how the inherent problems of collective action deflect policy from maximizing social welfare. One way of describing the evolution of the field is to say that these inherent problems are now seen as the background conditions of politics, significant mostly because of the institutions and behaviors that are necessary to overcome them and create effective democratic governance. As we will see, this change may in part be due to the reduced dominance of economists whose focus is on welfare maximization and the increased role of political scientists, who are interested in political institutions rather than optimizing policy.

## 2. Trajectory of public choice theory

Public choice theory looks very different today than it did when it started. The differences are important on a range of dimensions, from the practical to the more theoretical and normative. To see some of these differences consider two images, to some degree caricatures, of public choice theory: the old school and the new school.

Classic public choice theory was dominated by economics. James Buchanan, William Landes, William Niskanen, Richard Posner, George Stigler, and Gordon Tullock, to name a few prominent practitioners, were economists or legal academics who drew heavily on economics. In their research, rational and self-interested individuals had goals familiar to consumers and producers in the market. Those individuals thought about money, mostly, and wanted to maximize profits, budgets, or rents of some kind. Political institutions too got caught up in rent seeking, joining with interest groups and industry to capture part of the public good for their own ends. (Economists use the term 'rent' to denote profits in excess of what a competitive market would provide, such as monopoly profits; 'rent seeking' is the effort to gain these excess profits.)

The courts, by contrast, typically operated outside of this greedy world of rent seeking. They were largely seen as non-strategic. Some accounts (Landes and Posner 1975) allowed them to uphold rent-seeking contracts as an external enforcement mechanism. In other accounts (Macey 1986; Eskridge 1994), the courts functioned essentially as guardians of the public interest, able to mitigate or stop rent seeking and to maximize social welfare, at least in efficiency terms.

A partial example of this admittedly artificial portrait of classic public choice theory is Niskanen's work on administrative agencies. In *Bureaucracy and Representative Government* (1971), Niskanen, an economist who had worked in government, assumes that bureaucrats are rational and self-interested. In his model, bureaucrats want to increase their agency's budget; that goal is a proxy for true objectives such as reputation and office perks. In Niskanen's administrative state, each agency is a monopoly provider of services with an informational advantage over the sole buyer of its services, Congress. Thus, agencies are able to charge high prices for their products and also produce too much, compared to a competitive market. The normative uptake is straightforward. Changes should be made to agencies and Congress, so that the bilateral monopoly does not operate unchecked.

In other examples, the courts are portrayed as a necessary institution to step in and



prevent egregious rent seeking. In *Rethinking the Progressive Agenda: The Reform of the American Regulatory State* (1992), Professor Susan Rose-Ackerman, an economist, argues that courts should make Congress more accountable to voters. Specifically, she contends that ‘judges should demand internal statutory consistency as a way of preventing hidden deals’ and ‘judges should ask if appropriations acts are consistent with statutory purposes (44–5).’ For Rose-Ackerman, public choice nicely explains much of legislative and regulatory action, but the courts transcend this quagmire and indeed can squelch destructive behavior by rational self-interested actors in these explicitly political institutions.

The public choice theory discussed in this volume retains some elements of the classic formulation. But the volume mainly reflects the theory’s modern incarnation. The new school of public choice has wider disciplinary roots. Some economists still lurk, but political scientists arguably dominate the current field. As before, research starts with rational and self-interested individuals, though some scholars tinker with the bounds of rationality. These individuals are not thinking like profit-seeking firms, however. Rather, their objectives are now frequently cast in policy terms, often on an ideological scale, from conservative to liberal. Their goals seem better matched to what public institutions actually do – make policy decisions. The courts are no longer outside the public choice model, ready to swoop in as non-strategic actors to correct self-interested behavior that is at odds with social welfare. Instead, in more recent research, the courts are often incorporated as rational actors with their own goals that they are trying to achieve.<sup>4</sup>

The new models are both more sophisticated and more complex. They include multiple strategic players, each of whom is attempting to influence final outcomes through a multi-stage policy process. The structure of the process is much more important than in the earlier formulations, but structure is not tied in a straightforward way to outcomes.

