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INTRODUCTION

Public choice theory purports to explain and predict the behavior of political agents (politicians, bureaucrats, voters, and rent seekers) on the assumption that they are instrumentally rational. According to this assumption, an agent will pursue his subjective ends by choosing the course of action that, given his beliefs, is both conducive to that end and personally cheapest. Agents may be mistaken in their beliefs about means and costs, but this does not by itself detract from their rationality. They choose the least costly means to their ends, given their beliefs.

Economists extensively used the instrumental model of rationality to study the behavior of consumers, producers, and firms in various types of markets. Indeed, "rational choice theory" is a term frequently used to denote the basic conceptual apparatus of economics. Public choice[1] incorporates into economic models the behavior of political agents, such as voters and politicians, whom traditional economists treated exogenously. It does not ascribe to political agents the same goals that traditional economists ascribed to economic agents, although both public choice and traditional economists adopt the postulate of utility maximization as an analytical tool that allows them to study the formal properties of instrumental rationality, such

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1. For convenience, I will sometimes use the term "public choice" to refer to public choice theory.

as the scope of transitivity of preferences in individual and collective behavior. When their purpose is not formal analysis but rather the derivation of predictions, public choice theorists usually substitute maximization of votes, of political power, of bureaucratic appropriations, and other "non-economic" goals for maximization of monetary income—the goal postulated in many predictive applications of traditional economics.[2]

This Article rejects various philosophically interesting objections to the use of public choice theory in legal education. In Part I, I reject the view that the descriptive ambitions of public choice do not fit the interpretive skills that law schools are expected to foster. In Part II, I reject the view that public choice carries a harmful moral message. Part III replies to objections to the focus on efficiency that underlies most public choice scholarship. Part IV replies to the objection that legal education should be about case-by-case balancing, and as such makes no room for public choice theorizing. Part V counters some epistemic objections to teaching public choice at law schools. Part VI offers concluding remarks.

I. INSTRUMENTAL RATIONALITY AND RULE FOLLOWING

It is natural for professors of economics to teach public choice. After all, public choice generates explanations and predictions about political markets. The new perspectives introduced by public choice in areas conventionally classified as "economic" certainly earn public choice a place in an economics curriculum. The innovations range from explanations of special-interest legislation (*i.e.*, legislation that benefits concentrated interests at the expense of the overall public welfare) in terms of collusions between regulatory agencies and regulated industries to predictions of increased public expenditure as a result of logrolling (*i.e.*, vote trading by legislators). But what if our concern is not to explain or predict (for short, describe) behavior but rather to *interpret* rules? Judges and lawyers are supposed to interpret legal rules, and law professors are expected to develop prospective judges' and lawyers' interpretive skills. It might seem, then, that law schools make no room for the descriptive aims of public choice theory. This view draws a stark distinction between, on the one hand,

2. For a recent, non-technical introduction to public choice theory, see ROBERT D. COOTER, THE STRATEGIC CONSTITUTION (2000). For a defense of the view that rulers seek glory rather than revenue-maximization, see Manfredi M. A. La Manna & Gabriella Slomp, *Leviathan: Revenue-Maximizer or Glory Seeker?*, 5 CONST. POL. ECON. 159 (1994).

describing the behavior of political actors as a function of the constitutional rules under which they act, and, on the other, interpreting those constitutional rules. While explanations and predictions have to do with causes and effects, interpretation has to do with the irreducible notions of meaning and rule following. Or so many writers have thought.[3]

There is an obvious sense in which differences between description and interpretation are no good grounds for excluding public choice from legal education. We expect law schools to provide legislative as well as interpretive skills. Just as a lawyer trained in the economic analysis of intellectual property law is better equipped to advise legislators on the likely distributional and efficiency effects of a bill introducing new registration requirements for trademarks, a lawyer trained in public choice is better equipped to advise the drafters of a constitutional reform. In both cases, legislators will take advantage of the causal frameworks studied by economics theories of law. But what about the interpretive skills themselves? Does public choice make room for them? The instrumental model of rationality presupposed by public choice views agents as making *separate* cost-efficient choices, given their beliefs. Such opportunism seems to exclude *rule following*. The suggested conclusion is that in a world of opportunistic agents, no question of interpreting rules could possibly arise.

