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Public Choice, Public Opinion, and the Fuller Court

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BOOK REVIEW

Public Choice, Public Opinion, and the Fuller Court

THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910.
By James W. Ely, Jr.* U. South Carolina, 1995. Pp. xii, 215, appen-
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*Reviewed by Jonathan R. Macey***

I. INTRODUCTION	374
II. THE FULLER COURT AND POLITICAL THEORY: PUBLIC CHOICE	375
A. <i>Public Choice: A Primer</i>	376
B. <i>The Framers' Jurisprudential Vision</i>	378
III. THE FULLER COURT AND THE FUTURE OF AMERICAN JURISPRUDENCE	384
A. <i>Economic Rights</i>	384
B. <i>Non-economic Rights and Other "Flaws" in the Fuller Court</i>	389
IV. CONCLUSION: A FULLER COURT IN THE FUTURE?	392

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I. INTRODUCTION

Everyone has his own, personal view about what role the United States Supreme Court should play in American political life. Conservatives of the Robert Bork variety prefer that supreme court justices treat congressional enactments with great deference and respect.¹ Liberals of the Laurence Tribe persuasion like judges to take an active role in ensuring certain individual rights, such as the right to abortion,² while giving Congress latitude to regulate in the sphere of economic rights. Libertarians of the Bernard Siegan orientation strenuously deny the difference between economic liberties and other sorts of human rights and would have judges actively protect both sets of rights.³

While it is easy to develop a theory of judicial review and constitutional interpretation—every first year law student does it—it is considerably more difficult to put such a system into operation. Thus, while pundits have much to say about what the Supreme Court should be doing, their ideas are of utterly no use to economists, political theorists, or other social scientists because they provide no guidance about how to structure a constitutional system that would give judges sufficient incentives to assume the role that the commentators think they should. In other words, it is one thing to say that supreme court justices should behave in a certain way, or adopt a particular constitutional perspective. It is something else entirely to figure out how to make them behave in this way.

One of the reasons that James W. Ely's recent book, *The Chief Justiceship of Melville W. Fuller, 1888-1910*, is an important contribution to political theory, as well as to the history of the Supreme Court, is that it provides an important lens through which to view the Court at a time when it played a much different role in American life than it does today. In particular, the Fuller Court played active roles in protecting property rights and in fostering commerce, while the modern Court has largely abdicated its historical obligations in these regards.⁴ It is important to ponder what motivated the Fuller Court

1. See generally Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990).

2. See Laurence Tribe, *American Constitutional Law* 1354 (Foundation, 2d ed. 1988) (arguing that banning abortion would be equivalent to enslaving women).

3. See generally Bernard H. Siegan, *Economic Liberties and the Constitution* (U. Chicago, 1980).

4. James W. Ely, Jr., *The Chief Justiceship of Melville W. Fuller, 1888-1910* at 1-2 (U. South Carolina, 1995).

because its jurisprudence raises issues that have special relevance today.

Limited government, respect for private property, and state autonomy are all values that are gradually coming back into favor in American public opinion, as the new Republican congressional leadership tries to deal with the wreckage of the welfare state. These were precisely the values that guided Chief Justice Melville W. Fuller when he led the United States Supreme Court during the twenty-two year period from 1888-1910. For this reason, and because the book is a well-researched, interestingly written account of a chief justice about whom not enough is known, the historical lessons of Ely's work are well worth pondering.

This Book Review begins with a discussion of the modern theory of public choice and explains why the constitutional values expressed by the Fuller Court are worth studying from the perspective of this political theory. In short, public choice theory, which focuses on the dominant role of interest groups in the legislative process, provides a useful lens through which to view the Fuller Court because the Fuller Court's decisions in the areas of property rights and economic rights demonstrate that it recognized the negative effects associated with coercive wealth transfers by interest groups. Curiously, the Fuller Court's decisions in non-economic areas such as civil rights indicate that it did not understand the nature of interest groups outside the economic sphere. Following this discussion, the Book Review goes on to consider the lessons to be learned from the Fuller Court.

II. THE FULLER COURT AND POLITICAL THEORY: PUBLIC CHOICE

Building on economic analysis, public choice, also known as the interest group theory of legislation, posits that "legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare."⁵ According to the theory, all citizens are both demanders and suppliers of laws, but certain citizens share legislative goals with highly organized interest groups that provide them with an advantage over other citizens in the procure-

5. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 265 (1982).

ment of favorable legal rules. The basic thrust of the theory is that legislatures use "taxes, subsidies, regulations, and other political instruments . . . to raise the welfare of more influential pressure groups. Groups compete within the context of rules that translate expenditures for political pressure into political influence and access to political resources."⁶

A. *Public Choice: A Primer*

In other words, the interest group theory of legislation takes the view that individuals and firms can obtain their goals by turning to competitive markets or to the legislative arena, where wealth is transferred rather than created.⁷ To obtain wealth transfers in the legislative arena, individuals and firms organize into interest groups that demand legislation. Those individuals and firms most successful at organizing into interest groups (sometimes referred to as "distributional coalitions"⁸) will succeed in transferring wealth from less organized individuals and groups. As Robert Tollison has observed, legislation is supplied by "individuals who do not find it cost effective to resist having their wealth taken away. . . . The supply of legislation is, therefore, grounded in the unorganized or relatively less-organized members of society."⁹

While exchanges of wealth that occur as a result of consensual, marketplace transactions increase overall societal wealth,¹⁰ interest groups that seek and obtain wealth transfers in the legislative arena impose significant costs on society.¹¹ These costs include (1) the costs that the interest group must incur to obtain the transfer, (2) the costs that other groups must incur to block legislation that threatens their interests or saddles them with new taxes, (3) the costs that arise as firms divert their resources from more valued to less valued—but unregulated—uses in order to avoid the consequences of interest group activity, and (4) the costs that groups and firms in unregulated

6. Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 Cornell L. Rev. 43, 45-46 (1988) (citing Gary S. Becker, *Pressure Groups and Political Behavior*, in Richard D. Coe and Charles K. Wilber, eds., *Capitalism and Democracy: Schumpeter Revisited* 120, 124 (U. Notre Dame, 1985)).

7. Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 Va. L. Rev. 471, 477-78 (1988).

8. *Id.* at 479.

9. Robert D. Tollison, *Public Choice and Legislation*, 74 Va. L. Rev. 339, 343 (1988).

10. Macey, 74 Va. L. Rev. at 477-78 (cited in note 7).

11. *Id.* at 478.

markets must incur to keep their markets free of interest group wealth transfers.

In short, then, "economic actors expend vast amounts of resources to obtain rent-seeking legislation, to comply with it, to avoid having to comply with it, to adjust to it, and to prevent it from being enacted in the first place."¹² In addition to the effects on the behavior of individual firms and markets, Mancur Olson has observed that, from a societal perspective, special-interest organizations and collusions (1) reduce efficiency and aggregate income in the societies in which they operate, (2) make political life more divisive, (3) slow down a society's capacity to adopt new technologies and reallocate resources in response to changing conditions, thereby reducing the rate of economic growth, and (4) increase the complexity of regulation, the role of government, and the complexity of understandings, thereby impeding the economic growth and development of the society as a whole.¹³

The jurisprudential implications of the interest group theory of policy making seem clear. Those nations that can design jurisprudential systems to channel and control the destructive tendencies of interest groups will flourish, while those nations that are unable to control interest group demands for wealth transfers will ultimately crumble as governments slowly but systematically remove incentives to create wealth.¹⁴ The reason that there is any economic activity at all, in light of the awesome power of the modern Leviathan to divert the proceeds of such activity to favored constituents through the power to tax and regulate, is because the constitutional system imposes costs on interest groups seeking their own selfish ends.¹⁵

One way to evaluate the performance of a justice on the Supreme Court, then, is by the extent to which the judge's judicial philosophy recognizes and implements these constitutional safeguards to control the proclivities of the interest groups demanding wealth transfers. My thesis is that Chief Justice Fuller was acutely aware of

12. *Id.* at 478-79. "Rent-seeking" refers to the process by which groups seek to obtain economic "rents" (in other words, payments for the use of an economic asset in excess of the market price) through governmental intervention in the market. *Id.* at 472 n.4. Paradigmatic examples of rent-seeking include efforts by industry to obtain tariffs and quotas on imports and efforts by labor or industry groups to obtain legally mandated entry barriers in the form of licensing requirements for new entrants. The additional income above competitive prices earned as a result of obtaining these regulations is known as economic rent. *Id.*

13. Mancur Olson, *The Rise and Decline of Nations: Economic Growth, Stagflation, and Social Rigidities* 74 (Yale U., 1982).

14. Macey, 74 *Va. L. Rev.* at 480 (cited in note 7).

15. *Id.* at 480-81.

the problem of coercive wealth transfers by interest groups, and that this awareness guided his jurisprudence and contributed mightily to the increasing social and economic stability of the United States during his time on the Court.

The issue I consider in the next Section is the extent to which the Framers understood interest group theory and drafted the Constitution to deal effectively with the problem of distributional coalitions. To the extent that they did, there is a further basis for admiration of the salutary effects of Chief Justice Fuller's judicial philosophy.

B. The Framers' Jurisprudential Vision

The Framers of the Constitution understood the problem of interest groups from both a theoretical and an historical perspective, and were acutely aware of the importance of controlling interest group activity.¹⁶ John Adams's *A Defence of the Constitutions of Government of the United States of America*,¹⁷ for example, is an annotated analysis of the operation of the various republics that existed throughout world history, amounting to a description of the modern theory of public choice in its cataloguing of the destructive effects of interest groups. This resource provided valuable data to the Framers about the desirability of various constitutional formulations.¹⁸

Because of their historical learning, the Framers felt an urgent need to avoid the pitfalls that had doomed previous attempts at establishing functional and survivable democracies.¹⁹ These pitfalls consisted largely of trusting too much in democracy and ignoring the destructive influence posed by interest groups. To deal with the problem of interest groups, the Framers did not simply draft another constitution on the basis of pragmatic principles about good government. Rather, like Marx, they developed a complete unitary "political theory worthy of a prominent place in the history of Western thought."²⁰

16. See generally *Federalist No. 10* (Madison), in Clinton Rossiter, ed., *The Federalist Papers* (Mentor, 1961).

17. John Adams, *A Defence of the Constitutions of Government of the United States of America* (Hall & Sellers, 1787).

18. Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 *Geo. Wash. L. Rev.* 50, 77-78 (1987).