The chapters that follow lay out many examples of this modern version of public choice theory. To name just one, Matthew Stephenson’s work (2006) on the ‘strategic substitution effect’ examines how agencies can trade off between procedural formality and interpretative plausibility to obtain judicial approval. The courts care both about the agency’s policy objectives and loyalty to the statute’s text, but they know less than the agency does about the agency’s needs to interpret a statute broadly. They can, however, tie greater deference to greater procedures. Agencies care about their policy objectives. They do not want to be reversed by the courts and can choose to use costly procedures to obtain greater judicial deference for more aggressive interpretations. The players are rational and self-interested, though their objectives do differ. ‘The result’, as Stephenson summarizes in his chapter here, ‘is a separating equilibrium, in which agencies promulgate aggressive interpretations in formal proceedings, and more plausible interpretations in less formal contexts’. Although Stephenson explores some of the model’s normative implications and pulls out some empirical predictions, he neither proposes reforms nor tests any of the predictions.

Alongside this more politically and legally grounded version of public choice theory is an expanding body of empirical research connected to public choice and public law. This research is being conducted by legal scholars and social scientists. The empirical legal studies movement, if one can call it that, seems to be enjoying a growth spurt, with its own dedicated blog and peer-reviewed journal.<sup>5</sup> To be certain, only some of this empirical work targets public law and institutions. Even this targeted work, however, often is

not paired directly with formally derived public choice models. There are some exceptions, of course (see studies cited in Enelow and Morton 1993). Empirical public law studies are instead typically grounded in more loosely formulated public choice theory. Just as theoretical work in public choice has benefitted from methodological innovation, so has empirical work. Sophistication in methods also brings more circumspection. Results are more nuanced, harder in many cases to interpret, and much more open to methodological critique.

The volume addresses some of this empirical work. Consider one set of examples. In recent years, there has been a resurgence of analysis of judicial voting patterns in a range of cases. At the crudest level, many studies have found that a judge's ideology, typically measured as the party of her appointing President, influences her votes in cases. On a finer level, some studies (Miles and Sunstein 2006) focus on the composition of the judicial panel and its effect on voting. There seem to be two panel effects: minority opposing-party judges often vote with the majority, and mixed-party panels frequently reach more moderate outcomes than non-mixed panels. How these effects stack up – in other words, whether the majority's preferences or concessions to the minority dominate – is not clear. And that uncertainty makes normative proposals (such as mandating mixed panels in all cases) hard to evaluate.<sup>6</sup>

In sum, current research in public choice and public law is wide-ranging, whether theoretical, empirical, or both. It draws on classic economic assumptions about instrumental rationality and their repercussions for collective decision-making. It also treats individual actors and institutions carefully – no longer simply applying economic theories to politics but instead combining economics and political science to better understand the complex political realities of public institutions, even if ultimately we are less informed about how to make such institutions function better.

### 3. **Lessons moving forward**

For particular subjects, the individual chapters in this volume generally describe and dissect considerable research in public choice and public law. They also suggest future research projects, tied again to specific issues that are discussed in some depth. Looking at these chapters together, three broader lessons for the field also emerge.

#### *Modeling and its limits*

First, as with any analytic approach, there are limits to public choice theory. Models by their nature are simplified versions of reality, and they are therefore limited in their ability to accommodate empirical richness.

On one hand, these limits can be pushed. More institutional detail should be incorporated into models of public institutions. Administrative agencies, for example, are run by political appointees and civil servants. Their incentives and goals are often different. Some decisions do not go through the political appointees; other decisions are split between competing offices; and other calls are made at the top but may be met with resistance below. Modeling agencies as single preference points harks back to older models of Congress as a unicameral legislature represented by its median member. Much ink has been spilled applying social choice theory to Congress or more recently to courts. What about multi-member or multi-bureau agencies? It is often said that 'Congress is a "they", not an "it"'<sup>7</sup> – but the same is true of the executive branch.

In addition, more behavioral detail should be included into models of individual choices. Rational individuals falter. Preferences develop and change. Some attention has been devoted to gaps in rationality (and much more to holes in information), but little work investigates the origins of private and public actors' preferences in public law. For instance, many models of the Supreme Court place the justices on a scale from conservative to liberal and predict strategic behavior (working essentially from given preferences to forecast votes); other empirical work generates placements on an ideological scale from past cases (using former decisions to create preference profiles). What about investigating how, as a matter of theory (not just empirically), preferences can shift over a justice's tenure (or indeed over a court term)? Do justices trade off between policy or doctrinal preferences and their long-term reputation (or, at the term level, between case outcomes and workload management)? When political parties shift their policy stances over time, do judges who are already on the bench track these changes or remain fixed in the party's earlier stance?