But this is a mistake. Instrumental rationality makes room for the sort of rule following that lawyers and judges must presuppose when they interpret legal rules. Sometimes it is best for me to commit myself to following a certain rule even in those occasions where I believe that my goals will be best achieved by transgressing the rule. This is the case when I predict that such a belief will be unreliable—perhaps I will be too distraught, or too hurried, to adequately pick out the least costly means to achieve my goals. Most importantly, it may be best for me to commit myself to genuinely *following* a rule, as opposed to using it as a rule of thumb, *i.e.* as a practical recipe, a stress- or time-saving device to advance my ends. I can ignore a rule of thumb when I feel confident enough that its normal conditions of application are absent, but compliance with a genuine rule admits of no exception. Instrumental rationality may have led me to adopt that rule as a *fundamental* premise of my practical reasoning within a cer-

3. This description/interpretation dichotomy is usually associated with the rational choice/sociological paradigms in the dispute about the methodology of the social sciences. For a useful survey, see VIKTOR J. VANBERG, RULES AND CHOICE IN ECONOMICS 11–24 (1994).

tain range of situations: my current anticipation of epistemic and motivational weaknesses may have led me to become so committed.[4]

Another way in which the assumption of instrumental rationality can account for genuine rule following is this: Game-theoretic analyses of trust explain why people who have developed a disposition to fulfill their promises *as a matter of duty* do better in market societies.[5] It may be psychologically impossible for people to *appear* to be trustworthy (and thus reap the social benefits this yields) unless they *are* rule followers. Strategic "rule following" may be less profitable than genuine rule following. This may be due to our limited ability to simulate commitment to rules.[6] Does this picture involve a tension between the assumption of opportunism (which takes agents to be exclusively responsive to current estimates of future streams of personal costs and benefits) and rule following (which is sensitive to past commitments to rules)? No. At a fundamental level, instrumental rationality alone is performing the explanatory task. The explanation of A's doing x proceeds here by assuming that A has now a goal, G, set for her by a rule that it was instrumentally rational at an earlier time for her to adopt, given her goals G' at that time. The explanation also assumes that A regards x as a cost-efficient means of furthering G. For example, someone committed to a rule that forbids him from intentionally killing the innocent usually furthers the goal that this rule set for him (*i.e.*, his refraining from intentionally killing the innocent) quite easily, namely, by so refraining. He might have endorsed such a rule as a (cost-efficient) way of securing for himself an afterlife in Heaven, given his beliefs that following God's commands is conducive to such a life and that God forbids persons from intentionally killing the innocent. Or he might have endorsed such a rule as a (cost-efficient) way of becoming a good person, given his beliefs (religious or otherwise) at that earlier time. In both cases, this agent was instrumentally rational throughout.

There is, then, nothing in public choice analysis that excludes genuine rule following. Whether an agent follows a rule, and which

4. *See* ROBERT NOZICK, THE NATURE OF RATIONALITY 3–40 (1993); *see also* VANBERG, *supra* note 3, at 25–40, 60–76.

5. Game theory is the formal analysis of interactions where the agents' gains and losses partly depend on what others do, on the assumption that everyone is instrumentally rational. For a non-technical and philosophically interesting introduction, see FREDERIC SCHICK, MAKING CHOICES: A RECASTING OF DECISION THEORY 82–105 (1997). For a non-technical discussion of evolutionary game-theoretical explanations of rule following, see VANBERG, *supra* note 3, at 30–38.

6. *See* VANBERG, *supra* note 3, at 60–76.

one, are empirical matters that must be ascertained in each context. The crucial point is that saying that someone is following a rule is perfectly compatible with appealing to instrumental rationality at the most fundamental explanatory level. The upshot is that there is no obstacle to viewing legal rules as sources of non-opportunistic reasons for (ultimately) instrumentally rational agents. But then, the worries about public choice thwarting the development of the interpretive skills praised by law schools are unwarranted. A public choice explanation of the emergence of clusters whose members share the interpretive attitude need not be inconsistent or otherwise mysterious. To put it differently, the suggestion is that the essence of law teaching—interpreting legal rules and balancing the considerations that bear on the solutions to particular cases—need not be erased by public choice teaching. Rather, it may be explained by it. Indeed, as we shall see in Part IV, public choice may help us discriminate between opportunistic and principled behavior, thereby enabling us to identify those discursive practices that are genuinely legal.

II. THE MORAL-MESSAGE OBJECTION

Public choice is frequently associated with cynicism. It usually portrays politicians as bent on maximizing votes, bureaucrats as bent on maximizing appropriations, and so on, rather than ascribing them the public-spirited goals mentioned in their job descriptions. Many people expect lawyers, and especially judges and legislators, to be public-spirited. It may seem natural, then, to worry about the detrimental impact of public choice teaching on the public spiritedness of prospective lawyers, judges, and legislators. As a preliminary step to dispelling this worry, it is useful to recall a classical illustration of the role of morality in taking us away from collective tragedies. Game theorists call a "prisoner's dilemma" a strategic situation where universal cooperation in a collective endeavor yields higher individual payoffs than universal defection, but the individual payoff from defection is higher than the individual payoff from cooperation, irrespective of how the others behave. Defecting is therefore instrumentally rational. Now experimental prisoner's dilemmas show that students of economics tend to behave less cooperatively than students of other disciplines do.[7] Should we abstain from teaching economics, then?

7. *See* Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 J. ECON. PERSP. 159 (1993).

