CHAPTER 1

INTRODUCTION TO THE ECONOMIC ANALYSIS OF COLLECTIVE DECISION MAKING

Introduction

Public choice applies the methodology of economics to the subject matter of political science. In recent decades, scholars writing in such disciplines as political science, economics, and law have expanded the scope of public choice to study the closely related subject areas of law and the legal process. Extending public choice to study law and lawmaking institutions is natural. The institutional focus of political science bears striking similarities to the institutional focus of law including especially public law. And yet, the public choice methodology is notably different from the doctrinal approach that legal scholars generally employ. Quite often the two disciplines suggest different implications for the same legal doctrine or policy. Perhaps more notably, public choice sometimes also suggests different implications concerning questions of legal policy, respecting both public and private law, than does its analytical cousin, law and economics.

The study of law and economics, which began in the middle part of the twentieth century, gained substantial traction within large segments of the legal academy beginning in the 1980s.\(^1\) Law and economics has since developed into an established and widely respected approach to the study of legal policy.\(^2\) Early scholars writing in the field applied principles of economic reasoning, with a heavy emphasis on neoclassical price theory and its concomitant emphasis on microeconomic efficiency, to study substantive common law rules. While economic analysis had long been associated with antitrust law, it soon became notable for providing “positive,” or descriptive, accounts of longstanding doctrines of contract, tort, and property, that when viewed strictly through the analytical

\(^1\) Among the reasons was the influence, and controversy, provoked by the first edition of Richard Posner’s famous treatise, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973), a book now in its seventh edition.

\(^2\) See Bryant G. Garth, Strategic Research in Law and Society, 18 FLA. ST. U. L. REV. 57, 59 (1990) (“Law and economics represents the one example of a social science that has successfully found a place at the core of the legal arguments made in courts, administrative agencies, and other legal settings.”).
frameworks set out in judicial opinions often appeared imprecise or even internally inconsistent. More recently, scholars have broadened the focus of law and economics to offer valuable insights into wide ranging bodies of both public and private law, including, for example, civil procedure, tax, and even family law.

The differing analytical approaches of law and economics and public choice can roughly be described as follows. Law and economics directly shines the light of economics onto legal doctrines, while public choice instead passes economic analysis through an intermediate institutional filter before illuminating legal doctrines. Some readers might be surprised that these two complementary methodologies are capable of generating substantially divergent implications for the same questions of legal policy. Providing a brief illustration that draws upon an actual Supreme Court case will help to draw out the comparison between these two economic methodologies, and to contrast both with the more traditional, and familiar, doctrinal perspective. In the remainder of this chapter we will explore several foundational assumptions and analytical tools that the two economic methodologies share in common as a prelude to developing the specific public choice tools in the chapters that follow.

I. THREE ANALYTICAL PERSPECTIVES ON THE DOCTRINE OF EXPORT TAXATION

We begin with a simplified presentation of an actual Supreme Court case, *Commonwealth Edison Co. v. Montana.* The *Commonwealth Edison* case draws upon the dormant Commerce Clause doctrine, an important and hopefully familiar doctrine from American constitutional law.

In the 1970s, it was estimated that Montana held about 25% of the nation’s coal reserves and over 50% of the nation’s low-sulfur coal reserves. During this period, oil and gasoline prices were rising rapidly. The Montana legislature enacted a 30% severance tax on coal with knowledge that about 90% of that coal was regularly shipped out of state. Because low-sulfur coal was an alternative to increasingly costly gas and oil, the Montana legislators anticipated that even the costly severance tax...
would not substantially reduce the quantity of coal that consumers purchased for out-of-state shipment. In fact, the severance tax did not substantially reduce coal consumption in or out of state and, as anticipated, through out-of-state purchases, the tax funded approximately 20% of the state’s tax revenues. Commonwealth Edison, a company that purchased large quantities of coal from Montana for out-of-state shipment, claimed that the severance tax violated the dormant Commerce Clause doctrine.

A. DOCTRINAL ANALYSIS

Let us first consider a brief, and somewhat simplified, doctrinal analysis of Commonwealth Edison. The analysis necessarily begins with the text of the Commerce Clause itself, set out in Article I, § 8 of the Constitution. The Commerce Clause states: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” The Commerce Clause challenge presented several questions, some of which had been resolved in prior Supreme Court cases, which applied to this case through the doctrine of stare decisis or precedent, and others of which were of first impression, meaning that they had yet to be resolved.

To determine the constitutionality of the severance tax based upon the Commerce Clause challenge, the Supreme Court had to answer the following questions: (1) Does the Commerce Clause go beyond delegating regulatory power to Congress, as a strict reading of the text might suggest, and also empower courts to invalidate state legislation that undermines a unified national market in the absence of a federal statute? (yes, based upon long-standing Commerce Clause precedents) (2) Given that the Commerce Clause operates in a dormant capacity, and given that the challenged Montana tax, although neutral in wording—all purchasers had to pay the tax—was designed with the knowledge that it would primarily burden out-of-state purchasers while benefiting Montana taxpayers, should the Court apply strict dormant Commerce Clause scrutiny, rather than the substantially more relaxed balancing test? (no, because the case involves a neutral tax, the balancing test applies) (3) Applying the balancing test, does the neutrally apportioned severance tax survive despite its anticipated disproportionate impact on out-of-state purchasers? (yes, under the balancing test, the Court focuses primarily on fair apportionment without closely evaluating the true incidence of the tax).

To summarize, in Commonwealth Edison, the Supreme Court determined that the primary issue was whether the tax discriminated against out-of-state coal purchasers. Because it did not, the Court rejected

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the application of strict scrutiny under the Commerce Clause and instead applied a balancing test. Under that test, the Court rejected the argument that the tax was not “fairly apportioned.” While the anticipated burden on out-of-state consumers might have suggested unfair apportionment, the Court instead used the case to establish that under the balancing test, it would not analyze the difficult questions that arise when a particular neutral tax produces a disproportionate burden on one group of taxpayers as compared with another, even when the difference is that the disadvantaged group is out of state.

B. A LAW AND ECONOMICS ANALYSIS

Let us now consider an alternative analysis that draws upon the analytical tools associated with law and economics. The severance tax challenged in Commonwealth Edison was applied during a period in which the demand for coal was “inelastic,” meaning that the demand was largely insensitive to changes in price. Imposing the severance tax, therefore, was not likely to dramatically reduce the amount of coal purchased. As a result, the tax had the anticipated effect of transferring wealth (the tax proceeds) from out-of-state purchasers to benefit in-state taxpayers in the form of lower tax obligations.

To properly evaluate the tax, it is important to consider the primary disciplining mechanism that promotes the proper, or “efficient,” allocation of “public goods.” The efficient provision of such goods requires that the anticipated beneficiaries are financially responsible for their procurement through taxation. Sustaining the Montana severance tax threatened to undermine the efficiency of public goods provision in Montana and in other states that might enact similar laws. It did so by encouraging those states to devise methods through which to export substantial portions of their tax obligations onto out-of-state consumers who thus pay for, but do not benefit from, state-provided goods and services. Thus, the law and economics analysis reveals a problematic implication of Commonwealth Edison. The case threatens to promote inefficient incentives regarding the provision of public goods. And it does so in apparent tension with a central objective of the dormant Commerce Clause doctrine, namely, facilitating a unified national market.

