

# *Edward J. Lopez (ed.): The pursuit of justice: law and economics of legal institutions*

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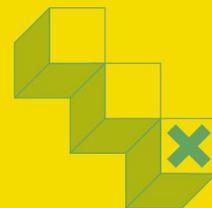
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# PUBLIC CHOICE



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**Edward J. Lopez (ed.): The pursuit of justice:  
law and economics of legal institutions****New York: Palgrave Macmillan, 2010. Xi + 303 pages.  
USD 25.50 (paper)****Claudia R. Williamson**Published online: 15 October 2010  
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Public choice theory fundamentally altered the way economists, and other social scientists, analyze government behavior. The positive approach to public economics removes the romance from government highlighting how government actually works, not how we think it ought to work. The ‘politics without romance’ mentality is no longer confined to strictly analyzing voting rules, political institutions, and politicians’ behavior.

In *The Pursuit of Justice*, Lopez has organized a collection of work applying this mentality to law and economics, a relatively new approach to legal studies. Four underlying themes emerge throughout the chapters including (1) the consequences of development takings and the unsound principle of ‘just compensation,’ (2) how the selection mechanisms of the judiciary structures incentives shaping judicial outcomes, (3) judicial decisions are susceptible to special interest politics, and (4) the market is capable of providing many legal services attributed to government.

One of the most fundamental and robust findings in economic development is the importance of secure property rights. While the United States always ranks very high on a variety of property rights indices when compared to the rest of the world (for example, see the Economic Freedom of the World), Chapters 7 and 8 investigate how the abuse of eminent domain, legal government takings for public use, is sending the United States down a slippery slope. As Somin in Chapter 7 highlights, the ‘public use’ clause has become a mechanism for courts to redistribute private land to other private individuals, in the belief that the new property holders will contribute more to the local tax base and economic development. Once the property is transferred, however, there exists no binding constraint for the new property holder(s) to actually do anything beneficial. Since the government is required to compensate the property losers, many individuals may not view eminent domain use as abusive. Bratland, in Chapter 8, argues that since no assent has taken place, just compensation is impossible. Value of property is subjective and only becomes revealed through market transactions—not from government coercion. Eminent domain is a classic example

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of government failure where organized groups use the power of government to gain special benefits at the expense of the public at large.

One major theme throughout several chapters is how the selection mechanism of the judiciary plays an important role in judicial outcomes. Different selection mechanisms—election versus appointment—create different incentives for judicial behavior. Using U.S. survey data, Chapter 3 by Sobel, Hall, and Ryan, illustrates that the perceived quality of each state's legal system depends on the selection mechanism of its judges. Elected judges are much worse than appointed, with partisan judges fairing worse than nonpartisan elected judges. Using data from New York, the authors also demonstrate how the timing of election can impact conviction rates showing that wrongful convictions spike right before an election. Tomic and Hakes in Chapter 6 analyze how elected versus appointed judges answer to different groups impacting their sentencing decisions. Elected judges are more likely to have higher incarceration rates but shorter sentences compared to appointed judges. Elected judges need to appear tough on crime to local voters but have the luxury of spreading the costs of incarceration across the state. Appointed judges answer to the state legislature and are sensitive to state-wide budgetary pressure resulting in lower incarceration rates but longer sentences. Cordis in Chapter 5 generalizes the study of the effects of political institutions on the judiciary to include measures of judicial independence and the rigidity of constitutional review and the level of corruption in public office. She finds that judicial independence can act as a check on government behavior, while the effect of constitutional review is more ambiguous. These three chapters find that public officials respond to incentives shaped by political institutions.

Another underlying theme is that judicial behavior and outcomes are shaped by special interests with emphasis on one particular organized group—lawyers. Barton, in Chapter 9, clearly outlines and demonstrates the lawyer-judge bias: when possible, judges make decisions that benefit the overall legal profession. Barton argues that part of this can be explained by the selection mechanisms of judges, tying into another theme from previous chapters. Chapter 11 can be viewed as an application of the lawyer-judge bias where Keckler argues that legal innovations surrounding class action lawsuits allow judges to allocate rents at their discretion. Since identifying all the beneficiaries in a suit is nearly impossible, judges have a pot of money to redistribute to their favorite beneficiaries, typically groups within the legal profession.

Chapters 10, by Haymond, and 12, by Summers, demonstrate two classic public choice examples: rent-seeking and capture theory of regulation. Chapter 10 presents evidence where certain class action lawsuits are seen as opportunities for rent extraction. Lawyers can file a suit against a corporation or politicians can threaten regulation. This often results in corporations finding it cheaper to settle out of court. The effect is essentially corporations subsidizing the general state tax fund. Chapter 12 traces the history of regulation of the legal profession showing how lawyers found it in their own self interest to lobby for stronger regulations requiring minimum education standards, stricter licensing, and mandatory bar admission, just to name a few. Overall, these four chapters illustrate how the legal profession can organize itself as a special interest group receiving concentrated benefits while dispersing the costs.

Chapter after chapter is an illustration of massive government failings within the legal system and the judicial process. It is possible to become frustrated after reading so many examples of government's inabilities; however, Chapters 2 and 4 illustrate that we need not get discouraged because the market is capable of providing many of the legal services currently ascribed to government. Curott and Stringham, in Chapter 2, provide historical examples where private law relied upon voluntary institutions to enforce rights, property,

and contracts. Courts only became codified once the King realized the profit opportunity from declaring various acts as violations of the 'king's peace.' Koppl, in Chapter 4, provides an interesting market based cost saving approach to forensic science. He illustrates that over 98 percent of wrongful convictions could be eliminated through simple institutional reform.

Lopez has assembled a well-written collection of essays accessible to wide audience. One does not have to be a trained public choice economist to understand the message from each chapter and the overall themes of the book. The authors use a variety of techniques including historical case studies, statistics, case studies, and econometrics to apply public choice to law and economics. These chapters remind us that traditional market failure arguments underpin much of the support for government provision of law and order; however, public choice theory and comparative institutional analysis is needed to further advance our knowledge of how legal services are actually supplied and how we can improve upon the existing system.