Well, this seems to be an overreaction; economists may well be on balance beneficial, even if a world devoid of economists were more cooperative (including cooperation in the achievement of evil goals). Still, it may seem that the above empirical results make the case against using public choice theory *in legal education* particularly strong. Law schools train future lawyers, judges, and legislators, *i.e.* persons who play a leading role in politics and law. There may be legitimate concerns, then, about public choice fostering objectionable behavioral traits precisely in areas in which morally correct behavior can make a huge difference in society as a whole. There is no obvious objection to instilling students of *economics* the narrowly self-interested rationality that economists ascribe to producers, consumers, and firms, especially if those students plan to serve in the private sector. But things seem to be different when it comes to teaching public choice to law students. Imagine that, like their economics counterparts, law students exposed to public choice internalize the behavioral patterns that public choice ascribes to political actors. We can easily see why this might be socially harmful. For example, judges who were taught public choice theories of adjudication would be consciously displaying opportunistic behavior aimed at a successful career or fame. Their ostensible appeal to principles would be instrumental to such aims. To the extent that the political process through which judges are selected is plagued with the pathologies described in the public choice literature, it may seem natural to attribute such less-than-lofty goals to judges.[8] Again, legislators trained in public choice would try to maximize votes, power, glory, or whatever the public choice model they were exposed to postulates. Since judges and legislators can have significant social impact, it seems that law schools should instill public-spirited aims, rather than enhance, or reinforce, narrow self-interest in those ways.

But this story is empirically dubious. Students of economics learn that *rational agents* involved in a prisoner's dilemma will defect. So perhaps the above evidence should not be taken to show that students of economics become more *narrowly self-interested*, but rather that they become more sensitive to the demands of *rationality*. Indeed, rational choice analysis helps us understand why *rational* agents will sometimes fail to efficiently channel their *altruistic* impulses. To see this, consider that some forms of charity are what economists call

8. Cynical accounts of judicial activity do not strictly follow, however, from the assumption of instrumental rationality. *See* Part IV.

"public goods." Each individual can consume a public good as much as she wishes without detracting others from limitless levels of consumption. Moreover, anyone can consume a public good for free, including those who have not incurred costs in producing the good. A lighthouse is a classical example of a public good. Navigators cannot (or rather could not, when technologies for excluding free riders were unavailable) be charged for the service provided by a lighthouse, and, for all practical purposes, they can use this service in unlimited amounts. Although all the navigators in a certain area would be better off with a lighthouse than without it, even if each did his share in paying for it, none of them finds it personally profitable to contribute. Each navigator realizes that whatever the others do, he will be better off if he refrains from doing his share, since nobody will be able to prevent him from free riding in the efforts of others to build and maintain the lighthouse. Since every navigator is subject to the same incentive structure, underproduction of lighthouses is the predictable outcome. The production of public goods is subject to a generalized prisoner's dilemma: each potential consumer ends up worse off vis-à-vis a situation in which greater amounts of public goods are produced at every consumer's expense.

Crucially for present purposes, in a society of altruists certain forms of charity are public goods. Suppose that medical care can be most efficiently provided through indivisible and costly technological devices. Suppose, in addition, that a great number of individual contributors is needed to purchase one such device. Each potential contributor faces, then, a cost threshold: above the threshold, her contribution to the purchase of the device would be superfluous, and below the threshold it would be insufficient. Therefore, the vast majority of the potential contributions will be superfluous or insufficient; by construction, the likelihood that any given contribution is the one needed to reach the threshold is negligible. As a result, individuals, being altruistic, will choose to contribute to other charitable endeavors in which they can definitely make a difference. Thus, they may donate cotton and bed clothes to hospitals. By hypothesis, such contributions will not improve medical care as much as the above devices would. A sub-optimal level of medical care is, then, the predictable outcome. Like other public goods, some forms of charity fall prey to free riding.[9]

9. *See, e.g.*, ALLEN BUCHANAN, ETHICS, EFFICIENCY, AND THE MARKET 71–73 (1985).

The upshot is that there is nothing in a society of altruists that makes it impervious to rational choice analysis. But then, the above evidence about students of economics defecting in prisoner's dilemmas need not show that they are more selfish than the rest of us. Rather, it may indicate that they better understand what rationality requires in a prisoner's dilemma. They will defect more than the rest of us will, but sometimes they may well do so out of altruism. Whatever their goals, students of economics may have internalized the instrumental model of rationality. Such goals may differ from the goals ascribed to political agents by public choice theorists. Why, then, should we expect students of public choice to internalize the goals ascribed to political agents, rather than develop keen antipathy to them? Indeed, familiarity with public choice theory would help public-spirited constitutional drafters and legislators. As I shall argue in Part V, they would thereby find themselves better equipped to design institutions, policies, and laws aimed at facilitating the appointment or election of the virtuous to public office, or at least at preventing the wicked from doing as much evil as they could.

III. THE NORMATIVE OBJECTION

Public choice scholarship has paid much attention to the impact of various constitutional rules on efficiency. This may induce supporters of usual standards of legitimacy or justice, such as equality, not to teach public choice. They might think that public choice should not be taught just in case the moral criteria underlying its selection of problems are not acceptable. Notice that this is a general objection to teaching public choice—it need not be confined to law schools.