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9 For a thoughtful analysis consistent with this discussion, see Levmore, supra note 6.
11 For a discussion of two competing definitions of efficiency, Pareto superior and Kaldor Hicks, see infra p. ___.
12 Public goods are characterized by two features: (1) value is not diminished by consumption; and (2) once the goods are provided, noncontributors cannot be effectively excluded from receiving the benefits of those goods. See Paul A. Samuelson, The Pure Theory of Public Expenditure, 36 REV. ECON. & STAT. 386–89 (1954).
C. PUBLIC CHOICE ANALYSIS

Finally, let us consider an alternative analysis of Commonwealth Edison from the perspective of public choice. The public choice analysis begins with an assessment of the political dynamics that gave rise to the challenged severance tax on coal. The Montana state legislators understood that under the Supreme Court’s dormant Commerce Clause doctrine, facially discriminatory taxes are subject to strict Commerce Clause scrutiny, a test that is generally fatal to the challenged law. To avoid this result, the Montana legislators crafted the severance tax on coal in neutral terms. This ensured that the tax applied equally, based upon the quantity of coal purchased, to both in- and out-of-state purchasers. Adopting the neutral tax allowed the Montana legislature to benefit from a more relaxed standard of scrutiny associated with a balancing test even though those enacting the tax were well aware that the actual burden, or “incidence,” of the tax would fall most heavily on out-of-state purchasers.

While the severance tax thus threatened to promote a seemingly inefficient incentive to provide government goods and services funded by those who would not receive the benefits, public choice analysis suggests two countervailing institutional considerations. These considerations lend support to the Court’s decision to apply a lower standard than strict dormant Commerce Clause scrutiny, with the effect of sustaining the severance tax. First, if the Supreme Court were to strike down the challenged severance tax based upon considerations of fairness to out-of-state coal purchasers (protecting them from funding public goods provided to Montana residents), the precedent would create seemingly intractable burdens on future courts presented with challenged tax policies that impose differential burdens on taxpayers, but that do so in less stark terms than those characterized by Commonwealth Edison. Determining the acceptable incidence of tax burdens on particular payers is not conducive to clear, articulable judicial standards. For that reason, questions of tax fairness are generally left to political processes to resolve. Second, like coal generally, low-sulfur coal is a natural resource that is randomly distributed among states. While allowing Montana to impose its severance tax on coal undoubtedly burdens out-of-state purchasers, it is unlikely to provide residents in burdened states with a meaningful opportunity to reciprocate by passing tax laws that singularly target residents in Montana. Sustaining the Montana severance tax produces, in effect, a single wealth transfer from out-of-state purchasers to Montana

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13 For a discussion consistent with this analysis, see Stearns, supra note 6.

14 The incidence of a tax is not necessarily where the tax is imposed in the first instance, but rather is a function of the ability of those nominally paying the tax to pass on the tax to end consumers by raising prices. For a discussion of incidence analysis, see SAMUELSON & NORDHAUS, supra note 10, at 73 (“By incidence we mean the ultimate economic impact or burden of a tax.” (emphasis removed)).
citizens, but does so without threatening to generate reciprocal laws that undermine the objective of national political union among states that lies at the core of the dormant Commerce Clause doctrine.

The preceding discussion was not intended to conclusively resolve the issues presented in Commonwealth Edison or to demonstrate the rightness (or wrongness) of the holding. Instead, the discussion highlights important differences between and among three approaches used to address an important constitutional doctrine. In this example, the law and economics analysis provides an important normative basis for challenging the doctrine that the Supreme Court developed in Commonwealth Edison involving export taxation. In contrast, the public choice analysis suggests an alternative account that helps to restore the doctrinal distinction between discriminatory laws subject to strict dormant Commerce Clause scrutiny and neutral tax policies with differential effects that are instead subject to a more relaxed balancing test.

This is the first of many illustrations of the differing perspectives offered by doctrinal analysis, law and economics, and public choice, as applied to a wide range of topics in both public and private law. In some cases, the normative approaches of law and economics and public choice will coincide, while in others, public choice will help to explain apparent ongoing tensions between insights drawn from efficiency analysis and seemingly stubborn or resistant doctrine.

While the discussion thus far has focused on the divergent implications of public choice and law and economics as applied to an actual Supreme Court doctrine, the two disciplines share an important common methodological foundation. The remainder of this chapter, which considers the economic analysis of collective decision-making, develops several common threads that help to tie these disciplines together. For students who have a background in economic theory, much of what follows will be a refresher. For those students for whom this course represents their first entrée into economic reasoning, what follows can best be conceived as a helpful primer on several foundational economic principles that will be further developed throughout this book.

In developing and applying the specific tools associated with public choice, the chapters that follow will flesh out the concepts introduced below. We begin with several foundational assumptions, or “axioms,” which public choice scholars generally assume (but do not always state) in their work.

II. AXIOMS OF ECONOMIC ANALYSIS

Like economists generally, public choice scholars construct models that are intended to capture or describe important defining
characteristics of a broad range of complex phenomena observable in the real world. One of the most important aspects of the methodology of economics is appreciating that the models are not intended to capture the underlying complex reality; instead, they allow scholars to construct a manageable image of that reality. In this course, we will present numerous public choice models that are intended to help explain law-making institutions, judicial practices or norms, and legal doctrines. It is important up front to observe that these models are not intended to exclude analyses or insights growing out of other disciplines that study the same phenomena. Often the public choice analysis will complement intuitions drawn from other disciplines, and other times it will encourage us to reconsider those intuitions. But any complete analysis will inevitably depend upon a combination of analytical approaches.

The public choice approach, like that of economics generally, is deliberately reductionist. While it seeks to capture essential features of studied phenomena, in doing so it deliberately excludes other aspects of the same phenomena. As with all models, the goal is not to capture the innumerable subtleties associated with the complex world. Instead, it is to distill the essence of the phenomena under review into an image that allows the scholar to develop and test various hypotheses.\(^\text{15}\)

We will now introduce some basic assumptions that are relevant to understanding public choice theory and economics more generally, including several analytical techniques that scholars use to generate testable public choice hypotheses. At the end of the chapter, we will present three brief public choice applications that demonstrate the potential range of public choice in explaining various aspects of collective decision making. Following the chapter is an appendix that provides a more detailed introduction to several price theoretical concepts. We begin with a critical, and often misunderstood, foundation of all economic analysis, namely the assumption of individual rationality.

**A. THE ASSUMPTION OF INDIVIDUAL RATIONALITY**

Human beings are infinitely diverse and complex creatures who manifest a dizzying array of instincts, passions, and behaviors. Humans are variously impulsive or cautious, analytic or careless, selfish or altruistic, hardworking or lazy, ambitious or content, heroic or cowardly, and compassionate or cruel. Not only do different people hold wide-ranging traits, but individuals also possess a peculiar combination of sometimes inconsistent traits. Individuals often exhibit conflicting or

\(^\text{15}\) See Milton Friedman, *The Methodology of Positive Economics*, in *Essays in Positive Economics* 3–43 (1953). For a debate on whether public choice scholarship has lived up to its expectation of developing testable hypotheses capable of falsification, see *infra* chapter 2 (discussing Donald P. Green & Ian Shapiro, *Pathologies of Rational Choice* (1994), and *The Rational Choice Controversy: Economic Models of Politics Reconsidered* (Jeffrey Friedman ed., 1986)).
erratic behaviors, and even behaviors that seem ill-suited to furthering objectives that they sincerely express a desire to pursue.\footnote{For a useful discussion that ascribes certain documented manifestations of behavior that appear in tension with the economist’s understanding of rationality to cognitive processes that evolved at a time far removed from modern developed market structures, see Owen D. Jones, \textit{Time–Shifted Rationality and the Law of Law’s Leverage: Behavioral Economics Meets Behavioral Biology}, 95 NW. U. L. REV. 1141 (2001).} All of this might appear to pose an insurmountable obstacle to scholars who seek to construct analytical models that rest upon some set of underlying generalizations concerning how individuals behave as a means of testing hypotheses about how changes in institutions or rules are likely to influence or modify human behavior.

Economists and public choice scholars avoid setting out strong assumptions concerning individual human desires or motivations. Instead, they rest their models on the seemingly simple assumption of individual “rationality.” Individual rationality posits that whatever divergent preferences an individual might hold, she is presumed to engage in the cost-effective pursuit of her desired objectives. Along with economists generally, public choice scholars take individual motivations as assumed or given. For example, one can be as rational in the pursuit of starting or growing a firm as in building or contributing to a charity.