19. For a more complete discussion of this point, see *id.* at 50.

20. Gordon S. Wood, *The Creation of the American Republic, 1776-1787* at 615 (U.N.C., 1969).

The Framers' most important innovation was their realistic appreciation of *homo economicus*, economic man. Previous attempts at developing systems of self-governance had faltered because they had erroneously assumed that political leaders would be able to ignore their own private interests (and those of their constituents) and make decisions purely from the perspective of the greater good of the whole.²¹ Prior to the Framers' development of a new political theory, the success or failure of a government was thought to depend on the virtue of its rulers:

Ancient and medieval thought and practice were said to have failed disastrously by clinging to illusions regarding how men *ought* to be. Instead, the new science would take man as he actually *is*, would accept as primary in his nature the self-interestedness and passion displayed by all men everywhere and, precisely on that basis, would work out decent political solutions.²²

As Bruce Ackerman has observed so cogently, the Framers' great insight was "to recognize that the future of American politics will not be one long, glorious reenactment of the American Revolution."²³ The Framers rejected the notion of direct democracy because minority rights are so easily trampled by majority interests under such a system.²⁴

Perhaps the most famous expression of the Framers' concerns about the future political leaders of America is contained in *Federalist No. 10*, where Madison noted wryly that "[e]nlightened statesmen will not always be at the helm" of the new republic.²⁵ Consistent with basic economic principles, the Framers assumed that they were establishing a constitutional framework that would channel and control, at least to some extent, the self-interest of those in charge of the government.

The problem caused by the relentless and inevitable self-interest of politicians is not simply that they will take bribes and engage in other plainly illegal conduct. After all, it has always been possible to

21. Macey, 56 Geo. Wash. L. Rev. at 56 (cited in note 18).

22. This passage appears with attribution—to Martin Diamond—but without citation in Daniel Patrick Moynihan, *The "New Science of Politics" and the Old Art of Government*, 86 Pub. Int. 22, 23 (1987).

23. Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L. J. 1013, 1020 (1984).

24. See *Federalist No. 10* (Madison), in Rossiter, ed., *The Federalist Papers* at 81 (cited in note 16) (noting that in direct democracies "common passion or interest will, in almost every case, be felt by a majority of the whole").

25. *Id.* at 80.

devote sufficient resources to detection and to impose such stiff penalties that illegal activities become trivial.²⁶ Rather, the seemingly intractable problem is that elected officials will ignore the larger interests of the polity to pursue the narrow interests of those special-interest constituencies that can legally provide politicians (and bureaucrats) with vital political support, important strategic assistance in areas of personal interest to particular politicians, and even future employment. Concerns about self-interest led the Framers to design the Constitution with a view toward impeding interest groups from using their influence to obtain economic advantage through the political process. The goal of controlling interest groups has been accurately described by Cass Sunstein as "the most promising candidate for a unitary theory of the Constitution."²⁷

The Framers, for the first time in world history, had the teaching of "[t]he new political science, based on constitutionalists such as Locke, Hume, and Montesquieu" at their disposal,²⁸ and they made full use of this new science. In particular, as Walter Berns has observed:

From Locke, "America's philosopher," as he used to be called, the Framers learned how to channel the passions and energies of men into safe activities. . . . [T]he government that secures the right to pursue happiness will be the one that, to the extent possible, leaves men alone to do what they are inclined to do. And according to Locke, they are *naturally* and primarily inclined to seek the "conveniences and comforts of Life."²⁹

Moreover, contrary to present-day thinking, the decidedly politically incorrect, laissez-faire perspective of Adam Smith also had a large influence on the Framers. Smith has been rightly described as the "immediate source" of the *Federalist's* idea that the goal of providing for "[t]he prosperity of commerce . . . is now perceived and acknowledged by all enlightened statesmen to be the most useful as well as the most productive source of national wealth, and has accordingly become a primary object of their political cares."³⁰

26. See generally Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968).

27. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1732 (1984).

28. Harvey C. Mansfield, Jr., *Constitutional Government: The Soul of Modern Democracy*, 86 Pub. Int. 53, 57 (1987).

29. Walter Berns, *The New Pursuit of Happiness*, 86 Pub. Int. 65, 73 (1987).

30. *Id.* at 72 (quoting *Federalist No. 12* (Hamilton), in Rossiter, ed., *The Federalist Papers* at 91 (cited in note 16)).

A variety of features of the Constitution channel and control self-interest to promote stability and prosperity. The federalist system, which creates competition among the various providers of legal rules, causes politicians to suffer the costs associated with citizen relocation if they enact inequitable rules, thereby dissuading them from doing so.³¹

In addition, evidence of the Framers' intentions to deal with the problem of interest group rent-seeking may be gleaned from the language of the Constitution itself. Constitutional protections of property, commerce, the privileges and immunities of citizenship, equal protection, and due process are all "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."³²

As I have observed elsewhere,

the very structure of the Constitution itself was designed to block the power of legislatures to transfer wealth to special interest groups. The structural features in the Constitution that protect property rights by reducing the efficacy of interest group activity are as follows: (1) the provision for a bicameral legislature in which the House and the Senate are of different sizes and represent different constituencies; (2) the executive veto; and (3) the provision for an independent judiciary.³³

The bicameral legislature reduces the efficacy of special interest groups by raising the transaction costs associated with influencing collective decision making within government.³⁴ Likewise, the executive veto raises costs to interest groups by raising the level of consensus needed within government before action is taken.