I have three replies. First, it is misleading to contrast efficiency with principles of political morality, such as liberty, equality, or rights. Presumably, egalitarians want efficient moves towards equality, that is, moves that bring about a more equal distribution in the least costly way. Moreover, it is hard to see how egalitarians could deny that individuals are entitled to voluntarily exchange whatever rights an *egalitarian* regime conferred to them. They are arguably entitled to do so as long as they do not thereby affect the rights of others. (If *every* conceivable exchange of egalitarian rights fails to meet this condition, then it is hard to see what choices or interests those rights are sup-

posed to protect, or even what "right" means in this context).[10] Banning voluntary exchanges would be tantamount to blocking moves that, on the usual Paretian definition, are efficient. And such a ban would be intuitively wrong: allowing people to improve their situations at no one's expense is arguably a *necessary* condition for the legitimacy of a social order. Traditional theories of distributive justice, egalitarian or otherwise, are best conceived as laying down *additional* (necessary or sufficient) conditions.

Second, the objection assumes that we have a moral duty not to teach wrong principles. But this need not be so. Consider classical utilitarianism, the ethical theory that enjoins us to maximize the net amount of happiness in the world. Suppose that utilitarianism is the true or valid moral theory. Does it follow *from this alone* that we ought to teach utilitarianism? Clearly not. Such a prescription would follow only in a world in which teaching utilitarianism maximizes net happiness. Some philosophers, including some utilitarian ones, argued that ours is not such a world. Owing to epistemic or motivational shortcomings, agents who heed to utilitarian considerations in their decision-making processes may fail to maximize net happiness. If so, utilitarianism may oblige us to make agents adopt some form of non-utilitarian ethic, say, the Golden Rule. We would be so obliged if, by deliberately following the Golden Rule, agents were in effect maximizing overall net happiness. To put it differently, the hope here is that, by adopting the Golden Rule as a decision procedure, the agent's behavior will conform to a utilitarian standard of rightness. [11] A valid moral theory may consistently mandate us to teach a theory that is incompatible with it. But then, we may have a moral duty, all things considered, to teach public choice theory, no matter how morally objectionable its moral message is.

Third, public choice theory yields predictions about the distributional profiles that would obtain in various institutional settings. Independent theories of justice may disallow such distributions, in which case public choice theory enables us to identify the institutional

10. *See* Guido Pincione, *Market Rights and the Rule of Law: A Case for Procedural Constitutionalism*, 26 HARV. J.L. & PUB. POL'Y 397, 423–25 (2003).

11. See the classical discussion of the utilitarian duty to teach utilitarianism in HENRY SIDGWICK, THE METHODS OF ETHICS 475–95 (Hackett Publishing 1981) (7th ed. 1907). Representative contemporary discussions are R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT 25–64 (1981); DEREK PARFIT, REASONS AND PERSONS 3–116 (1984); and J.J.C. Smart, *An Outline of a System of Utilitarian Ethics*, *in* UTILITARIANISM: FOR AND AGAINST (J.J.C. Smart & Bernard Williams, 1973).

changes capable of altering such distributions in the right direction. Public choice theory is neutral with respect to theories of distributive justice. It is instrumental to distributive justice, without taking sides on conceptions of distributive justice. We can illustrate this by considering again egalitarianism, to mention a social goal that opponents to public choice frequently invoke. One common proposition in public choice scholarship is that, under majority rule, governments will tend to disperse costs and concentrate benefits.[12] Members of groups whose individual organizational costs are low and who stand to gain much individually from a public policy have an incentive to invest (through campaign funding, publicity, lobbying, and other means) in the enactment of such a policy. For example, subsidized industries have an incentive to lobby for the maintenance of the subsidies, whereas consumers and taxpayers, who stand to lose as a result of higher taxes and prices, face high organizational costs to oppose the subsidies. They will then not feel inclined to lobby for their abolition. Arguably, this asymmetry between concentrated benefits and dispersed costs fuels itself; the wealthier one is, the more one can invest in favorable legislation. The upshot is that majority rule over distributive issues buttresses existing inequalities. This shows that public choice analysis should interest egalitarians who seek advice on institutional reform.

IV. THE PSYCHOLOGICAL OBJECTION

Anthony T. Kronman argues that law professors cannot teach anything different than what they believe is true.[13] Kronman points out that law professors have been jettisoning the "prudential" disposition towards law, a disposition to balance the mutually incommensurable considerations that bear on a legal case, as something different from deriving a solution from a monistic, universalistic value theory. Kronman's defense of the prudentialist approach need not concern us here. For present purposes it is instructive to discuss his view that the economic analysis of law, also called "law and economics," makes no room for the prudentialist approach. Both law and economics and public choice theory view legal rules as implicit prices. For example, law and economics views the criminal law as a means to raise the op-

12. The first systematic defense of this proposition appears in MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1971).