Limits can and should be pushed, but they also do not disappear. Public choice theory, even with more institutional and behavioral detail, is just one lens through which to view public law. As the academy (whether economics, political science, or law) becomes increasingly specialized, researchers are less likely to engage meaningfully with disciplines and methodologies different from their own. But public choice research would benefit from more reading in history, anthropology, and sociology, in particular – in small part to be more aware of what public choice cannot address. To take one example, the intellectual history of the study of the bureaucracy is in many ways a trajectory from sociology to economics to political science. But a compelling, rich story of the administrative state needs at least all three disciplines, as well as multiple methodologies – historical analysis, formal modeling, case studies, and statistical testing. Such complex, interwoven storytelling, at its best, is extremely difficult; Daniel Carpenter (2001) and a few others have tried, with considerable success. At the least, scholars and readers need to determine what stories public choice theory can tell, how else those stories could be told, and what stories remain to be covered.

### *Empirical testing*

Second, empirical work in public law needs to be better tied to public choice theory to the extent that such theory may inform the work. Much empirical analysis tests various hypotheses, such as whether agencies engage in midnight rulemaking because there are considerable benefits and few costs to such action at the end of a presidential administration. The empirical analysis is exploratory, looking for potentially interesting relationships. But empirical studies rarely test predictions generated from formal public choice models.

One notable exception is David Epstein and Sharyn O'Halloran's (1999) research on delegation in a governmental system where authority is split between a legislature and executive. They begin by developing a formal model of making policy: internally through the legislature, externally through an administrative agency, or some combination of the two. Their model essentially reduces the legislature's decision to 'trad[ing] off the internal policy production costs of the committee system against the external costs of delegation (7)'. They draw from the model several propositions, which they then convert into testable predictions and analyze using a sample of post-World War II legislation.

It is hard work. This approach requires difficult formal modeling and statistical testing. But the development of the field requires more devotion to using underlying theories to drive empirical exploration. In any event, because it requires expertise in both modeling and empirics, this approach is likely a call for more co-authorship. The suggestion also works in both directions. Not only should empiricists better ground their research in theory, theorists should also explicitly consider the empirical validity of their assumptions and empirical implications of their work. At the very least, they should ensure that their models are at least in principle susceptible to empirical testing, which is not always true today. 'Empirical' in this context can mean both qualitative and quantitative information. Even if public choice theorists do not team with empiricists, they can articulate testable propositions from their models, whether formal or informal, and propose possible datasets or case studies that might be used to analyze those propositions. Without some bridge to empirical testing, model building can make only a limited contribution to understanding the world.

For most of the past decade, the National Science Foundation has been funding efforts to integrate theoretical models and empirical testing, most notably through annual extensive summer institutes entitled Empirical Implications of Theoretical Models. Such integration can prevent models that are based on invalid assumptions or produce unrealistic or untestable predictions; it can also help provide 'causal motivation' and 'theoretical specificity' for empirical work. The ideal, in NSF's view, is to produce research with the following components: '(1) theory (informed by case study, field work, or a "puzzle"; (2) a model identifying causal linkages; (3) deductions and hypotheses; (4) measurement and research design; and (5) data collection and analysis' (Granato and Scioli 2004, 315). These integration efforts have made some critical headway in political science, but much more needs to be done in law.<sup>8</sup>

### *Normative implications*

Third, as theory and empirical work in public choice and public law grows more sophisticated, normative implications become harder to draw. Formal public choice models often produce multiple stable outcomes (that is, equilibria); regression models frequently yield conflicting or unexpected results. In other words, there is considerable uncertainty. We ultimately may know less from learning more. Given this uncertainty, those interested in prescription have to proceed cautiously.

This caution could take several forms. To start, the overall ambition of normative work should likely be restricted. If reformers were minimalists, normative lessons would be more incremental than fundamental in most circumstances, barring some clearly untenable situation. Marginal changes could then be assessed and refinements made. Since we have limited ability to predict the results of structural changes, the odds are that any change will be about as good as the average political institution. Unless a current institution is performing substantially below average, reforms are not likely to produce improvements and carry with them a risk of harming the situation. This insight suggests a Burkean attitude, promoting incremental change except in cases of clear institutional failure. Or, in plainer language, 'if it ain't broke, don't fix it'.