The economic understanding of rationality is thus quite different from \textit{homo economicus}. Critics of economic analysis often presume that the theory rests upon the understanding that individual conduct is invariably narrowly self-interested. In fact, this is a caricature of the economist’s assumption of rationality. Individuals may be motivated by any number of inspirations. While this can, and often will, include the desire to maximize income or profit, it also includes competing concerns, for example, supporting family and friends; gaining intellectual stimulation; increasing leisure; or exhibiting commitments to religion, charity, or a community. Economists assume that \textit{whatever} ends an individual seeks, he or she will do so “rationally.” This simple assertion about individual rationality distinguishes an economic or public choice approach to the study of human behavior from those associated with such related disciplines as psychology, philosophy, or sociology.

Economists further assume that while individuals are widely divergent, rationality renders certain attributes of human nature constant. This point is perhaps best illustrated by way of comparison. Consider, for example, the approach to human behavior associated with “republican” philosophy.\footnote{To avoid confusion, we are discussing small “r” republicanism, which describes a political philosophy, often associated with \textsc{Jean Jacques Rousseau}, \textit{The Social Contract} (Penguin Classics Reprint ed., 1968) (1762), rather than large “R” Republicanism, which instead describes a political party associated with an ideology or bundle of ideologies.} Such an approach assumes that however selfish individuals may be when they are operating within the private
economic sphere, they are expected to relinquish personal motivations in favor of the “public good” when entering the public or political sphere. An influential modern variant, “civic republicanism” contends that ideology or public spiritedness, rather than rational self interest, is necessary to explain certain political behaviors, including for example why people vote. Scholars embracing this perspective contend that because most voters understand that their votes will almost certainly not control the outcome of an election, economic or public choice models are hard pressed to explain voting or to do so other than in a circular manner.\(^\text{18}\)

Similarly, some legal scholars contend that ordinary and constitutional politics are distinguished based upon the level of public spiritedness among those participating in the process. Thus, for example, Bruce Ackerman has contended that while self-interested behavior characterizes the rough and tumble of “ordinary politics,” those developing constitutions tend to engage in a higher level of public spiritedness that includes focusing on the good of the larger populace.\(^\text{19}\) In contrast, consider the views of Nobel Laureate James Buchanan, working in the public choice tradition.\(^\text{20}\) Buchanan, like Ackerman, predicts that choices and behavior will differ in the context of constitutional decision making. But Buchanan argues that this differing behavior will result from the different nature of the rules and institutions implicated by constitutional decision making. Because of the different natures of constitutions versus statutes, Buchanan argues, constitutions tend to be written at a higher level of abstraction and neutrality. As a result of this difference in generality, it is more difficult for individuals to predict where they will be in a post-constitutional regime than it is to predict how specific pieces of legislation, enacted within an existing constitutional regime, might affect them. Constitutional choice problems are thus analogous to the “veil of ignorance” thought experiment advanced by philosopher John Rawls.\(^\text{21}\) Buchanan predicts that individuals will behave differently in a constitutional choice setting versus a legislative setting because of the institutional choices they confront, not because of a change in their preferences.

Other well known scholarly traditions, dating to Karl Marx,\(^\text{22}\) assume that individual preferences are a product of group or class associations. Marxian economic analysis is premised upon the idea that the ruling class will seek to further its interest at the expense of the

\(^{17}\) For a more detailed discussion of voting, see infra pp. \(\_\_\_\_\_\_\_\).

\(^{19}\) See, e.g., BRUCE ACKERMAN, WE THE PEOPLE 1: FOUNDATIONS (1991).


working class. In more modern times, legal scholars associated with critical legal studies, critical race theory, and certain strands of feminist scholarship,\(^{23}\) have built on this insight to criticize legal policies that benefit perceived elites or to advance policies that help those perceived as marginalized or otherwise disadvantaged.

In contrast, economists influenced by a neoclassical perspective question whether individuals, behaving rationally, will further interests inuring to the benefit of a group they are associated with when doing so operates to their individual detriment. For an interesting, and controversial, example, consider the following economic analysis of racial discrimination among private firms. Nobel prize-winning economist Gary Becker has suggested that in competitive labor markets, firms that seek to indulge racial prejudices in the process of hiring or promotions will incur a cost that puts them at a competitive disadvantage relative to firms that do not. Over time, the racist firms will thus be forced either to change their policies, regardless of personal views concerning matters of race, or risk falling out of the market.\(^{24}\) One noted criticism of the Becker model is that it responds to the problem of racism by suggesting that as a theoretical matter, it should not exist.\(^{25}\)

In considering the merits of Professor Becker’s theory, consider once again the nature of economic analysis. Through deliberately reductionist models of interactive human behavior, the theory allows economists to construct models capable of empirical testing. Can you think of any tests that one might develop to falsify or reaffirm Professor Becker’s theory that, holding all else constant, private market competition should be expected to drive racially discriminatory firms out of the market? Given that racism does exist in numerous institutional settings, can Becker’s model be extended to explain the circumstances in which it can arise and persist?

More generally, economists are skeptical of claims that individual rationality, and thus behavior, changes simply as a function of the context in which such behavior takes place. Economists are inclined, for example, to question whether citizens who engage in self-interested private pursuits 364 days a year will shed this predilection on the Tuesday after the first Monday in November (Election Day) thus casting their ballots in a manner that in otherwise uncharacteristic fashion seeks to advance a larger notion of public good. Similarly, economists are inclined to question whether a greater degree of public spiritedness better characterizes


\(^{24}\) See generally Gary S. Becker, The Economics of Discrimination (2d ed. 1971).

constitutional politics than ordinary politics. While economists doubt that context or group affiliation alone changes rational motivations, economists believe that institutional incentives can and do shape human behavior.

B. INSTITUTIONS MATTER

Public choice theorists question whether individuals change their personal motivations as they move from one sphere of activity to the next. They agree, however, that individual behavior often changes as individuals move from one institutional environment to the next. An individual member of Congress, for example, who is motivated to procure special interest legislation for her district or to further partisan concerns associated with her party is unlikely to abandon these goals simply because she is called upon to address a set of questions that are labeled constitutional, rather than ordinary, politics. For example, her motivations are likely to remain constant when voting on a prospective judicial nominee, a proposed constitutional amendment, or a decision whether to impeach the President or some other officer. But the constancy of human nature does not imply constancy of individual behavior. Quite the contrary.

Economics is predicated on the assumption that individuals respond rationally to changes in incentives. If the price of oranges rises relative to the price of grapefruits, then holding all else constant (for example assuming that the same land is hospitable to both crops and that the demand functions for both crops are otherwise similar), economists would predict that citrus farmers will, along the relevant margin, increase their production of oranges relative to grapefruits, and conversely, that consumers will purchase fewer oranges and more grapefruits. Changes in relative prices change individual incentives.

While price often affects behavior, so too do incentives created within institutions. A fundamental tenet of public choice is that institutions matter. By this, economists understand that institutions internalize mechanisms that reward or punish particular behaviors and that individuals, behaving rationally, modify their behavior in response to the resulting institutional incentives.

This of course raises the question: What is an institution? Nobel prize-winning economist Douglass North has defined “institutions” as follows: “[T]he humanly devised constraints that structure human interaction. They are made up of formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behavior, conventions,”

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26 To be clear, “rationally” does not mean “perfectly.” Cf. Jones, supra note 16, at 1166–67 (explaining the error of assuming that evolutionary processes transform the human mind into a perfectly calculating utility maximization machine).
self-imposed codes of conduct), and their enforcement characteristics. Together, they define the incentive structure of societies and specifically economies.\textsuperscript{27}

As an example of the importance of institutions in motivating individual behavior, consider the relative difference in “independence” that judges have in various institutional settings. In the United States, federal judges have a high degree of independence. Article III judges are appointed for life rather than elected for a term of years and serve during “good behavior.” This has been interpreted to permit removal only for corruption or malfeasance, rather than for the substantive content, or popularity, of their rulings or written opinions. In contrast, many states have various forms of elected judiciaries. In some states, judicial candidates run for office in standard partisan elections.