13. *See* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 238–40 (1993).

portunity cost of committing a crime. To the extent that public choice theory views constitutional rules as incentive structures under which political agents behave, it can be seen as part and parcel of law and economics.[14] Kronman imagines someone advocating the prudentialist approach by appeal to the normative aims of law and economics (*i.e.*, wealth maximization). This person might argue that prudentialist professors would further those normative aims to a higher degree than professors who teach law and economics. Kronman counters, however, that "[a]ny attempt to justify prudence from the very different standpoint of economics creates two special difficulties."[15] The first difficulty is the psychological barrier to teach something that one believes is nonscientific. Kronman says that professors persuaded by law and economics will end up teaching what they believe to be the truth about law. They will set aside the prudentialist attitude, "for they know that this attitude misrepresents the truth about morality (conceiving it to be less unitary and exact than it actually is)."[16] A parallel argument can be constructed by substituting "public choice theory" for "law and economics."

The second, and related, difficulty that Kronman observes in the project of justifying prudence on law and economics grounds is the invasive tendency of law and economics: it narrows more and more the areas of law where the prudentialist attitude seems appropriate.[17] "Posner's suggestion that prudence has a place in law and legal education conceals the tension between the economic point of view from which this claim must be defended, on the one hand, and the deliberative habits that it authorizes, on the other."[18]

Some claims that I made in the previous Part seem to support Kronman's views. We saw that there is no inconsistency between "*P* is a true or valid moral principle" and "*P* (in conjunction with factual statements) forbids us to teach *P*." Whether law professors must teach things that they believe to be false or invalid depends, *inter alia*, on whether they are psychologically capable of detaching their teach-

14. Law and economics and public choice differ sharply as regards the connections between law and efficiency. While law and economics scholars tend to regard the legal system as efficient, public choice scholars tend to stress the role of constitutional rules in bringing about *government failure, i.e.* inefficient policies. *See* Saul Levmore, *Property's Uneasy Path and Expanding Future*, 70 U. CHI. L. REV. 181 (2003).

15. KRONMAN, *supra* note 13, at 239.

16. *Id.*

17. *Id.* at 239–40.

18. *Id.* at 240. Richard Posner is one of the most prominent figures in the law and economics movement.

ing from their beliefs. If Kronman is right in that law professors cannot help but teach what they believe to be true, then it is utopian to tell professors persuaded by law and economics to teach in the prudential fashion that Kronman favors. The suggested conclusion would be that the economic lawyer could not meaningfully say that law professors should adopt prudentialist teaching methods.

But I cannot accept this line of reasoning. To begin with, I am not sure what to make of the second "difficulty" that Kronman points out. Is his reference to the "tension" between the economic approach and prudentialism intended to say that the project of providing an economic rationale for prudentialism is inconsistent or in any other way unsatisfactory? One would expect that as the law and economics apparatus gets more refined and thus harder to understand, lawyers and judges have a stronger reason to resort to the prudentialist approach, if, as law and economics claims, this supplies the appropriate shortcuts. It is the economics of knowledge that tells lawyers and judges to take such shortcuts, and presumably law professors will be well advised to use them as well. Moreover, using such shortcuts would be in the spirit of law and economics scholars' belief that traditional legal reasoning (unconsciously) promotes efficiency. This argument for prudential reasoning is structurally similar to the utilitarian defense of non-utilitarian decision procedures that I exposed in Part III.

Kronman's first "difficulty" is the psychological barrier to using such shortcuts. Even if the barrier were real, however, law schools could make room for both public choice and prudentialism in an obvious way: professors who teach public choice need not be the same as those who adopt the prudentialist approach. What about law *students*, then? Could they not be psychologically prevented from taking at face value prudentialist courses had they been exposed to public choice courses, and vice versa? Legal reasoning may be *ultimate*, in the sense that lawyers and judges regard prudential considerations as the final arbiters of legal soundness. On this view, prudential considerations, however difficult to reconstruct (perhaps an impossible endeavor, if Kronman is correct about the irreducible value pluralism of prudential reasoning), arbitrate among a variety of values and principles, *including* the wealth-maximizing paradigm that informs much public choice literature. It follows that adoption of the prudentialist view *eo ipso* expels (normative) public choice theory as the final arbiter in legal interpretation. So, while making public choice and pruden-

tialist professors teach separate courses may well overcome the alleged psychological barrier to teaching what one believes to be false, it may create a similar barrier in the students. They would be asked to display a schizophrenic attitude towards law—the same kind of schizophrenia that the separation of teaching duties was supposed to spare the law professor.