Even without interest group theory, it is important to raise the costs of wealth-transferring activity because of the problem, inherent to some extent in every democracy, of minority exploitation by majorities. While this exploitation may take shape, for example, in the persecution and derogation of religious, social, or ethnic minorities, it

31. Macey, 74 Va. L. Rev. at 506 (cited in note 7).

32. Sunstein, 84 Colum. L. Rev. at 1689 (cited in note 27).

33. Jonathan R. Macey, *Thayer, Nagel and the Founders' Design: A Comment*, 88 Nw. U. L. Rev. 226, 228 (1993).

34. See Robert E. McCormick and Robert D. Tollison, *Politicians, Legislation and the Economy: An Inquiry into the Interest-Group Theory of Government* 45-57 (M. Nijhoff, 1981) (arguing that certain attributes of a legislature, particularly its size and ratio of chamber sizes, will predictably affect the influence of interest groups).

may also exist in more subtle forms. For instance, the majority of persons are debtors to a minority who are creditors. With majority support, laws that benefit debtors at the expense of minority creditors are likely. Though such majority exploitation may take many forms, a perceived barrier exists when the costs of wealth-transferring activity are increased.

Finally, the provision for an independent judiciary protects against the tyranny of faction by providing a forum in which the complaints of those aggrieved by the legislative process may be heard by an impartial tribunal. And it is here, of course, that the role of judges generally and the jurisprudence of Chief Justice Fuller in particular become relevant to the political philosophy of the Framers.

As the Framers recognized, interest group theory dictates that it is important to raise the costs to interest groups of effectuating welfare-reducing wealth transfers. Under the Constitution, the basic mechanism for raising such costs is the system of checks and balances of which the separation of powers is a part.

Under the American system of separated powers, the federal government serves as a check on the states; the states, aided by municipal authorities, serve as a check on one another; and, at the federal level, the legislative, executive, and judicial branches restrain each other. This checking function is only possible at the federal level, however, if the executive and the judicial branches are willing to use their independence from the legislative branch to control, that is, to check, its activities. As the next Section of this Book Review demonstrates, it was the Fuller Court's willingness to confront the legislative branch that makes its jurisprudence interesting, both from the perspective of political theory, and from the perspective of the Founders' design.

Clearly, the Framers' intention to prevent wealth-transfer and minority exploitation could not be effected unless some authority, independent of democratic processes, could be invoked to curb legislative proclivities. The most obvious way that judges can check legislative excess is through judicial review. For example, as Erwin Chemerinsky has argued, the legislature's proclivity to succumb to interest group pressures has eroded the viability of arguments favoring judicial deference to the legislative will.³⁵ Scholars as far apart on

35. See Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 Harv. L. Rev. 43, 46-47, 80-81 (1989) (arguing that the Rehnquist Court's majoritarian philosophy is flawed in part because the influence of special interest groups has lessened the likelihood that the legislative process actually reflects the majority's preferences).

the political spectrum as Richard Epstein,³⁶ Cass Sunstein,³⁷ Jerry Mashaw,³⁸ or even Bernard Siegan,³⁹ argue in favor of active judicial review to combat the problems that interest groups' rent-seeking pose for democracy. While the details of the constitutional solutions offered by these scholars differ widely, they share the view that the problems posed by interest groups justify more intrusive judicial review—the kind of review afforded by the Fuller Court.

Even those scholars who do not go so far as to advocate more ready invocation of the power of judicial review argue that judges should keep the problem of interest group transfers in mind when they interpret statutes. In particular, I have argued that the power of statutory interpretation can be a powerful tool in limiting the efficacy of interest groups.⁴⁰ In a similar vein, William Eskridge suggests that judges construing statutes should first analyze whether the statute bears the hallmarks of an interest group bargain, characterized by concentrated benefits and broadly distributed costs. If so, Eskridge proposes that the statute be narrowly construed.⁴¹ Frank Easterbrook has argued that statutes representing interest group transfers should be narrowly construed by judges,⁴² and Cass Sunstein has made similar arguments about legislation that does not promote the public good, but simply reflects the will of powerful interest groups.⁴³

There are, of course, major differences in the jurisprudential approaches of all of these authors. Yet, the common thread that connects this diverse body of work is its understanding of the problem of

36. See Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. Chi. L. Rev. 703, 705-17 (1984) (arguing that the Constitution leaves to state governments only very limited control over the economic activities within their jurisdictions).

37. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 Stan. L. Rev. 29, 31 (1985) (arguing that Madisonian republicanism is "a foundation from which judges and others might evaluate political processes and outcomes").

38. See Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 Tulane L. Rev. 849, 875 (1980) (advocating judicial review of "private-regarding" economic legislation); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 Chi. Kent L. Rev. 123, 141-50 (1989).

39. Siegan, *Economic Liberties* at 265-303 (cited in note 3) (questioning the "prevailing judicial wisdom" that is based on the assumption that society functions better when final determinations on socioeconomic questions rest with the political branches).

40. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 226 (1986).

41. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 279, 298-99, 303-09, 324-25 (1988).

42. Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 51-54 (1984).

43. Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 471, 486 (1989).

interest group distortion of democratic processes. Significantly, while the current Court does not share this understanding, the Fuller Court was extremely sensitive to this concern.⁴⁴ The question is why this is so.

