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Public Choice Theory and the Fragmented Web of the Contemporary Administrative State

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LAWYERS, JUDGES, AND THE PUBLIC INTEREST

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SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES. By *Charles Haar.* Princeton: Princeton University Press. 1996. Pp. xiv, 256. $29.95.

Charles Haar, the Louis D. Brandeis Professor of Law Emeritus at the Harvard Law School and a certified elder statesman of the housing and land-use community, was one of those scholar-politicians of the 1960s who spun out innovative theories in law reviews and then moved into government to see them applied. His generation inspired mine to pursue law as a means to serve the public interest. But the days of the Kennedy brothers' Camelot are long past. Today, big government and "big courts" alike are seen as parts of the problem. In the more austere political climate of the 1990s, however, Charles Haar is not the least bit repentant, and he has found a magnificent topic around which to reaffirm his faith in the capacity of big government and, particularly, big courts to move us collectively toward the just society. In *Suburbs Under Siege: Race, Space, and Audacious Judges,* Professor Haar dissects New Jersey's famous *Mount Laurel* cases,[1] finding in them not only a compelling demonstration of judicial success in the arduous task of law reform, but confirmation that courts can be *better* than legislatures at such a task.

Suburbs Under Siege is a very welcome book. For too long, commentary on the *Mount Laurel* doctrine, one of the most important social initiatives of our time, has been left in the hands of people like myself who are day-to-day players at the grassroots level, and who therefore inevitably risk commenting with an advocate's bias.[2] Charles Haar brings into the conversation not only his wealth

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1. Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975) *(Mount Laurel I);* Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) *(Mount Laurel II).*

2. Of course, I am now going to comment on Professor Haar's book from my perspective as a day-to-day player, and so it is only fair that I summarize briefly my involvement with this issue. I had no lawyer's role whatsoever in the first and second *Mount Laurel* cases themselves, but from 1983 onwards, I served as co-counsel to the public-interest plaintiffs in *Urban League of Greater New Brunswick, see infra* note 27. *Urban League* was one of the first fully litigated cases under the *Mount Laurel II* rules and it therefore became the laboratory for distilling into workable form many of the bold but untested remedies that had been author-

of experience and formidable analytic skill, but also his fresh perspective. He renewed my faith in what I have been doing for the past two decades. There was an unmistakable goodness about the best of the 1960s commitment to social reform through law, and that goodness pervades *Suburbs Under Siege.* If Professor Haar's vision sometimes exceeds his grasp, then as now, his unshakable conviction that humankind is perfectible and that lawsuits can lead the way reminds me of why I decided to become a public-interest lawyer in the first place. The book is about late-century land-use law, but it should be read by anyone who wishes to understand the heart and soul of postwar legal liberalism.

Despite my enthusiasm for *Suburbs Under Siege,* however, I have two fundamental disagreements with Professor Haar's approach to the *Mount Laurel* saga. Our differences are important, because the *Mount Laurel* doctrine has not traveled well beyond New Jersey, and it is important to understand why.[3] He and I are in complete agreement that there is a legitimate role for courts in breaking the political stalemate that has brought us exclusionary zoning, racial discrimination, and an unacceptable degree of social distress in sheltering our people. But our different takes on the *Mount Laurel* cases may explain why those cases have not sparked a land-use revolution. Specifically, it is my view that Professor Haar overvalues the importance of co-opting the private sector as a key element in the success of the *Mount Laurel* process. I also believe that he overstates the case for the legitimacy of the New Jersey Supreme Court's intervention into land-use policymaking by not inquiring closely enough into the precise nature of the constitutional violation at hand and the possibility of different paths to the goal of land-use equity.

THE *MOUNT LAUREL* STORY

In all likelihood, the reader whose attention has been drawn to *Suburbs Under Siege* is already familiar with the New Jersey

ized in principle by the New Jersey Supreme Court. In January 1986, I argued (unsuccessfully) the *Urban League* portion of the so-called *Mount Laurel III* case, described *infra* note 13 and accompanying text, before the supreme court, and in 1993 I represented the New Jersey affiliate of the ACLU *amicus curiae* in the *Warren Township* case, described *infra* text accompanying note 53. I was during this same period a founding member and President of the Alliance for Affordable Housing, a coalition of public-interest groups that successfully coordinated opposition to a proposed constitutional amendment that would (as its proponents urged on their bumper stickers) "Undo Mount Laurel Two." The Alliance also conducted the first major study of *Mount Laurel* compliance, *see infra* note 21. At present, I am representing a statewide advocacy organization, New Jersey Future, in as yet unpublished litigation against the Council on Affordable Housing that challenges approval of an inclusionary development on the basis that it violates the "sound planning" language in the second *Mount Laurel* case, *see* 456 A.2d at 430-31.

3. It has been expressly followed, and then only in a limited way, in New Hampshire. *See* Britton v. Town of Chester, 595 A.2d 492 (N.H. 1991).