Imagine two otherwise identical candidates for judgeships, one of whom is appointed to a federal court and the other of whom is elected to a state court for a term of years. Notwithstanding their similar ideologies and common philosophy concerning the proper judicial role, it is reasonable to predict that each will behave differently based upon the incentives associated with the two differing institutional settings.\textsuperscript{28} Few would deny that federal judges care about how their rulings and opinions are received.\textsuperscript{29} We can predict, however, that in contrast with state judges who face reelection pressure, Article III judges are less likely to respond directly to the pressures of popular opinion and are more likely to adhere to their preexisting judicial philosophy, including, perhaps, indulging their personal ideological views even if those views are unpopular with the general public.

As is often the case, this important question of legal policy does not admit of a right or wrong answer. A careful analysis based upon economic principles, however, can help to unmask important—if unstated—assumptions that enter into the relevant policy choice. In this instance, the analysis, which reveals likely divergent incentives among judges appointed for life versus judges elected for a term of years, reflects assumptions concerning who the principals are to whom we wish the judges to direct their responsive behavior. Elected judiciaries, responsive to the political pressures of current constituencies, implicitly view judges as agents of voting constituencies. In contrast, independent judiciaries, those relatively isolated from popular political pressures, implicitly view


\textsuperscript{28} For now we set aside the problem that once the institutional arrangements are put in place, these different judicial institutions attract potential judges who no longer share common approaches to the methodology of judging.

\textsuperscript{29} Or as Finley Peter Dunne’s Mr. Dooley famously put it: “NO matter whether th’ constitution follows th’ flag or not, th’ supreme coort follows th’ iliction returns.” FINLEY PETER DUNNE, MR. DOOLEY ON THE CHOICE OF LAW 52 (Edward J. Bander comp., 1963) (1901).
judges as agents of those who enacted the laws that they are now called upon to interpret. Of course if judges or other actors were perfect agents for their respective principals there would be no need to build incentives within institutions that minimize potential divergences between the goals of the principal and the actions of the agent. It is thus not human nature, but rather the different incentives created by the different institutions, that lead to different predictions about judicial behavior.  

C. AGENCY COSTS

The divergence between the goals of a group of voters or other decision makers and the actions of those they elect or otherwise choose to represent their interests is referred to as “agency costs.” Agents, whether they are legislators or judges, are not blank slates. A fundamental tenet of public choice holds that agents are not neutral conduits through which principals further their goals. Instead, the agents themselves possess preferences and motivations that sometimes coincide with, and other times diverge from, those of their principals. James Madison highlighted the problem of agency costs in creating Congress in a famous passage from the Federalist No. 51:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.  

Madison was discussing the problem of agency costs in the context of the legislature. But the problem of agency costs also arises in selecting any governmental official, whether the Executive, bureaucrats, or judges. As the preceding discussion shows, in the judicial context, the problem is complicated because before we can identify appropriate measures to reduce agency costs, we must confront the logically antecedent question, who is the principal?

Public choice alone does not provide an answer as to the optimal degree of judicial independence in a constitutional system. And, as our divergent systems of judicial selection between the federal government and the states, and among states themselves, demonstrate, this is not a question that necessarily admits of a single correct answer. Public choice can, however, assist in identifying the tradeoffs between accountability, independence, and agency costs, in designing institutions that will improve the probability of obtaining a preferred balance among these

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30 We will revisit the question of the possible motivations and preferences of judges infra Chapter 7.

concerns. In addition, public choice analysis can help to unmask implicit assumptions concerning the role of judges and whose interests, or which principals, they are expected to serve.

D. METHODOLOGICAL INDIVIDUALISM

Like economics generally, public choice rests on the premise of methodological individualism.32 A careful assessment of any institution demands that one first understand how that institution affects the incentives of the individuals comprising or affected by it. James Buchanan and Gordon Tullock, two leading public choice theorists, expressed this intuition as follows: “Collective action is viewed as the action of individuals when they choose to accomplish purposes collectively rather than individually, and the government is seen as nothing more than the set of processes, the machine, which allows such collective action to take place.”33 And as Kenneth Shepsle, another leading public choice scholar, famously put it: “Congress is a ‘They,’ not an ‘It.’”34

Methodological individualism lies at the foundation of economic analysis, underpinning all models of human interaction and behavior. To illustrate, consider a commodity cartel, such as a cartel for oil production. Considered as a collective, the cartel members have a strong incentive to reduce aggregate output, with pro rata allocations among individual producers, in an effort to set the price at the same level that a monopolist would who controlled the entire market. And yet, it is well understood that this result is likely to be unstable. The resulting instability arises as a direct consequence of the divergent motivations of the cartel as a whole, on the one hand, and its individual members, on the other. Assuming pro rata cuts based, for example, on preexisting market share or some other formula (perhaps an average over the prior three years), each individual cartel member, behaving rationally, has an incentive to “cheat.” Specifically, each member is motivated to sell just a bit more than the allocated cartel share at a price just below the level dictated by the cartel. Each individual member of the cartel hopes to get away with modest cheating while also hoping that the remaining cartel members adhere to their quotas, thus sustaining the overall favorable pricing structure. For the cartel as a whole, however, the problem gets much worse. Each cartel member shares the same incentive to benefit from the artificially inflated cartel price, by selling more than the allocated share. Over time,

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33 See BUCHANAN & TULLOCK, supra note 20, at 13.

therefore, the cartel output and pricing scheme tends to erode, with the
effect of moving both the output and price back toward the pre-cartel,
competitive level.

Although each of the cartel members would have been better off had
all adhered strictly to the allotted quota than by participating in a regime
in which all members cheat on their quota, thus driving the price back
down to the competitive levels, the difficulty is that the ultimate
production decisions are made individually. Admonishing members to
cooperate will not ensure that they do so. The individual firm’s goal of
maximizing profits does not disappear simply because the firms have
collectively identified themselves as a cartel.

E. FREE RIDING AND FORCED RIDING

Collective choice institutions likewise give rise to problems of “free”
and “forced” riding, key concepts that underlie public choice theory. Free
riding occurs when an individual is able to gain some of the benefit of the
 provision of a collective good without being required to pay the marginal
cost associated with its provision. Free riding occurs most commonly in
connection with the provision of public goods.\textsuperscript{35} Consider, for example,
national defense. Once an army is formed, all Americans benefit from its
existence in that the army cannot decide to protect my home from
invasion, but not my neighbor’s. Thus, if I pay taxes to support an army,
my neighbor benefits as well, even if he makes no similar financial
contribution. As a result, my neighbor has the opportunity and incentive
to “free ride” on my willingness to provide the public good by declining to
contribute his fair share. Each individual (including myself) has the same
incentive to free ride, however. As a result, if left to voluntary individual
contribution, rational self-interest will tend toward an underproduction
of public goods. Although the group as a whole would be better off if
everyone contributed to the provision of the public good, each individual’s
personal incentive deviates from this collective goal.

In other collective choice situations, similar dynamics might lead to
“forced riding,” the mirror image of free riding. Forced riding occurs when
an individual is forced by other members of the group (such as under a
majority voting regime) to contribute to the provision of a public good
beyond the personal benefit he receives from it.\textsuperscript{36} At the extreme,
an individual might gain negative utility from the provision of a given public
good; for instance, a pacifist may actually feel herself to be made worse off

\textsuperscript{35} See supra note 12 (defining public goods).