In addition to being minimalist, any normative analysis should be particularized to specific institutional arrangements and actors. If relatively minor changes in theoretical or empirical models can result in different predicted outcomes, general across-the-board

reforms may create undesired results. For instance, voting systems that work in some settings may not work in others. In order to be confident that changes will produce desirable results across many different settings, we would need a model that applies to all of those settings with strong reliability. Since we do not have such models, we should be wary of normative recommendations that fail to pay close attention to context.

Finally, reformers should consider focusing on process values instead of on outcomes, if outcomes are highly uncertain and contingent on complex institutional factors. By reforming the means, outcomes may or may not change, but the process can be restructured in beneficial ways. For example, it may be difficult to know whether allowing minority parties to have ballot access will produce improved policy outcomes, but we might nonetheless support such access on grounds of fairness. Similarly, we may not be sure whether judicial enforcement of federalism leads to better policy arguments, but we might support them on the basis of communitarian values or reject them based on the intrinsic importance we place on membership in the national political community.

All three of these lessons are relatively easy to state but hard to implement. We have moved beyond the initial reaction by many to early public choice work – that the pathologies of collective decision-making create only negative results, negative in terms of positive description and negative in terms of the feasibility of reform. Current work captures more of the rich institutional detail of public law. Results, such as they are, are more complex, providing interesting perspectives on the interaction of public and at times private actors. Moving forward, the field, with some effort and reflection, can become more theoretically and empirically grounded, which will make it simultaneously increasingly compelling and still more cautious.

#### 4. Overview of volume

The book has four parts. It begins with foundations of public choice theory. It then addresses structural constitutional law, voting, and democracy. It next turns to administrative design and action. It concludes with in-depth examination of a handful of specific policy areas. The chapters cover a wide range of important issues in public choice and public law, but they are not designed to be exhaustive. Rather, they aim to summarize much of the key literature in a range of major topics and to frame that literature for open debates and future research.

##### *Part I: Foundations*

The body of the book begins with a critical introduction to the core tenets of public choice theory. The authors include an adherent, a skeptic, and a partial consumer of the field. It starts with an overview by the partial consumer of public choice scholarship, Jerry Mashaw, whose 1997 book, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law*, tried to forge a sophisticated middle ground between proponents and critics of public choice theory for public law. His chapter provides a clear overview of the core components of public choice theory. It then criticizes some of the important applications of the theory to public law, including legislative outcomes and the interaction between the legislature and agencies. It also examines the potential normative implications of public choice theory for the courts. Mashaw concludes by expressing some warranted frustration at the difficulty in using public choice theory to reform public

institutions (as discussed in the third lesson above), but he also expresses hope that recent research may provide some helpful insight into old and important problems.

The remaining chapters in Part I examine the two main dilemmas of collective action by self-interested rational individuals: the potential for lack of cooperation and undemocratic group decisions. Steven Croley, the public choice skeptic, takes up the former issue, the lack of cooperation, in a chapter on interest group theory. Interest groups themselves face collective action problems, which are easier to overcome in organizing a small number with high individual stakes. Thus, according to the classic public choice account, the firms in an industry are easier to organize than individual consumers and will therefore have greater political influence. Maxwell Stearns, the adherent (and co-author of a new casebook devoted to public choice and public law), addresses the latter issue, incoherent aggregation of preferences, in a chapter on social choice theory. Both authors compile the well-trodden and more provocative elements of their topics, drawing from both the more classic and modern versions of public choice theory and suggesting avenues for further research.

After distinguishing interest groups from interests, Croley starts by providing a 'skeptical primer' of the formation of such groups. He details the classic public choice account and then questions its assumptions and implications. Some readers may retain their preference for the conventional account; others may find the criticism more compelling. In any event, the primer raises important questions about 'why some interests and not others organize for political purposes'. In line with more modern treatments, Croley moves beyond interest group theory and examines interest groups empirically, both describing the population of interest groups and assessing their impact on public policy. The chapter also draws some interesting connections between the theory and empirical work, including how some of the empirical facts and analysis call into question standard public choice accounts of group formation.

Stearns begins by laying out important concepts in social choice theory for the uninitiated or for those needing a refresher, including the Median Voter Theorem and Arrow's Theorem, to name but two. He also explains some basic voting systems for aggregating individual preferences. The second part of the chapter takes on the normative implications of social choice theory, but not as the classic formulations of public choice theory would suggest. Those formulations typically emphasized the pathologies of social choice theory for public institutions. Stearns, by contrast, 'demonstrate[s] that collective decision making bodies can improve the quality of their outputs when they operate together and that this holds true even if each institution is separately prone to the problem of cycling.' The chapter thus provides several glosses on social choice theory, from the classic to the more modern view.