III. THE FULLER COURT AND THE FUTURE OF AMERICAN JURISPRUDENCE

Professor Ely observes that “[n]ever before had the Supreme Court exercised the power of judicial review so actively.”⁴⁵ But it is important to recognize the extremely focused way that the Fuller Court used its power to nullify congressional acts. It did not use its authority indiscriminately. In fact, Professor Ely is quite right to point out that “given the Court’s reputation as a bastion of laissez-faire thought, most regulations were found to pass muster.”⁴⁶

The critical point here is that the Fuller Court did not act to protect big business, as is currently supposed. Rather, Ely’s biography is stunningly convincing in its contention that the Fuller Court was trying to reconcile the tension between the Commerce Clause, which grants the federal government broad power to regulate, and the Court’s respect for the basic structure of the Constitution and the intentions of the Framers, which envisioned that the states would retain some ability to regulate economic activity within their borders.⁴⁷

A. *Economic Rights*

The Fuller Court did not merely try to maintain an appropriate balance between the federal and state spheres of power. Rather, it showed a great awareness of the problems presented by interest group rent-seeking. The Fuller Court safeguarded entrepreneurial liberty, defended the national market, and crafted a workable jurisprudence for the industrial age against a host of interest group pressures. Indeed the lesson of the Fuller Court may be easily summarized: the vigorous defense of property rights is the surest protection of the public interest against destructive, welfare-reducing interest group wealth transfers.

44. See Part III.

45. Ely, *Fuller* at 83 (cited in note 4).

46. *Id.*

47. See, for example, *id.* at 127-28. See also U.S. Const., Art. 1, § 8, cl. 3; *id.* Amend. X.

Perhaps the best way to illustrate the Fuller Court's vigilance against interest group wealth transfers is with reference to its most infamous case, *Lochner v. New York*.⁴⁸ In *Lochner*, Justice Peckham, speaking for a five-to-four majority, held unconstitutional a New York statute limiting the maximum number of hours of work by bakers to ten hours per day or sixty hours per week.⁴⁹ Professor Ely observes the commonly ignored fact that the Court fully recognized that states had the power to enact legislation to protect the health of bakers.⁵⁰

The Court, however, had good reason to believe that the New York legislature was doing more than merely protecting bakers' health. First, as Justice Peckham noted, there did not appear to be any relationship between the number of working hours and the health of bakers.⁵¹ Second, consistent with public choice analysis, the Court recognized that the legislature had an ulterior motive.⁵²

The Court recognized that "the real object and purpose" of the statute had nothing to do with health and safety.⁵³ In fact, as a host of scholars have pointed out, the real object and purpose of the New York legislation was to favor large bakeries over the smaller, family-run bakeries that were generally operated by immigrants.⁵⁴ These smaller bakeries typically employed recent immigrants and "often provided the[se] laborers with sleeping quarters, enabling them to spend long hours on the job."⁵⁵ The statutory limitations on bakers' hours severely impaired the ability of these small, family-run bakeries to compete with their larger, more politically organized rivals.⁵⁶

As Professor Ely points out, "*Lochner* was not typical of the Fuller Court's handling of liberty of contract claims."⁵⁷ Where the Court found anticompetitive, special interest group oriented measures "designed to drive small-scale immigrant bakers out of business,"⁵⁸ it declared them unconstitutional. But in other cases, such as *Muller v.*

48. 198 U.S. 45 (1905).

49. *Id.* at 64.

50. Ely, *Fuller* at 98 (cited in note 4).

51. *Lochner*, 198 U.S. at 62.

52. *Id.* at 63.

53. *Id.* at 53, 64.

54. See Siegan, *Economic Liberties* at 113-121 (cited in note 3); Mary Cornelia Porter, *Lochner and Company: Revisionism Revisited*, in Ellen Frankel Paul and Howard Dickman, eds., *Liberty, Property, and Government: Constitutional Interpretation Before the New Deal* 11-38 (S.U.N.Y., 1989); Epstein, 51 U. Chi. L. Rev. at 714-15 (cited in note 36).

55. Siegan, *Economic Liberties* at 177 (cited in note 3).

56. *Id.* at 117-18.

57. Ely, *Fuller* at 100 (cited in note 4).

58. *Id.*

The State of Oregon,⁵⁹ where the Court found no nefarious, public-choice motivations, it accepted important regulatory modifications, notwithstanding the background rule of freedom of contract.

A comparison of the decisions in *Adair v. United States*⁶⁰ and *McLean v. State of Arkansas*⁶¹ further supports Professor Ely's contention that the Fuller Court was more pragmatic than is generally believed. In *Adair*, which involved labor relations on railroads, the Court reaffirmed its holding in *Lochner*. The Court held that so called yellow-dog contracts, which made it a condition of employment that employees not belong to any labor union, could not be outlawed for railroad workers by Congress. The Court determined that forbidding these contracts was an invasion of personal liberty as well as the rights of property guaranteed by the Fifth Amendment. Professor Ely notes that the growth of a major new interest group coalition, organized labor, was something that deeply troubled the Fuller Court.⁶² In light of the destructive and pernicious effects that organized labor has had on the public sector, and the incredible record of corruption in the union movement in the private sector, it is difficult to conclude that the Court was wrong in having misgivings about organized labor.⁶³

It is a well known implication of basic microeconomic theory that support for organized labor involves a tradeoff between levels of employment and wage levels.⁶⁴ Supply and demand conditions obtain in labor markets as in other markets. Where labor unions succeed in raising wage rates above the non-union equilibrium level, employment will decrease.⁶⁵ Because the new unemployment falls on non-unionized workers, the unions do not care. That is why modern unions uniformly support raising the minimum wage level, despite evidence that doing so raises unemployment levels. By lowering the differential between the minimum wage and the prevailing union wage levels, raising the minimum wage lowers the costs of unionization.⁶⁶ To its great credit, the Fuller Court was unwilling to allow the

59. 208 U.S. 412 (1908).

60. 208 U.S. 161 (1908).