\textsuperscript{36} For a similar analytical problem, consider cases of forced subsidization of livestock and
agricultural marketing programs, which are challenged by contributors who do not perceive a
proportional benefit of the collective advertising. See, e.g., Johanns v. Livestock Mktg. Ass’n, 544
U.S. 550 (2005) (rejecting First Amendment challenge to program that forced subsidization of
government advertising and distinguishing cases that struck down similar non-government
advertising programs).
by the provision of national defense. As a less extreme example, consider those who do not enjoy opera but whose taxes subsidize opera productions or those who do not enjoy sports but whose taxes subsidize the construction of a new baseball stadium. Even assuming that a majority fully supports these expenditures, those receiving the benefit of the publicly procured goods do not bear the full cost. This suggests forced riding, which results in an overproduction of such collective goods relative to those public goods where members of the majority coalition are not able to force others to subsidize the satisfaction of their preferences. Does the forced riding concept offer insight into Commonwealth Edison v. Montana? If so, which of the three analyses used to describe that case does it tend to support?

F. STRUCTURING APPROPRIATE MICRO–FOUNDATIONS

As the twin concepts of free riding and forced riding demonstrate, in seeking to promote the ability of institutions to generate preferred outcomes, it is essential first to provide appropriate “micro-foundations” for individual actions. Effective group performance is impossible unless the institutions motivate individuals to act in a manner that advances the objectives at the appropriate levels the collective body was designed to accomplish.

Let us return to the problem of the cartel. Assume once again that the objective is to reduce output in an effort to raise price. An obvious way to align the incentives of the individuals with those of the group of producers is to combine the productive capacities into a single firm. At that point, the individual running the now single firm has an incentive to reduce output and raise price, even though the same individual, as one of several members of a cartel, would instead have an incentive to cheat from an imposed quota intended to achieve the same overall result.

G. POLITICS AS AN EXCHANGE MODEL

Disaggregating collective action via the assumption of methodological individualism not only helps to explain the formation and structure of private institutions, but also it transforms the traditional understanding of politics. In contrast with the conventional understanding of politics as a search for the “public interest,” public choice helps to reframe collective action as an exchange model. We will present the exchange model in more detail in chapter 2. For now, it is sufficient to note that within this analysis, those who demand government–provided goods and services—voters, interest groups, and lobbyists—offer their support to those elected

37 Such an objective is obviously detrimental to consumers who would prefer the benefits of a competitive regime, which increases output and lowers price.
officials who, in exchange, agree to provide them. Unlike private market exchange, however, the costs and benefits of lawmaking “transactions” affect persons who do not necessarily participate in the bargain. As the Commonwealth Edison case illustrates, the contributions of those who receive particular services might not match those who contribute—and indeed who might be forced to contribute—to the provision of those services.

H. PARETO OPTIMALITY VERSUS KALDOR HICKS EFFICIENCY AND THE HOLDOUT PROBLEM

In theory, even without adhering to a unanimous consent rule as a precondition to collective action, it is possible to ensure outcomes that benefit all persons affected by the decisions of the group. If a proposed change in law is welfare maximizing, those benefiting by the action (the “winners”) could compensate those harmed by the action (the “losers”) and still come out ahead. The winners would thus be made better off, even after paying compensation to the losers, and the losers would be no worse off once they had been fully compensated for any losses. If such compensation took place, the result would satisfy the most stringent definition of economic efficiency. A change from the status quo to an alternative state is Pareto superior if it improves the position of at least one participant without making anyone else worse off. Pareto optimality demands that all potential Pareto superior moves have already taken place. When this occurs, any further changes from the status quo would instead effect a wealth transfer between or among participants, with the result that at least one party to the exchange would be made worse off.


The importance of the Pareto principle in formulating law and public policy has long been the subject of academic debate. See, e.g., Daniel A. Farber, The Problematics of the Pareto Principle (bepress Legal Series Working Paper No. 698, 2005), available at http://law.bepress.com/cgi/viewcontent.cgi?article=3513 & context=expresso (demonstrating theoretical and practical limitations in applying Pareto principle in legal policymaking); Marc Fleurbaey, Bertil Tungodden & Howard F. Chang, Any Non-welfarist Method of Policy Assessment Violates the Pareto Principle: A Comment, 111 J. POL. ECON. 1382, 1383 (2003) (using social welfare function analysis to critique Kaplow and Shavell’s assertion that “welfarism and the Pareto indifference condition are equivalent”); Louis Kaplow & Steven Shavell, Any Non-welfarist Method of Policy Assessment Violates the Pareto Principle, 109 J. POL. ECON. 281 (2001) (arguing that policy making should be based solely on Pareto criterion, the claimed equivalent to welfarism); Guido Calabresi, The Pointlessness of Pareto: Carrying Coase Further, 100 YALE L.J. 1211 (1991) (maintaining that Pareto criterion has limited normative implications because logically, all Pareto improvements should already have taken place).
In private markets, at least assuming no negative externalities, meaning that persons not party to the transaction are not adversely affected, Pareto superior exchanges routinely occur. When an individual purchases a latte for $3, the buyer presumably values the coffee more than the money, and the vendor values the money more than the coffee. In contrast, when the government provides goods and services, it uses its coercive power of taxation to fund its programs. When this occurs, not everyone benefits and those who do benefit might not do so to the same degree. Thus, the benefits such programs confer might only loosely match the specific contributions that particular taxpayers provide. In theory, those who benefit could pay off those who are disadvantaged, and the result would satisfy the condition of Pareto superiority. Because those previously disadvantaged and now compensated would no longer be worse off, while those who are advantaged would continue to be (albeit with a reduction equal to the amount of compensation to the losers), the program would improve the plight of the winners without causing others harm. The practical difficulties with such a regime, however, are generally thought to make actual compensation implausible.

Under an alternative definition of efficiency, Kaldor Hicks, a change from the status quo is efficient when the potential for such compensation exists even though the actual compensation does not occur. The intuition is that because the winners’ welfare has improved by more than the losers’ welfare has suffered (hence the possibility of compensation), the overall result is welfare enhancing. This more relaxed standard for efficiency, while acknowledging the unavoidable nature of winners and losers in the procurement of publicly provided goods or services, provides an important normative foundation for the provision of many public programs that cannot satisfy the more stringent Pareto criterion.

In the collective choice setting, from an economic perspective, the best evidence of whether a given collectively chosen policy maximizes social welfare would be the unanimous consent of all members of the relevant community to the action. The unanimity benchmark for collective choice, therefore, appears functionally identical to the Pareto superiority criterion for market transactions. A unanimity rule for collective choice, however, creates the difficulty that even a single person could prevent the proposed law from passing. A single person might oppose based upon the merits of the proposed change or in a strategic effort to use veto power to demand some other benefit as a precondition to tendering support. In the context of individual market transactions (such as for purchasing a cup of coffee), the problem of the strategic holdout does not arise, as an individual lacks the power to impose costs on anyone

40 For a discussion of externalities, see infra part II.I.
other than herself. In a collective choice setting, however, the need for consent among all relevant parties can be very expensive and thus give rise to serious problems of strategic hold-outs.

As a result, although a rule requiring the unanimous assent of those governed as a precondition to coercive governmental action might prevent imposing costs on those who do not benefit from such action, both as a theoretical and as a practical matter, the unanimity norm is impossible to implement. Thus, in judging the merits of a given collective choice institution, it becomes necessary to adopt an alternative to Pareto superiority, or its analogue, unanimous consent, such as Kaldor Hicks efficiency, and to accept a majority or supermajority decision-making rule.