To assess this view, it is important to see its likely motivation. From the public choice perspective, political and legal discourse is at odds with prudential reasoning, as Kronman understands it, or, for that matter, with any sort of genuinely normative reasoning, as distinct from bargaining. Public choice has an unmasking ambition. It does not take at face value what politicians and legislators say. It views political argument as bargaining, or sheer posturing aimed at earning votes, or rent-seeking rhetoric of special interests, and so forth. Consistency requires the public choice theorist to extend the unmasking to the discourse of judges and lawyers. Thus, public choice scholars tend to view lawyers as experts in the manipulation of the legal system to the benefit of those who stand to gain or lose from special interest legislation. In support of this view, public choice theorists sometimes note that the number and earnings of lawyers vary directly with the redistributive powers of the state.[19] Likewise, consistency requires public choice scholars to treat the discursive behavior of the judiciary endogenously, *i.e.*, as a dependent variable in a comprehensive rational actor model—after all, judges are selected through the very political process studied by public choice theory.[20] Public choice cynicism cannot possibly regard participants in legal discourse as *arguing* in any recognizable sense; bargaining is the very essence of the law. It seems, then, that public choice makes no room for prudentialism. Prudentialism is about sound legal arguments. The pedagogical message seems straightforward: neither the teacher nor the student can (sincerely) embrace both public choice and prudentialism. They must pick out one approach to the detriment of the other.

Yet this view fails to recognize all the relevant implications of the instrumental rationality postulate on which public choice theory rests.

19. *See* RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 1–20 (1995).

20. It is odd, then, that public choice models of legislation seldom view the judiciary as governed by the behavioral postulates that allegedly govern the behavior of legislators and other political actors. For a brief survey, see Edward L. Rubin, *Public Choice and Legal Scholarship*, 46 J. LEGAL EDUC. 490, 499 (1996).

There is no obstacle to public choice explaining *both* the occurrence of genuine argument in some settings *and* the occurrence of bargaining in others. It need not rest on bold assumptions to do that. It suffices that a relatively tiny minority of people just happens to be committed to genuine argument. Those people have an incentive to get together with like-minded people and to restrict entry to fake arguers (and, for that matter, to bullies and other kinds of non-arguers). Moreover, they have an incentive to get together with good arguers and to set up selection processes ensuring high-quality argumentation. In the course of time, self-selective and selective pressures may give rise to universities, research institutes, and other argument-sensitive institutions. Conceivably, the judicial branch may be one of those institutions. We may complicate this picture by placing the judiciary within a larger game in which law schools make prospective judges internalize the value of intellectual honesty. Law schools will then help enhance, through journal articles and other forms of public criticism, the quality of judicial argument.

Crucially, this is an uncompromising public choice picture. It informs us about the ratio of arguers to fake arguers (*i.e.*, bargainers and posturers of various sorts) that a certain group will display. If *instrumentally rational*, individuals will join groups composed of like-minded people, or select them as members. Instrumental rationality alone, fleshed out by an appropriate (independently testable) ascription to the relevant agents of goals and beliefs about how to achieve them, does the job. Given information about a group's initial membership and institutional structure, a model of this sort may yield predictions about the types of individuals who will join the group, or be accepted by it. Some groups will attract good arguers and reject bad (or non-) arguers. Other groups will put a premium on rhetorical or bargaining abilities. Such models may help us identify, given information about initial membership and internal rules, equilibrium shares of arguers and fake arguers once the selective and self-selective pressures generated by those rules operated for a sufficiently long time. For example, we may be able to infer the intellectual behavior prevailing at a university department: given appointment procedures and past membership, the selective and self-selective mechanisms postulated by the model will enable us to derive propositions about current membership. Public choice tells us, in short, what kind of people a

given institution will have selected for, given previous membership.[21] It follows that public choice theory, and more generally rational choice theory, makes room for genuine argument. Its models enable us to infer how represented a deliberative disposition is in a certain group.

Teaching public choice can therefore sharpen students' awareness of the proper province of genuine legal argument. It may help them develop a sense of when, say, a Supreme Court ruling was motivated by a Dworkinian interpretation of the Constitution (*i.e.*, one that sees the Constitution in light of the best moral theory[22]), rather than to political bargaining that led to the appointment of the justices. To cite an extreme example, most of us would sneer at attributing argument-sensitive aims to the judges who convicted Joseph Stalin's political enemies during the 1936–1938 Great Purge in the Soviet Union. We would rather adopt a cynical stance towards such trials. But things may be not so clear. If so, public choice may help us identify the venues where genuine legal argument is likely to obtain.[23]

V. THE EPISTEMIC OBJECTION

When we say that a historian of science is teaching Aristotelian physics, we mean that he is detachedly *expounding* Aristotle's physics. We do not mean to say that that he *endorses* Aristotle's physics. By contrast, when we say that somebody teaches physics *simpliciter*, we imply that she regards current physics as reliable. While the professor of history of science teaches in the sense of reporting others' beliefs, the professor of physics conveys her beliefs about what the most reliable physical theories are. It might be thought that professors ought to teach (what they believe is) the truth in *non*-moral matters. This view is consistent with the claim, defended in Part III, that

21. Postulating such equilibria need not be ad hoc: it may explain the *resilience to change* of vastly different behavioral patterns displayed by different groups despite the fact that they are governed by similar institutions. Developments around the idea of *multiple equilibria* (classically illustrated by the convergence on driving either on the left side or on the right side of the road, in the absence of formal traffic rules) help us to understand why the same institutions yield so different and stable behavioral patterns. For discussion of the role of multiple equilibria in the explanation of widely different crime rates among institutionally similar societies, see Robert D. Cooter, *The Rule of State Law Versus the Rule-of-Law State: Economic Analysis of the Legal Foundations of Development*, *in* THE LAW AND ECONOMICS OF DEVELOPMENT 101 (Edgardo Buscaglia et al. eds., 1997).