61. 211 U.S. 539 (1909).

62. Ely, *Fuller* at 102 (cited in note 4).

63. See, for example, Steven Brill, *The Teamsters* 544-46 (Simon & Schuster, 1978); Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. Ill. L. Rev. 367, 369 & nn.2-3.

64. See, for example, Paul A. Samuelson, *Economics: An Introductory Analysis* 554-58 (McGraw-Hill, 7th ed. 1967).

65. *Id.* at 557.

66. For example, if the minimum wage is \$1.00 and the union wage is \$10.00, the employer would have to pay a \$9.00 premium to hire a union worker. If, in contrast, the minimum wage is increased to \$9.00, then the "cost" of hiring a union employee is only \$1.00.

unions to succeed in the legislative arena with contractual terms that they were unable to negotiate in bilateral bargaining with employers.

As its decision in *McLean* demonstrates, however, the Fuller Court was not anti-labor. It was simply anti-interest group. At issue in *McLean* was a state law requiring that wages for mine workers be calculated on the basis of the coal's weight before it had been sifted through a screen. The Supreme Court upheld the statute. What is important here is that the statute did not transfer wealth among groups of workers. Rather, it simply provided protection for the contractual rights of workers who might be defrauded if their employers used the net weight of coal for compensation purposes, rather than its gross weight. As the Court observed, "Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with freedom of contract."⁶⁷

Professor Ely captures the essence of the Fuller Court when he observes:

[T]he justices endeavored to reconcile their commitment to entrepreneurial liberty and the free market with legislative efforts at economic reform.

At the same time, one must acknowledge the significance of the liberty of contract in shaping constitutional jurisprudence for the ensuing decades. The doctrine affirmed the Supreme Court's dedication to limited government and particularly to the belief that government did not have unfettered dominion over economic life. In this respect, *it served as a potential check upon arbitrary governmental action, causing state legislatures to justify regulation more carefully*. Moreover, the justices reserved for themselves the authority to decide when lawmakers exceeded the scope of the police power and trespassed upon property or contractual rights.⁶⁸

Unlike the present day Court, the Fuller Court did not abdicate its responsibility to check and balance the actions of the other branches within the constitutional system of separated powers.

There has been much written in recent years about the Takings Clause.⁶⁹ Here is an area of jurisprudence that appears uniquely designed to curb rent-seeking and other abuses of the law-making process. In *Dobbins v. Los Angeles*,⁷⁰ the Fuller Court invali-

67. *McLean*, 211 U.S. at 550.

68. Ely, *Fuller* at 103 (cited in note 4) (emphasis added).

69. See, for example, Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard U., 1985).

70. 195 U.S. 223 (1904).

dated a city ordinance that prohibited the construction of a gasworks in a particular area. The landowner had, under a preceding ordinance, obtained permission from the city to build a gasworks and commenced construction. The city then enacted a new ordinance that prohibited the gasworks. The Court held that this sudden attempt to expropriate an investment in a fixed, immovable asset effected "a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment."⁷¹ Ely correctly applauds this decision.⁷²

Similarly, in *Missouri Pacific Railway Company v. Nebraska*,⁷³ the Fuller Court invalidated a blatant attempt at rent-seeking by the Nebraska legislature. The Nebraska statute compelled an out-of-state entity, the Missouri Pacific Railway Company, to transfer part of its land, albeit with compensation, to a group of (undoubtedly well-connected) in-state interests for the purpose of erecting a commercial grain elevator on the property. Ely correctly notes that the Court, "[i]n effect," decided that this was not a taking of property for public use, and was therefore an unauthorized legislative activity.⁷⁴ There is no way to reconcile this holding with modern decisions as to the Takings Clause.⁷⁵

There are dozens of succinct examples in Ely's book showing how the Fuller Court protected economic interests. But none of these is of more topical interest than the brief discussion of *Gulf, Colorado and Santa Fe Railway Company v. Ellis*.⁷⁶ This case involved a decision of the Fuller Court to invalidate a law permitting plaintiffs in small stakes cases against railroads to recover attorneys' fees. Perhaps no interest group is more powerful on today's political scene than lawyers in general, and plaintiffs' attorneys in particular.⁷⁷ Clearly, lawyers as an interest group benefit mightily from any deci-

71. Id. at 241.

72. Ely, *Fuller* at 106 (cited in note 4).

73. 164 U.S. 403 (1896).

74. Ely, *Fuller* at 106 (cited in note 4).

75. For example, in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court upheld a statutory scheme whereby the state of Hawaii condemned certain land owned by lessors and transferred it to the lessees. The state compensated the owners. The court stated that "[t]he mere fact that property taken outright by eminent domain is transferred . . . to private beneficiaries does not condemn that taking as having only a private purpose." Id. at 243-44.

76. 165 U.S. 150 (1897) (discussed in Ely, *Fuller* at 126 (cited in note 4)).

77. Note, for example, the recent efforts of trial lawyers to kill the Securities Litigation Reform Act by encouraging President Clinton to veto the bill. See Michael K. Frisby and Jeffrey Taylor, *Senate Poised to Override Securities Veto*, Wall St. J. A3 (Dec. 22, 1995); John Stossel, *Protect Us From Legal Vultures*, Wall St. J. A8 (Jan. 2, 1996); *Review & Outlook: The Litigation Reform Tide*, Wall St. J. A12 (Jan. 15, 1996).

sion that allows fee shifting, since the demand for lawyers will go up if their clients do not have to bear the cost of litigation. It is heartening to see that the Fuller Court resisted this effort to expand the role of lawyers in society by holding the fee-shifting statute unconstitutional on the grounds that it impermissibly discriminated against railroad companies.