I. THE PROBLEM OF EXTERNALITIES AND THE COASE THEOREM

In well-functioning markets, with well-defined and freely transferable property rights, the rational actions of individuals will not only tend to raise each person’s utility, but will also promote societal welfare. Where, however, property rights are poorly defined, or individuals can pass part of their costs of production on to others, one can no longer assume that individual actions combine to raise social welfare. For instance, a farmer might be able to raise and sell pigs to consumers under mutually beneficial terms. And yet, pig farming also gives rise to odors and pollution that are likely to annoy and harm the farmer’s neighbors. If the farmer is not required to compensate his neighbors for the harms created by pig farming, the farmer and his purchasers will not bear the full cost of the activity of raising pigs. At this point, it is no longer possible to infer an increase in social welfare from the transactions that improved the welfare of the farmer and his purchasers.\footnote{Activities that have externalities are clearly not \textit{Pareto} optimal and may or may not be \textit{Kaldor Hicks} efficient. Do you see why?}

This problem, known as \textit{negative externalities},\footnote{There are also \textit{positive} externalities, as for example, when a developer enters a blighted part of a city and introduces new shopping, employment, and entertainment opportunities with the effect of improving the overall quality of life for those residing there.} has long been a major focus of neoclassical economic theory. The influential economist Arthur Cecil Pigou believed that a major challenge facing market economies was ensuring that firms absorb the full costs of their own productive activities, and thus that regulation served to minimize potential negative externalities.

Nobel Prize-winning economist Ronald Coase was highly critical of Pigou’s project of devising mechanisms through which to limit externalities. Instead, Coase posited that a principal objective of the legal system is to limit barriers to private market transactions because such
transactions help to move resources to their most highly valued uses. If transactions cost barriers are minimized or removed, any problems associated with negative externalities could then be handled exclusively through private market transactions. Most surprisingly, Coase contended that this benign result obtained regardless of whether the legal system nominally protected the firm producing, or the firm suffering, the negative externality. Coase published this result in a famous essay, *The Problem of Social Cost*, which is most well known for setting out the now famous Coase Theorem.

The Coase Theorem is at once counterintuitive, controversial, and widely misunderstood. The theorem posits that in a world with zero transactions costs and perfect information, resources will flow to their most highly valued uses without regard to liability rules. This seemingly basic insight has generated a vast scholarship that has revealed both the theorem’s complexity and its significance in evaluating institutions.

One immediate difficulty that Coase confronted was that many critics understood the theorem to imply that transactions costs are low, and that as a result, resource allocation is generally efficient and welfare enhancing. Of course there are countless illustrations in the real world of inefficient resource allocations and of costly barriers to welfare-enhancing private market exchange.

What Coase intended, however, was quite the opposite. Coase posited two preconditions that render liability rules irrelevant to efficient allocation of resources: zero transactions costs and perfect information. Certainly in the real world, there is little reason to assume that transacting is costless. Transactions costs include travel, documentation, and communication. They also include opportunity cost, defined as the time and energy taken from other potentially profitable activities. And perhaps most significantly, although he specified perfect information as a separate condition, the cost of gathering the necessary information with which to enter into transactions is certainly among the greatest cost impediments to contracting.

To illustrate how Coase’s stylized world, one with zero transactions costs and with perfect information, yields optimal outcomes without regard to liability rules (meaning without regard to whether there is a “right” to cause or to be free of a negative externality), consider the

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45 See id. As demonstrated infra, chapter 3, the term Coase Theorem might be a misnomer because under certain conditions associated with empty core bargaining, even when the theorem’s articulated assumptions are satisfied, the predicted efficient resource allocation is not guaranteed.
following hypothetical.\textsuperscript{46} Imagine a laundry and a factory that pollutes into a river to the laundry’s detriment.\textsuperscript{47} The factory is worth $11,000; but by polluting, it reduces the laundry’s value from $40,000 to $24,000. Further assume that for the laundry to realize its potential value of $40,000, the factory must cease all pollution, which would require the factory to shut down.

The Coase Theorem posits that in a world with zero transactions costs and perfect information, this efficient result will be achieved—the factory will close and the laundry will operate—regardless of which of the two businesses owns the property right to pollute or to enjoin the pollution. Assume first that the factory owns the right to pollute. The laundry will pay up to $16,000—the difference in its value with and without the factory polluting—to purchase that right from the factory. Because the factory is worth only $11,000 even with the right to pollute, it has a rational incentive to sell its right to pollute, thus allowing the laundry to purchase the right to enjoin the pollution. Conversely, if the laundry owns the right to enjoin the factory’s pollution, the factory will not be able to purchase the pollution right from the laundry. The factory values that right at $11,000, $5000 less than the laundry values its contrary right to prevent the pollution. The example illustrates that if the owner of the laundry values the right to pollute more highly than does the owner of the factory, then regardless of who bears the property right to pollute—or conversely is the beneficiary of the liability rule when the factory pollutes—in a world with zero transactions costs and perfect information, the laundry will ultimately obtain that right.

A critical assumption in the analysis is that the numbers in the example capture all relevant costs. If there are hidden costs, psychological or otherwise, and if such costs are of sufficient magnitude to inhibit the deal, then the result will break down and the efficiency-promoting transaction will not occur, leaving the property right wherever the legal system happened to place it. If that right happened to rest with the laundry, then the efficient result is fortuitously achieved, but if it rested instead with the factory, then the transactions costs would suffice to prevent the efficient flow of resources, costing society up to the $5000 premium value that the laundry places on the property right.\textsuperscript{48}

\textsuperscript{46} We will later develop this hypothetical to present a limitation of the Coase Theorem in the context of empty core bargaining.

\textsuperscript{47} This is adapted from Varouj A. Aivazian & Jeffrey L. Callen, The Coase Theorem and the Empty Core, 24 J.L. & ECON. 175 (1981). See also Stearns, supra note 6, at 103–04.

\textsuperscript{48} Can you identify circumstances in which, even with low transactions costs, the Coasian result is unlikely to arise? If so, could you characterize the implicit impediment to the efficient outcome as a transaction cost? What does the preceding question suggest about the nature of transactions costs as that term is employed in the Coase theorem?
The preceding discussion introduced several important aspects of economic reasoning. This is an important starting point that will help you in appreciating the many public choice, social choice, and game theoretical concepts introduced throughout this book. We will now briefly consider three case studies that will help you in developing public choice insights in the chapters that follow.

III. THREE CASE STUDIES

The following case studies are intended to encourage you to think about the power of economic reasoning to tackle foundational questions about our political and legal processes. For each case study, you will continue to be able to revise your analysis as you acquire new frames of reference throughout this book. For now, evaluate each case study based upon the general intuitions developed in the preceding discussion.

A. IS VOTING IRRATIONAL?

Public choice applies economic principles, including those developed thus far, to politics and political processes. One foundational aspect of the political process, namely voting, however, is widely viewed as paradoxical especially when viewed from an economic perspective. The “paradox of voting” is that while virtually no informed voter expects her vote to control the outcome of an election and while voting is a costly activity, in every election, a considerable percentage of the population votes. The obvious costs of voting in terms of time and inconvenience are exacerbated when one also considers the cost of becoming sufficiently informed to cast a ballot for a desired candidate or group of candidates. As a result, some scholars claim that the act of voting defies “rationality” as that term is understood within economic analysis. One argument used to “rescue” voting from the claim that it is an irrational activity returns us to the definition of rationality itself. Rationality does not mean narrow self interest. Instead, individuals may rationally vote because they derive any number of non-pecuniary benefits, or an overall sense of satisfaction, from doing so. Consider the following rejoinder by Professors Daniel Farber and Philip Frickey:

Attempts have been made to reconcile voter behavior with the economic model by postulating a “taste” for voting. This explanation is tautological—anything people do can be “justified” by saying they have a taste for doing it.

49 We present a more detailed introduction to price theory in the appendix following this chapter.

50 Portions of the discussion that follow are adapted from MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY 64–72 (1997).

Professors Farber and Frickey go on to ask: “Why is it so difficult to admit that people vote out of political commitment, not personal satisfaction?”