22. *See* RONALD DWORKIN, LAW'S EMPIRE 151–275 (1986).

23. I think, then, that Rubin's suggestion that public choice has trouble at viewing judicial activity cynically needs some nuances. *See, e.g.*, Rubin, *supra* note 20, at 499–500.

they may be morally required to teach false (or invalid) *moral* principles. They are allowed to *expound* non-moral theories they reject, but not to teach them. This view may indeed regard the history of science as a valuable teaching subject, although it generally involves exposition of false theories. But whether we should teach non-historical subjects, such as (descriptive) public choice theory, depends, in this view, on the epistemic credentials of the respective theories.

It may seem natural to think that this view urges us not to teach theories whose *predictions* fail—is predictive failure not the mark of a false theory? But this is a mistake. False *predictions* may help us spot hidden factors. The discovery of Neptune is a well-known illustration of this point. By the mid-nineteenth century, astronomers had noticed that the orbit of Uranus was anomalous in terms of predictions derived from classical mechanics and background knowledge. However, the anomaly prompted the discovery of Neptune in 1846. Astronomical observations were guided towards Neptune by classical mechanics: it told astronomers where exactly a so-far unseen planet would have to be located to make Uranus display its observed orbit. In this way, wrong predictions of Uranus's orbit, based on classical mechanics and background knowledge, led to a spectacular confirmation of classical mechanics—the discovery of Neptune. Astronomers *used* classical mechanics to predict the position of a hidden planet. The epistemic objection to teaching public choice theory is not entitled, then, to rest content with whatever predictive failures public choice theory leads to. It must show (i) that public choice theory is unable to point to independently testable hidden factors, or (ii) that such independent tests disconfirm the theory, or (iii) that the predictive power of alternative theories is higher.

To be sure, we should distinguish between an interesting ad hoc hypothesis, such as the one that led to the discovery of Neptune, and hypotheses merely geared to immunizing a theory from predictive failure. It is tempting to explain predictive failure in terms of hidden factors whose presence cannot, for all practical purposes, be independently ascertained. But such moves do not increase our predictive capabilities. They may be psychologically satisfying: our theory seems to explain everything. The illusion vanishes as soon as we realize that *any* theory can be immunized in this way, so why prefer ours?[24]

24. *See* Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, *in* CRITICISM AND THE GROWTH OF KNOWLEDGE 91, 96, 108–11, 125, 143 (Imre Lakatos & Alan Musgrave eds., 1974). Hans Albert argues that rational acceptance of theories

Some writers have charged that public choice theory is especially apt to such immunizing maneuvers.[25] We saw that public choice assumes instrumental rationality: it tells us that agents will try to achieve their goals through those means that they regard as personally cost-efficient. It might be thought that there is a risk of circularity here. Can we not always tinker with our ascriptions of goals, or beliefs, so that we can always explain someone's actions? But there are limits to such tinkering. We may have independent evidence of the agent's goals. We may know, for example, the rate at which she traded off making money with various other goals in the past. Such evidence may enable us to ascribe goals (including, as we saw, moral commitments) to her. By the same token, we may have independently testable evidence about the agent's beliefs about means and costs. It is on the basis of both kinds of evidence that we can formulate testable predictions about human behavior. Sometimes such evidence is evolutionary in the way suggested in Part IV: we infer an agent's goals and beliefs from the fact that he belongs to a group that selects for such goals or beliefs. Competitive settings, such as markets and electoral politics, lend themselves to evolutionary explanations, that is, explanations based on processes that select for certain strategies. In such cases, we infer people's goals or beliefs from the roles they occupy at various stages of those processes. We can then test such inferences by seeing whether the institutional structure and previous memberships fit the process hypothesized in our evolutionary model. Thus, it seems reasonable to assume that politicians, especially if they are relatively successful, will be strongly sensitive to the electoral impact of their behavior. We may then predict that they will publicly favor certain types of policies, given their institutional constraints: which specific policies they will publicly favor will depend, for example, on the electoral system and the positions open to competition (local government, presidency, Senate seats, etc.).

But even if most public choice predictions failed, *and* they could not be saved by successful ad hoc hypotheses about hidden factors,[26] it would not follow that public choice theory is useless in *institutional design*—surely, a legitimate topic in a law curriculum. As a branch of

is incompatible with immunizing strategies. *See* HANS ALBERT, TREATISE ON CRITICAL REASON (Mary Varney Rorty trans., 1985).

25. *See* DONALD P. GREEN & IAN SHAPIRO, PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE 34–38 (1994).