## *Part II: Constitutional law*

Beginning with James Buchanan, public choice scholars have sought to understand how constitutional rules shape policy outcomes. This Part's authors are thus core public law scholars. Two of the chapters in Part II focus on how voters influence governmental decisions and on how the legal system structures that interaction.

Elizabeth Garrett's chapter concerns a topic that is often overlooked in the public choice literature: how important policies are created without the involvement of legislatures or agencies through direct democracy. Surprisingly, over two-thirds of Americans

live in jurisdictions with some form of direct democracy. As Garrett points out, the threat of popular initiatives may discipline legislative rent seeking. At the same time, it may also offer interest groups another avenue for influencing policy in their own favor.

The outcomes of direct democracy appear to be shaped by several factors. Money is important to obtain the signatures needed to qualify a ballot measure and to campaign for or against it. Voters may or may not have useful cues such as endorsements or opposition by interest groups with well-known stances. There may be strategic efforts to manipulate such cues, such as the example Garrett gives of the real estate developer group that named itself the 'Conservation Action Fund'. Finally, single-subject rules are unevenly enforced but may limit logrolling or compromise measures. And to further complicate the picture, politicians may strategically put forward crypto-initiatives that are not necessarily intended to pass but provide signals about the politicians' views to key interest groups. Overall, direct democracy is neither a revival of the glories of Athenian democracy nor a simple playground for special interests or majoritarian bigotry.

Voters more often influence outcomes by electing politicians to office rather than voting directly on policies, but elections reflect institutional structures as well as voter preferences. Sam Issacharoff and Laura Miller probe the functioning of electoral processes. They advocate structural approaches to electoral law, which focus on improving competitive conditions between political parties. These approaches are explicitly economic in their inspiration, mimicking some theories of oligopolistic competition in product markets. The oligopolistic situation is necessitated, Issacharoff and Miller say, by Duverger's Law, which postulates that under plurality voting rules in single-member districts, only two parties will sustainably compete. Issacharoff and Miller advocate a 'no lock-up' approach to judicial review of electoral rules.

Voters express their preferences in electing officials at many levels of government, but the resulting legislative and executive officers may have quite different political preferences. This is basic feature of the American constitutional scheme as well as others in countries from Australia to Germany. These federalist arrangements are the topic of Rick Hills's chapter.

Hills begins by examining 'exit based' theories of federalism such as the Tiebout Theorem, which posit that the competition of jurisdictions for voters drives policies toward optimal outcomes. These theories, he finds, can be considered only partially successful. Instead, he argues that scholars should give increased attention to 'voice based' theories, which consider how local governments may counter rational voter ignorance by providing incentives and processes for increased participation. It is not clear, however, whether this analysis provides insight into the federalism issues faced by courts. Not unusually, as theory becomes more complex and nuanced, normative prescriptions become more elusive.

Some early public choice theorists counted on courts to give effect to their normative prescriptions. Although early accounts of public choice theory made simplistic assumptions about judicial behavior, that behavior has increasingly become the focus for modeling and empirical research, as discussed by Tonja Jacobi in her chapter. She emphasizes the complex strategic choices facing Justices in determining whether to vote to hear a case and crafting an opinion that will mobilize other institutional actors (such as lower courts) or at least avoid legislative override.

The implication of this perspective is that it may be difficult to untangle the connections

between judicial policy preferences and legal doctrines, because of heterogeneity of preferences and the complicating effects of strategic incentives. This also makes empirical research more difficult because models may include many variables and cross-cutting effects. Much of the research is focused on the American courts, and the US Supreme Court in particular, which may limit the generalizability of the findings.

Unlike the other authors in this Part, who focus heavily on the US legal system, Tom Ginsburg examines the literature on comparative constitutional systems. Widening the scope of investigation beyond a single legal system underscores the behavior complexities of lawmaking. It turns out, for example, that we cannot even be sure of the systematic effects of such a basic structural difference as that between presidential and parliamentary systems. The normative picture is also unexpectedly complex in that interest groups may not merely be rent-seeking parasites on the political process but may actually play an important role in mobilizing support for public-regarding institutions.