In contrast, Professors Michael DeBow and Dwight Lee have argued that voting is rational if one views it as a “consumption” activity. Indeed, they argue that the apparent paradox of voting may even serve to increase the consumption value, or enjoyment, of voting. If individuals are confident that their votes will not control outcomes, then they might feel free to vote based upon their conscience, without regard to how the ultimate outcome might affect them personally. Knowledge of the paradox of voting might therefore be liberating in that it enables voters to make decisions based upon matters of principle, rather than pocketbooks.

Others have argued that if voters understand that their votes “do not count” this might make them increasingly irresponsible, allowing expressions of pure preference on a particular issue without coupling that preference with an expectation of producing any result. Similarly, it has been argued that when certain issues, for example abortion, are constitutionalized and thus removed from ordinary political processes, the result might be to produce more extreme and polarized public views, as votes cast become symbolic, rather than regulatory, acts. The limited influence of an individual’s vote on any given issue might give rise to this sort of irresponsible voting on a range of public policy issues, from immigration to national defense to spending.

Professors Farber and Frickey have responded to this line of argument by claiming that if people derive the ultimate satisfaction from voting because they expect their votes not to count, then they could derive even more satisfaction by locking themselves up in an empty house and shouting support for their favorite candidates. Obviously few people engage in this sort of senseless activity, but many people vote. If you conclude that although people have a taste for voting, they generally do not have a taste for senseless wastes of time, consider whether this merely restates the apparent tautology that Farber and Frickey have identified. If people actually did lock themselves in a room and shout support for candidates, we would have to maintain that because participants apparently derive some consumption value from this activity, they do not regard it as a senseless waste of time.

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55 See Farber & Frickey, supra note 52, at 1017.
1. An Expressive Theory of Voting

One explanation for why people vote is that they gain value from “expressive voting,” meaning that voting allows citizens to express their views on important matters of public policy. People might vote rather than merely shout in an empty house because they view voting as a more effective vehicle for expression. For example, voting results are tallied and widely reported in the media. In this view, the utility from voting comes from the act of voting itself and from the opportunity for expression that voting enables, rather than strictly from any expected payoff respecting the effect that any individual vote is likely to have on the outcome of the election. Thus, the act of voting might be similar to writing letters to the editor expressing views on political issues or engaging in peaceful political demonstrations. In each case, the effect of each individual in affecting the preferred policy outcome might be minuscule, and yet, if an individual gains utility from expressing herself in one manner rather than another, it is fully consistent with the rationality postulate. The “expressive theory” of voting is often referred to as a noninstrumental theory of individual motivation because the act of voting is an end in itself, rather than a means to the end of affecting the outcome of an election.

2. A Cost Function of Voting

If the cost of voting rises, holding all else constant, people are less likely to vote. If people vote out of “political commitment” rather than personal satisfaction, this tends to suggest that economic considerations, such as the cost of voting, should be largely irrelevant to the decision whether to vote. If individuals vote for consumption or expressive purposes, however, then this would suggest that the individual willingness to vote (the demand for voting) should decline as the price of voting rises. Available evidence suggests that this is generally, although not invariably, true. For instance, where jury pools are drawn from voter registration rolls, voter registration and participation rates are lower. Jury duty is a substantially more costly activity than merely voting, thus when the activities are linked, jury duty increases the cost of voting. If, in contrast, voting behavior was animated by a pure sense of civic commitment, then one would predict that the increased risk (or prospect) of jury duty (another form of civic commitment) should have no impact, or perhaps should have a positive impact, on the likelihood of registering to vote. Similarly, it has been argued that introducing the secret ballot reduced voter participation because secret voting eliminated

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57 Partners of the following discussion are based upon DENNIS C. MUELLER, PUBLIC CHOICE III, at 321–22 (2009).
a benefit to those who sought to bribe prospective voters, namely removing the ability to verify that commitments were honored. While eliminating this benefit might have reduced voter turnout, it surely improved the quality and representativeness of elections! Finally, factors such as bad weather, difficulty of registration requirements, and distance to the polling place generally lead to reduced levels of voting, although the effect might not be uniform across demographic groups.

3. Possibilities of Strategic Electoral Voting

There is some evidence that under specific conditions, individuals vote in a manner that might be described as strategic. For instance, in primary elections, many voters base their votes in significant part on the apparent electoral viability of the available candidates, rather than on which of those candidates is closest to their ideal point, meaning the point along a continuous liberal to conservative issue spectrum that most closely corresponds to a voter’s ideological preference. In addition, some studies suggest that voter turnout is higher in elections that are expected to be close. If so, is this also an example of strategic voting? Can you identify electoral contexts in which the possibility of strategic voting is instead likely to be limited? If so, what are the factors that limit strategic voting?

4. Group–Based Model of Vote Mobilization

Some commentators have suggested a non-instrumental theory of voting in which certain socioeconomic groups inculcate voting as a positive value. Examples of such groups include especially the well-educated and wealthy, and identifiable subgroups of voters, such as union members. In this model, voting might be analogized to cheering at a sporting event. At the margin, each fan in an 80,000 seat stadium adds little to the noise made in support of the team, even though each individual incurs a cost (such as a sore throat) from cheering (or booing). Nonetheless, fans do cheer for their team out of a sense of shared group solidarity. Similarly, citizens are trained through education and social norms to think—perhaps erroneously—that their votes make a difference in an instrumental sense. Indeed, some have suggested that democracy is dependent upon this form of misinformation. If so, does this also suggest

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60 For a helpful discussion, see Roger D. Congleton, The Median Voter Model, in THE ENCYCLOPEDIA OF PUBLIC CHOICE 382 (Charles K. Rowley & Friedrich Schneider eds., 2004). For a more detailed analysis of spatial reasoning in public choice modeling, see infra chapter 3.

61 See MUELLER, supra note 57, at 315.

62 See id. at 326–28; Feddersen, supra note 58, at 99–112.
that ultimately voting rests upon some tautological understanding of taste?

5. Voting as a Game of Cat and Mouse

Now consider the first of two purely instrumental voting models. Imagine a world in which everyone was familiar with the voters’ paradox. In theory, we might predict that no one would vote. If that were the result, however, even a single individual (let us call her an “initial voter”) who chose to vote—equipped with the understanding that the rest of the populace was rationally apathetic—could control the outcome of the election. Of course there is no reason to assume that the initial voter’s preferences will reflect the preferences of the population as a whole. As a result, some of those who previously declined to vote might now decide to vote simply to prevent an idiosyncratic individual from controlling the outcome (let us call these people “responsive voters”). But once the responsive voters turn out, this reduces the incentives of the initial voter to cast her ballot. And without the threat that the initial voter poses, the responsive voters lose their incentive to vote. This creates opportunities for a new set of initial voters to control the election. Now the responsive voters choose to cast their ballots, driving the new set of initial voters away. And on and on it goes.

Some studies suggest that this non-cooperative game can explain why every election produces at least some voters. The same studies suggest, however, that with a high degree of uncertainty concerning the behavior of other participants, rational voters will only vote if they derive some utility from the act of voting itself, without regard to the impact of their votes. At that point, are we back to an explanation based upon the taste for voting?

Consider, however, whether a cat and mouse game can be reframed to modify the end of voting itself. Perhaps it is rational to vote even if voters understand that the act of voting will not control outcomes in particular elections. Studies have suggested a high correlation between wealth and education on the one hand and voting on the other. This might appear anomalous in that well-educated and wealthy persons are more likely to be aware of the voters’ paradox than less educated and poor persons. But if educated persons know that it is “irrational” to vote, or more precisely that their individual acts of voting do not control outcomes, then they might intuit that this insight will dissuade many citizens from voting. As a consequence, they might also reason that if they do vote, their votes are likely to be afforded a disproportionate weight relative to their numbers given the disincentive of others to vote. This

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63 Mueller, supra note 57, at 303–32.
64 See id. at 306–07.
65 See id. at 327.
analysis ties into the game of cat and mouse. Even though these voters know that they are unlikely to be the marginal voters, they also know that by voting they are able to send a powerful signal to those who might try to become marginal voters in the future. In other words, the so-called paradox of voting may be premised upon an overly stringent view of the voter’s instrumental calculus. The paradox is premised on excluding any potential payoffs other than the prospect of influencing the outcome of a given election as the marginal voter.