26. Green and Shapiro endorse such skepticism. *See id.* at 34–42.

economics, public choice theory is a deductive system: its predictions follow deductively from rational choice assumptions together with propositions about the goals and beliefs of the relevant agents. A public choice model depicts a possible world in which actors could not help behaving as they do, given the goals and beliefs the model ascribes to them. The independent variable is the institutional framework: political agents are assumed to react to the incentives created by that framework. Were that possible world different from ours in ways that affect the relevant predictions, then the theory would fail as a predictive tool for our world. Assume that no deductive mistake was made, that agents have the hypothesized beliefs, and that the description of the setting in which agents behave (including the institutional framework) is accurate. Only the falsehood of the behavioral postulate can then be responsible for predictive failure: the goals of the political actors must differ from those ascribed to them by the model. If, for instance, the model assumed universal egoism, we would have a reason to suspect that some of the relevant actors are public spirited instead, and to subject this conjecture to independent tests.

But those predictive failures would be hardly a reason to believe that the theory yields no useful *policy recommendations*. Some day evil people may take advantage of the institutional framework to bring about the gloomy outcomes that would obtain in the cynical public-choice world—outcomes that, in the above example, we were so far fortunate to avoid thanks to the public spiritedness of the political actors. We would be well advised to *foreclose* that possibility, and this we will do better if we rely on a theory that tells us where that possibility remains open in *our* world. In its most cynical versions, public choice theory is about the potential for evil of an institutional framework. Even if there were a country where, say, the public choice predictions that regulatory agencies will be captured by special interests fail, it makes sense to revise that country's institutional framework in order to foreclose such a capture. It may make sense, for example, to revise that country's constitution so as to strengthen fiscal federalism, in the hope that it will then be more difficult for the states to externalize the cost of special-interest state legislation onto the federal budget.[27] We should achieve valuable social outcomes by relying as little as possible on virtue. Even if political actors are more

27. *See* DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 77–85 (1996).

virtuous than suggested by usual public choice models, we should *economize* on virtue.[28] Public choice theory is the most systematic attempt to tell us how.

VI. CONCLUDING REMARKS

I have argued that instrumental rationality makes room for the kind of rule following presupposed by lawyers and judges, that teaching public choice need not instill opportunistic attitudes, that public choice helps us efficiently achieve our preferred conception of a just or legitimate social order, that it allows us to characterize a genuinely legal culture (as opposed to a sheer balance of political power), and that it need not be predictively accurate in order to help us see how much virtue our institutions waste. Taken together, these claims make it highly advisable, I think, for us to teach public choice at law schools.

The objections that I addressed in this paper rest on various misinterpretations about public choice. Let me conclude with some brief remarks about what I think is the most fundamental and pervasive misinterpretation: that public choice is committed to universal and specific behavioral assumptions. Such a view underlies the charge of descriptive inaccuracy leveled so many times at public choice theorizing.[29] It is tempting to overstate the force of this charge. Consider again the society of altruists that I imagined in Part II. Such a society is indeed incompatible with some *interpreted* public choice models, such as those that flesh out the agents' utility functions (*i.e.*, what goods, and amounts, an individual's utility depends on) with a narrow version of the self-interest postulate. Based on rational choice assumptions, we predicted that charity would be under-produced in that society. We need not quarrel about whether that prediction is to be termed a "public (or rational) choice" one. The substantive point is that we can isolate a conceptual structure on which the prediction rested, a structure abstracted from behavioral hypotheses. The concepts of "public good" and "free rider" belong to that structure, as well as the usual formal requirements on rational action, such as transitivity of preferences. The fact that (many) *interpreted* public choice models are false is no reason to jettison *abstract* public choice analy-

28. For a nuanced (and technical) defense of institutions that economize on virtue, see Geoffrey Brennan & Alan Hamlin, *Economizing on Virtue*, 6 CONST. POL. ECON. 35 (1995).

29. For a useful survey of such charges, see LARS UDEHN, THE LIMITS OF PUBLIC CHOICE: A SOCIOLOGICAL CRITIQUE OF THE ECONOMIC THEORY OF POLITICS 60–114 (1996).

sis. To be sure, abstraction can yield successful explanations and predictions only in so far as we do not rest content with purely deductive juggling. But even abstract models that depict a world that is considerably at variance with ours can help us *understand* our world and regard it as less puzzling than it might otherwise appear to us. Thus, conceptualizing a good as "public" allows us to understand why certain goods that people regard as worth their personal cost are underproduced. Again, being told that certain interactions yield multiple equilibria may help us understand why the economic performances of countries that adopted similar constitutional regimes are so dissimilar.[30] Non-economists find such phenomena puzzling, and it is indeed ironic that sometimes this leads them to concoct explanations in terms of "cultural" and other factors that are not easily amenable to independent tests—the sort of ad hoc explanations that, as we saw in Part V, public choice has resources to avoid. Those concerned with institutional reform and its limits have much to learn from public choice models, even when they do not describe our world, and law schools are natural places to pursue those aims.

30. *See supra* note 21 and accompanying text.