B. Non-economic Rights and Other "Flaws" in the Fuller Court

While Ely's argument that the Fuller Court was not serving any ulterior purpose in its quest to safeguard economic liberties⁷⁸ is persuasive, he seems to wander inexplicably from the implications of his own analysis. He says that

[t]he central failing of the Fuller Court was its inability to comprehend the diminished significance of economic individualism in a national economy dominated by giant enterprises. This problem was particularly evident in employment relationships. As a practical matter, individuals often had no bargaining power and were compelled to accept whatever terms were offered by employers. Yet the Fuller Court was reluctant to sanction governmental intervention to strengthen the legal position of industrial workers and encourage the formation of labor unions.⁷⁹

Public choice theory reveals how profoundly incoherent this passage really is. Simply put, if individuals were without bargaining power in their relationships with their own employers, it is impossible to imagine how they could exert more bargaining power in their relations with the legislature. If unions were weak in the negotiating process with management, then they must have been weak in the negotiating process with the legislature. The reality was that the workers were quite powerful, and even more powerful with the legislature, because the voices of the disenfranchised, non-unionized workers were cut out of the political process, but not out of the bargaining process with management.

Professor Ely may also be too quick to condemn the Fuller Court in his discussions of civil rights, equal rights, and criminal justice. His discussion of literacy tests is illustrative.⁸⁰ It has never been clear to me why literacy tests are viewed as unambiguously racist. It seems virtually indisputable that the political process would

78. Ely, *Fuller* at 81 (cited in note 4).

79. *Id.*

80. *Id.* at 159.

be vastly improved if only literate people voted. Similarly, residency tests and poll taxes, which assure that only those with some stake in the system are able to vote, would help both blacks and whites by making the system more responsible. Professor Ely characterizes the Fuller Court's decisions in the civil liberties and equal rights areas as demonstrating "indifference to the plight of black citizens."⁸¹ But was the Fuller Court truly indifferent to black citizens, or was it simply concerned with the integrity of the political process?

It is equally plausible that the problem with the Fuller Court's race decisions was not that the Court was racist, but that the Court did not comprehend the nature of the interest group politics and public choice problems in this area as well as it understood them in the area of economic legislation. The legislature can no more be trusted to avoid special interest group pressures in the civil rights and civil liberties areas than it can be trusted to avoid them in the economic area. Indeed, as Jennifer Roback has observed in her scholarly studies of racism and segregation, rent-seeking is often behind separatist and racist policies.⁸²

A fundamental justification for segregative laws was that they merely reflected the racial preferences inherent in the majority of the population. Justice Brown, writing the majority opinion for the Fuller Court in *Plessy v. Ferguson*, articulated this belief when he wrote that "[l]egislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."⁸³ While this statement was in response to the assertion that legislation could overcome deeply rooted racial distinctions, Justice Brown wrote that the Louisiana legislature could enact railroad segregation laws because they were free "to act with reference to the established usages, customs and traditions of the people."⁸⁴ The Fuller Court in *Plessy* was mistaken; segregative laws are not reflections of majority preferences, rather they are rent-seeking.

The common misperception that customs anticipate racially segregative laws is refuted by the public choice model. Jennifer Roback has observed that legal segregation is a method by which rent-seeking politicians utilize collective action problems among the majority of the electorate to extract rent. That is, persons may have a

81. *Id.* at 160.

82. See generally Jennifer Roback, *Racism as Rent Seeking*, 27 *Econ. Inq.* 661 (1989); Jennifer Roback, *The Political Economy of Segregation: The Case of Segregated Street Cars*, 46 *J. Econ. Hist.* 893 (1986).

83. 163 U.S. 537, 551 (1896).

84. *Id.* at 550.

preference that others conform to their view of correct behavior, which is in this case racial segregation. However, these preferences are frequently latent in the private arena, because the costs of collective action to the persons with these preferences are too high.⁸⁵

A politician may, however, satisfy these latent preferences in exchange for political rent. Although the costs to persons of privately imposing their racial preferences on all of society are prohibitive, the politician may profit from doing so. This profit comes in the form of votes, which are relatively costless for the majority to cast in favor of the pro-segregationist candidate. Problematically, once the rent-seeking politicians "paid" for the votes with segregative laws that satisfy the latent preferences of some voters, the preferences of those voters become active. Thus, in exchange for political capital, the latent preferences of some voters become explicit racial segregation.⁸⁶

This imposition of the preferences of some on society at large has been examined in considerable depth in the literature.⁸⁷ For example, laws that mandated private companies to provide segregated streetcars came into existence in the South in the 1890s. As a general rule, these laws were resisted by the companies themselves, because of their effect on profitability and many white citizens.⁸⁸ Professor Roback notes:

The suppliers of a segregation ordinance are paid in the currency of (white) votes. The cost of casting a vote in favor of a pro-segregation candidate is quite minimal in comparison with the cost of boycotting streetcars or even of paying a slightly higher fare for each ride. Thus, voters with even a very small demand for segregation, that is, those willing to pay only a small private price to ride in a segregated car, might be willing to vote in favor of a segregation law.⁸⁹

Thus, the law could impose the preferences of some persons on all in scenarios where the private market could not. The Fuller Court simply failed to recognize these public choice dynamics in their race decisions.