Thus viewed, those most likely to vote do not anticipate being the marginal voter; instead they vote to invest in a signal. The signal conveys that regardless of where the voting margin lies, this core group of eligible voters will predictably vote. Those who consistently vote, e.g., in non-Presidential elections and regardless of weather conditions, signal to other voters that because they will vote no matter what, there is no point trying to play the game of cat and mouse with them. Moreover, signal strength directly correlates with the number of votes even though no single vote is predictably decisive.

This phenomenon might also provide another instrumental benefit to voting; within the relevant social groups to which such voters belong, the failure to vote is viewed negatively because it weakens the political signal for the group as a whole. The opposite is also true. Within the relevant social group, the act of voting is rewarded while the failure to do so—at least without a good excuse—may be frowned upon. Thus viewed, consistent voters create a form of political capital that is independent of the election-specific instrumentality of voting. In the event a core group of regular voters is unable to vote in a particular election, they need not worry because they will already have generated sufficient voting capital that others in the political process will likely behave as if most members of the core group had voted.

6. The Voter as Minimax–Regret Strategist

Let us now consider an alternative instrumental voting model. Assume that potential voters register a weak preference as between the two dominant candidates and that they ignore the probabilities of success of those candidates. Assume that a third, fringe candidate, perhaps one affiliated with either the Ku Klux Klan or a neo-Nazi group, enters the race. In this situation, mainstream voters turn out in large numbers because they fear that the fringe candidate might win. The strategy is named minimax regret because the voters are not seeking to optimize ideal outcomes, but rather to minimize the probability of an outcome that leads to a maximum regret.

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66 See id. at 307–08.
Perhaps surprisingly, those who turn out to vote for this reason tend to vote for their first choice candidate even if the second choice candidate stands a better chance of defeating the least favored candidate. Such voters appear to discount the low probability that the fringe candidate will win and the somewhat higher probability that their second choice candidate is more likely to prevent this least favored result from potentially emerging. Consider, for example, the possibility that a voter prefers candidate A to candidate B to candidate C, and that candidate C has drawn support away from candidate A. Candidate B may be the most effective challenger to the voter’s feared candidate C. If the voter were behaving in a strictly instrumental fashion, she would vote for B, but the relevant studies suggest that if she votes at all, she will likely vote for A.

Perhaps the voter’s rationale can be expressed as follows: “Because my vote is almost certainly not going to control the outcome, at the very least I can send a strong signal against candidate C; but if that’s the purpose of my vote, I may as well vote for my most favored candidate.” Does this further support the intuition that even in the minimax regret context, voters cast ballots because they derive a consumption benefit from doing so?

Final questions: Using the economist’s understanding of individual rationality, do you think it is rational to vote? If you said yes, how would you express your intuition? If you said no, what significance does your conclusion have for the ability to use models premised upon the economist’s understanding of rationality to explain other aspects of political processes? These are questions that you might wish to revisit as you further explore the tools of public choice theory throughout the course.

B. IS LEGISLATIVE LOGROLLING GOOD OR BAD?

In chapter 2, we develop models that treat political processes as an exchange network, similar in some respects to a private market but with important qualifications. One of the most important qualifications is that unlike private market exchange, which generally depends upon the unanimous assent of parties to transactions and which therefore is presumably welfare enhancing, or Pareto superior, lawmaking occurs through various majority, and sometimes supermajority, rules. As a result, even if the resulting laws are Kaldor Hicks efficient, implying that the law is welfare enhancing overall, winners and losers nonetheless remain.

Legislative processes do not, however, simply involve a series of votes cast on proposed legislation. Instead, they involve a complex framework that includes voting based upon merit, strategic voting or vote trading,
and reciprocal commitments made over extended periods of time. Here we consider the peculiar dynamic of vote trading, also known as logrolling.

Logrolling is often thought to be anathema to the “public good” and sound legislative decision-making processes because it permits private interests to attach unrelated, usually narrowly focused private benefits to larger public-regarding legislation. As such, it is often thought that legislative processes should be adapted to prevent or to minimize the power of special interests to attach private legislation (such as “pork barrel” projects) to general-interest bills. Such proposals can take any number of forms, including perhaps most notably the item veto and germaneness rules. On the other hand, if politics actually is an exchange process, then there might be nothing intrinsically wrong with logrolling. Instead, laws that further the public interest will often have unequal distributive effects. Even though welfare is generally enhanced, it is inevitable that certain people will be disadvantaged even by the most benign laws.

Logrolling might simply be a form of side payment from the social surplus created by the adoption of the law to compensate the “losers.” Just as compensatory side payments are sometimes involved in Pareto-improving exchanges—consider possible private arrangements to compensate third parties who suffer negative externalities—so too such payments might arise through political processes.

Alternatively, logrolling might be viewed as a means through which interest groups extort perks through the political process in exchange for allowing legislation to pass. In politics, as in football, it is generally easier to block than pass. Those empowered for various reasons to prevent the passage of desired legislation might use logrolling simply as a means to get preferred legislative benefits even though the larger legislation does not impose unique costs on them.

Can you think of circumstances in which logrolling is more likely to impose significant costs than benefits? In what circumstances is it likely to promote the passage of desirable legislation? Do you think that logrolling is likely to be a force for good or harm in Congress? If you wished to test this question empirically, how could you falsify either of these competing claims? Can you identify practices in Congress or elsewhere that affirmatively limit logrolling? What distinguishes institutions that prohibit or at least discourage opportunities for logrolling from those that encourage or at least condone logrolling? Can the question whether logrolling is good or bad be resolved outside of a particular institutional context? Why or why not? Bear these questions in mind especially as you read chapter 3.
C. IS LEGISLATIVE INTENT AN OXYMORON?

The preceding discussion highlights another important difference between private and public lawmaking markets. Unlike in private markets, decisions in public markets are made collectively. One of the major tasks of law, and one reason for the considerable overlap between public choice and public law, is the need to interpret statutes that are vague or imprecise as applied to new factual contexts presented in real cases.\textsuperscript{67}

Consider for example how the problem of logrolling, discussed above, affects legislative meaning. If legislation is the product of collective decision making, and if decision making is not only a function of the legislators’ views of the merits of the proposed bills, but also the product of strategic voting behavior related to matters extraneous to the bill, is it possible to construe meaning beyond the literal text of a statute? Does this help to justify arguments, advanced for example by Justice Antonin Scalia and Judge Frank Easterbrook,\textsuperscript{68} against judicial reliance upon legislative history when applying statutes in cases? In answering that question, should it matter that even when courts err in construing statutes, Congress rarely “corrects” such constructions by amending the laws? Does the practical inability of Congress to revisit statutes counsel in favor of a more liberal rule concerning legislative history or other related materials? To what extent do the answers to these questions depend upon how sanguine one is about the overall legislative process? Please bear these questions in mind especially as you read chapter 5.

D. CONCLUSION

The questions presented throughout this chapter will remain important throughout the course. As you acquire new skills, you might change your thinking about the relationships between markets and lawmaking institutions, and between and among various lawmaking bodies. One important aspect of a course in public choice is to question baselines against which one assesses public policy and to develop new techniques with which to evaluate proposed changes in public policy, whichever baselines one happens to select. In the next chapter, we introduce the tools of interest group theory, and in chapter 3, we further build upon these skills by introducing the unique problems of collective decision making associated with social choice. In the appendix that

\textsuperscript{67} This problem is exacerbated by another aspect of rationality, introduced in chapter 3, namely the problem of social choice and collective intransitivity of preference.

follows, we offer a brief primer on price theory, which will be of value in these and later chapters.