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PLAYING WITH FIRE

Gregory S. Alexander†

In his very interesting Article in this Symposium, Professor David Spence¹ tries to perform a heroic task. He attempts to coopt public choice theory in the service of progressive politics. He is not content to allow the conventional political valence associated with public choice theory to remain unchallenged. That valence is, of course, resoundingly antigovernment and pro-market. The basic normative lesson that most public choice theorists derive from their positive analysis of politics is political minimalism, a zero-sum strategy of empowering the private sphere at the expense of the public sphere. Spence wants to flip this normative implication of public choice theory on its head, or at least to challenge its assertion of the inevitability of public corruption. He seeks to appropriate public choice theory's analytical framework on behalf of a decidedly progressive political agenda.

Why a progressively inclined administrative law scholar would adopt this strategy is, I think, clear. It is a case of fighting fire with fire. The thinking here is that rather than rejecting the enemy's premises, which only results in the Right and Left talking past each other, you engage and then defeat (or at least destabilize) the enemy by turning her own arguments against her conclusions.

This sounds pretty clever, and it is—clever, I mean. But it is also risky. In this Comment I shall briefly describe three risks that this strategy involves. First, it risks reinforcing the perception of political preferences as exogenous and static. Second, it risks restricting the available vocabulary by which administrative law specialists analyze and understand politics to that of individual preference-maximization. Third, it isolates administrative law scholars from other analytical frameworks that have considerably more politically liberating potential.

† A. Robert Noll Professor of Law, Cornell University. I am grateful to my colleagues Cynthia Farina and Jeff Rachlinski for asking me to participate in this Symposium and to them and other commentators for commenting on my comments.

¹ David B. Spence, *A Public Choice Progressivism, Continued*, 87 CORNELL L. REV. 397 (2002).

I

REINFORCING THE STATIC IMAGE OF PREFERENCES

Professor Spence is aware of the recent literature that critiques, on positive grounds, the rational actor model.² Indeed, his Article explicitly emphasizes that he does not fully buy into rational actor theory. Nevertheless, embracing public choice theory's analytical method implies a degree of endorsement of rational actor theory's conception of individual preferences as given and fixed. As a result Professor Spence's Article fails seriously to integrate the critiques of rational actor theory. Once one concedes the basic validity of public choice theory's vision of politics it becomes too easy for Right-leaning students of the administrative state to say, in response to suggestions that the process of preference-formation is far more fluid and context-dependent than rational actor theory admits, "Yes, yes, I know all about that, but those objections are just marginal." Alternatively, politically conservative scholars respond, "Look, if you clutter up the model with a lot of reality, you're going to weaken it so much that it loses all predictive capacity." These responses exemplify exactly the sort of thinking that Progressives like Spence ought to be fighting. Doing so requires taking far more seriously than Spence does the critiques of rational actor theory. Taking those critiques seriously would lead Progressives to adopt a very different positive model of politics than the one they endorse.

II

WINNING THE BATTLE BUT LOSING THE WAR

The second risk that Professor Spence, as a political Progressive who endorses public choice theory, faces is that he may win the battle but lose the war. By that I mean the following: If you use public choice theory to advance some discrete item on the Progressive agenda, you may succeed in that limited respect but retard the Progressive agenda in the long run. The strategy of using positive public choice theory to argue against its normative implications for some particular issue inherently concedes the legitimacy of public choice theory's premises *tout court*. Professor Spence's strategy limits the range of analytical concepts that are available in theorizing about politics and the administrative state. It restricts Progressives to talking only in terms of individual self-interest, personal incentives, preference-maximization, and the like. Progressives who pursue this path self-censor not only their own analytical vocabulary, but the very premises of their vision of politics.

² See, e.g., DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY* (1994).

III IGNORANCE ISN'T ALWAYS BLISS

The third risk follows directly from the second. The strategy that Professor Spence pursues may well distract scholars from studying and applying other theories of democratic politics that are more straightforwardly progressive. To provide only one example, I am always struck when I flip through the legal literature on administrative law by the nearly total lack of attention paid to the work of Jürgen Habermas's discourse theory of democracy.³ Now, I don't expect my colleague Jon Macey to cite Habermas, but there are other administrative law scholars (including Professor Spence) who might well find Habermas's work both novel and illuminating.

Permit me to use a personal experience to illustrate my point. For several years now, my colleague Steve Shiffrin and I have regularly attended a colloquium on politics and social theory organized by Professors Jean Cohen, Axel Honnuth, and Frank Michelman and held in Prague. The colloquium attracts scholars from all over Europe and from a variety of disciplines, including law, government, sociology, and philosophy. The European participants are all fully aware of public choice theory, but they find it normatively impoverished and analytically incomplete. They are far more interested in working out the implications of Habermas's view that "the success of deliberative politics depends not on a collectively acting citizenry but on the institutionalization of the corresponding procedures and conditions of communication, as well as on the interplay of institutionalized deliberative processes with informally developed public opinions."⁴

The point is not that Habermas has discovered the one true path to democratic politics, but that his work, and the work of others, offer American administrative law scholars a very different vocabulary for discussing the administrative state. Progressive scholars might find that this vocabulary fits their vision of democracy, certainly on the normative level, but quite possibly on the positive level as well, much better than the vocabulary of public choice.

To close these ramblings, let me return to my earlier metaphor of fighting fire with fire. Sometimes that strategy succeeds. We all know, however, that whenever you play with fire you might get burned. As that consummate rational actor, Smokey Bear, says, "Remember, only YOU can prevent Federalist fires."

³ Habermas's most recent work on the subject is JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996).

⁴ *Id.* at 298.