Like other commentators, Professor Ely recognizes the extent to which the Fuller Court was, in large part, simply a mirror of public

85. Roback, 27 *Econ. Inq.* at 672 (cited in note 82).

86. *Id.* (describing the effective establishment of an "economic cartel").

87. Roback, 46 *J. Econ. Hist.* at 894 (cited in note 82).

88. *Id.*

89. *Id.* at 897.

opinion.⁹⁰ The Court's overwhelming desire to render decisions in harmony with prevailing public opinion was true not only with respect to the Court's staunchly laissez faire results, but also with respect to the Court's decisions about civil rights.

IV. CONCLUSION: A FULLER COURT IN THE FUTURE?

The two most notable things about the Fuller Court are the extent to which the opinions of the Court reflected its understanding of the pernicious effects of interest groups in the economic sphere (and its blindness to the equally destructive effects of interest groups outside the economic sphere), and the lack of intellectual prowess of its chief justice. As Professor Ely recognizes, Chief Justice Fuller was something of a plodder. He was diligent and conscientious, but lacked anything resembling real creativity or intellectual flair. Indeed, the description of the Fuller Court given by Ely is so banal that at times the book reads like a grammar school primer.⁹¹

The hordes of commentators who would like to see the Court return to a more activist era⁹² have much to learn from Professor Ely's historical account of the Fuller Court, and especially from his personal profile of Chief Justice Fuller. The following summarizes nicely Ely's major points about the chief justice:

[Fuller] never gained intellectual ascendancy over his associates. Fuller did not lead the Court by the force of his ideas, and he delivered few significant opinions. . . . In this limited sense, then, there was no Fuller Court. . . . [However, this] underscores Fuller's instinctive determination to guide the Court through skillful administration, moderating tensions, and building coalitions among the justices. Fuller had a solid core of associate justices who shared many of his constitutional values. He could therefore be an effective leader by forging working majorities and using the talents of his colleagues.⁹³

The point here is that for the Court to succeed the way that the Fuller Court succeeded requires moral and intellectual conviction as

90. Ely, *Fuller* at 213 (cited in note 4) (citing Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. Rev. 108 (1991)).

91. See, for example, *id.* at 215 ("[T]he justices were conscientious individuals who faced a myriad of new and nettlesome challenges in an age of rapid change").

92. For example, see the list of scholars accompanying notes 36-39. See also Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L. J. 31, 33 (1991).

93. Ely, *Fuller* at 70 (cited in note 4). See *id.* at 35-38 (elaborating on Chief Justice Fuller's leadership style as evidenced by his opinion assignments).

well as support from the general population. A somewhat distressing implication of the book for those who would like to see the modern Supreme Court lead an economic rights revolution is that the Court is far more likely to follow such a revolution than it is to lead it.

In this context, it is revealing that there is a bit of misrepresentation involved in the way that Professor Ely's book is packaged. The book is presented as a biography of a chief justice of the United States Supreme Court. And while the first two chapters do present biographical information, the remaining seven chapters—by far the major part of the book—are about the decisions of the Court while Fuller was the chief justice. The point that this is a book about the Supreme Court during the years that Fuller happened to be chief justice, rather than a book about Chief Justice Fuller, is underscored by the fact that Fuller was not the intellectual leader of the Court but rather its chief administrator. Stephen Field and John Marshall Harlan were the intellectual leaders. Fuller did not write most of the opinions, and he wrote almost none of the more important decisions during his tenure as chief justice.

But it is no criticism of Ely's book to say that it is really about the decisions of the United States Supreme Court during one of its most interesting eras. The point of the book is that the harsh criticisms that have been leveled at the Court's decisions are not consistent with either the Court's actual holdings or even with the Court's jurisprudential perspective.

Ely does a good job of rehabilitating the image of the "*Lochner* Court." He convincingly argues that the Court was interested in protecting personal liberty from arbitrary governmental interference and interest group politics, and that the Court simply viewed economic freedom as a very important aspect of personal liberty.⁹⁴ Ely traces the Fuller Court's allegiance to economic liberty and limited government back to the early days of American constitutionalism and Jacksonian democracy.⁹⁵

Nobody can continue to claim that the Fuller Court's jurisprudence was shaped by class bias, belief in social Darwinism, or a desire to protect the property rights of a privileged minority without confronting Professor Ely's scholarly refutation of these allegations. The

94. See *id.* at 80 ("A preoccupation with economic liberty had more to do with the course of the Fuller Court than any hidden desire to safeguard the interests of business per se").

95. *Id.* at 71 (noting that the Fuller Court pursued prior constitutional property rights goals with "heightened zeal").

Court was quite concerned that the federal government stay within the bounds of its constitutional grant of power.

Another of the book's recurrent themes is that the Court's philosophy "dovetailed" with utilitarian desires to build a strong industrial economy with few governmental restraints, and that this was in some sense visionary and ultimately good for the economic growth of the country. The book is a powerful antidote for those who believe that distrust of governmental regulation and respect for freedom of contract and other economic freedoms necessitate elitism, class bias, and social Darwinism. Rather, at least in the case of Chief Justice Fuller and his colleagues, these values arose from a legitimate philosophy of how the Constitution should be read and how society should be ordered.

The far more difficult question is to determine how the values shared by the Fuller Court could ever be replicated in this age of political correctness and moral relativism. Were the modern Court willing to embark on such a replication, which is not likely, effecting it would be more difficult because contemporary public opinion, at least among the elites, has shifted far from the values of the Fuller Court.