Many of the chapters in this book, but perhaps especially this one, should induce a sense of humility about the limits of our knowledge of how political structures and processes generate outcomes. The ability of scholars to create interesting, plausible models far outruns our ability to test those models or their often conflicting implications. Empirical work on public choice issues is difficult: key variables are difficult to measure, models are complex, and endogeneity is pervasive. Yet models by themselves demonstrate that something is possible, sometimes surprisingly so, but not that it is actually happening.

### *Part III: Agency design and action*

The next portion of the book turns, though not completely, from constitutions to statutes. It focuses on administrative agencies in public law. Two of the authors share similar training (doctorates in political science and law degrees) but they hail from different specialties, formal modeling and empirical testing. The other two authors draw predominantly from their economics and public policy expertise, also combined with their law degrees.

Part III starts with a comprehensive chapter by Matthew Stephenson, on how Congress, the White House, and the courts 'influenc[e] the interpretive practices of administrative agencies'. In examining Congress, Stephenson analyzes both the legislature's *ex ante* decision to delegate interpretative power to an agency and the legislature's *ex post* mechanisms to oversee that delegation. In considering the White House, he explains options available to the President to control agencies but emphasizes whether such options are effective and desirable. In analyzing the courts, the primary focus of the chapter, Stephenson addresses two major issues: how judicial review is often shaped by policy preferences of the judges, and how agencies then mold their behavior in light of judicial practices. Although Stephenson himself is a sophisticated formal modeler who does not typically engage in empirical work, his chapter explains his and others' technical models without any mathematics and explores related empirical work.

The other two chapters in Part III focus on more detailed aspects of the application of public choice theory to administrative agencies: agency structure and mechanism choice. Jacob Gersen, a wide-ranging public law scholar who draws on theory, empirics, and doctrine, examines bureaucratic design. Jonathan Wiener, an environmental law and risk management specialist, and Barak Richman, a business and economics scholar,



analyze decisions over which instrument (for instance, a conduct rule, price/liability rule, or information disclosure rule) to use to implement public policies.

Gersen's chapter integrates public choice theory and concrete disputes in administrative design. He begins by examining *ex ante* concerns about agency design and then turns to analyzing the connection between these concerns and various overseers of the bureaucracy. Gersen then applies this theoretical work to two core problems in administrative law: distinguishing binding rules from other forms of agency decisions such as guidance documents and ensuring fidelity to the non-delegation principles of Article I of the US Constitution. The rest of the chapter explores issues in vertical and horizontal structures of agencies. For the former, Gersen examines centralization and insulation, with a focus on their applications to the unitary executive debate. For the latter, he analyzes redundancy, with an emphasis on how overlapping jurisdictions do and should shape deference doctrines.

Unlike other chapters that relegate normative discussion to the end, Wiener and Richman start with the normative question governing mechanism choice, determining what instruments are optimal in particular settings. They then examine positive questions of mechanism choice, analyzing how political institutions help shape outcomes. In other words, the chapter sets up normative ideals for policy implementation and then uses public choice theory to see how actual policy choices depart from these ideals. This positive (in the sense of descriptive) account of instrument choice focuses on the role of interest groups in determining policy tools and on the disjunction between what theory would predict and empirical realities. The account also considers how unorganized individuals and crisis events can influence mechanism choice. Unlike other chapters in this Part that consider only American institutions, this chapter is comparative as well, examining how international environmental treaties and European Union regulation place American experiences in context and provide potential lessons for policymaking.

#### *Part IV: Specific statutory schemes*

We wrote earlier about the need for more contextual research on institutions. The chapters in Part IV provide rich case studies from a public choice perspective of how preferences, institutions, and procedures shape regulatory outcomes. The settings are drug safety, energy regulation, and environmental law.

Part IV begins with Dan Carpenter's study of food and drug regulation. The federal government plays a unique gate keeping role for new drugs, a system that has been widely copied internationally. Carpenter critiques existing theories about the FDA because of their static models and failure to include uncertainty as a key factor, while he considers most historical accounts of the development of the system to be too simplistic. He is particularly critical of the school of analysis initiated by Sam Peltzman's economic approach. Many analysts take the industry and its products as exogenous and then analyze their relationship with the FDA, whereas the industry and its product portfolio are endogenous and have been massively shaped (and reshaped) by regulation.

Carpenter stresses the role of information in understanding the evolution of regulatory systems and the importance of organizational reputation. Because of uncertainty about drug properties, the agency is faced with a problem in stochastic optimal control. Carpenter develops a model for the agency review process and then extends the model to include strategic drug development decisions by companies and strategic review