Supreme Court's bold experiment in law reform, the *Mount Laurel* doctrine, and it is not my intention to retell the story here under the guise of reviewing the book. Nor, in all frankness, would I send the reader to Professor Haar's account solely for the purpose of acquiring the narrative details of the events in question; while his telling of the tale is serviceable, his real interest in telling it — and mine in his telling — is so that he can then use the story as a case study in judicial activism.[4]

The Mount Laurel *Litigation*

Let this skeletal summary suffice, then. In 1971,[5] a team of young legal services lawyers in Camden, New Jersey came to the aid of black residents of Mount Laurel Township, a once-rural community that was rapidly developing as a bedroom suburb of Philadelphia. Their goal was to break the municipality's exclusionary land use system, which consisted of zoning laws and habitability codes operating in tandem to force demolition of the poor, rundown housing that was all the plaintiffs could afford — a chicken coop in one notorious example — and to preclude the construction of modest new homes and subsidized public housing that could have given them safe, sanitary, and affordable alternatives. When the case reached the New Jersey Supreme Court, it was welcomed by Justice Frederick Hall, who had been campaigning within the court for years to reform its excessive deference to municipal autonomy in land-use matters.[6] Justice Hall's opinion gave voice to what is now known as the *Mount Laurel* doctrine:

> We conclude that every such [developing] municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. . . . at least to the extent of the municipality's fair share of the present and prospective regional need therefor.[7]

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4. For an exhilarating recounting of the *Mount Laurel* story that fills in the bare outlines I have sketched here, the reader will want to seek out DAVID L. KIRP ET AL., OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA (1995).

5. Professor Haar erroneously dates the original lawsuit to 1974. Pp. 1, 17. The papers were actually filed in May 1971; the trial court opinion was issued on May 1, 1972, *see* Southern Burlington County NAACP v. Township of Mount Laurel, 290 A.2d 465 (N.J. Super. Ct. Law Div. 1972), and the Supreme Court opinion on March 24, 1975, *see Mt. Laurel I*, 336 A.2d 713.

6. Justice Hall's dissent in *Vickers v. Gloucester Township*, 181 A.2d 129, 140, 145 (N.J. 1962) (Hall, J., dissenting), is commonly regarded as the opening judicial salvo in the campaign that eventually resulted in the *Mount Laurel* doctrine.

7. *Mount Laurel I*, 336 A.2d at 724. The "regional fair share" obligation of *Mount Laurel I* was originally interpreted to apply only to "developing" municipalities such as Mount Laurel Township. *See Mount Laurel II*, 456 A.2d at 422-23. This interpretation was modified in *Mount Laurel II* to apply to all municipalities throughout the state, insofar as they had "indigenous" housing need. Municipalities that encompassed land that was identified on state plans as appropriate for "growth" had further "fair share" obligations beyond their indigenous need. *See* 456 A.2d at 430.

This first *Mount Laurel* opinion prompted furious political opposition, municipal intransigence, and a flood of lawsuits, but very little actual progress toward breaking the back, of exclusionary zoning. Then, in 1983, under the vigorous leadership of new chief justice Robert Wilentz, the court issued a second major decision, *Mount Laurel II*,[8] in which it reaffirmed the holding of the first *Mount Laurel* case and outlined a sweeping set of remedial steps designed to ensure that municipalities obeyed their obligations under the New Jersey Constitution. Three specially assigned trial judges were given responsibility for all *Mount Laurel*-related litigation throughout the state. They were told to develop a formula that would assign specific numerical "fair share" obligations to individual municipalities, and they were authorized to grant "builder's remedies" to plaintiffs who successfully demonstrated that a municipality's land use ordinances were exclusionary. Pursuant to a "builder's remedy," the successful developer-litigant could bypass the local zoning and win a court order permitting its project to be built, so long as the builder proposed an "inclusionary development" — that is, one in which at least twenty percent of the units were made affordable to low- and moderate-income households.[9]

The Legislative Response

When the *Mount Laurel* trial judges began implementing their *Mount Laurel II* powers vigorously in 1984 and 1985, the legislature finally responded, as the court had been urging it to do since 1975. It enacted the Fair Housing Act of 1985,[10] arguably the most progressive piece of state housing legislation anywhere in the country. The Act's centerpiece was a new agency, the Council on Affordable Housing (COAH), which was authorized to take over from the courts the task of calculating housing obligations and certifying compliance plans for any municipality that voluntarily submitted to the Council's jurisdiction. The bait for doing so was that "substantively certified" municipalities were effectively immunized from *Mount Laurel* litigation.[11] The Act also authorized municipalities to transfer up to fifty percent of their fair share obligations to other municipalities pursuant to so-called Regional Contribution Agreements (RCAs), so long as the "sending" municipality also financed the housing activity in the "receiving" municipality.[12] In practice,

8. 456 A.2d at 390. Justice Hall, the author of *Mount Laurel I*, retired from the court shortly after that decision was announced and had died by the time *Mount Laurel II* was decided.

9. *See Mt. Laurel II*, 456 A.2d at 452. On inclusionary zoning generally, see ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES (1984).

10. N.J. STAT. ANN. §§ 52:27D-301 to -329 (West 1986 & Supp. 1997).

11. *See* N.J. STAT. ANN. § 52:27D-322.

12. *See* N.J. STAT. ANN. § 52:27D-312.

this permitted a reallocation of fair share housing obligations — and the low-income housing itself — from all-White middle-class suburbs to poorer and non-White urban centers.

In 1986, in *Hills Development Co. v. Township of Bernards,*[13] the New Jersey Supreme Court upheld the constitutionality of the Act, even while acknowledging that in some respects it diluted the methods of compliance that had been developed judicially. Since then, the supreme court has largely withdrawn from the field. It has tinkered at the edges, generally in ways that are helpful to the proponents of housing equity,[14] but has not revisited first principles, as it did in *Mount Laurel II.* The process remains controversial, but not at the white-heat level of a decade ago — when the governor could score political points by denouncing *Mount Laurel II* as "communistic."[15] The Council on Affordable Housing has bent over backward to accommodate municipal interests and concerns, and while housing advocates have decried the slow pace of progress, they have lacked the political power to control the process to the extent that they did in the courts.

In recounting all of this, *Suburbs Under Siege* takes an understated approach, but Professor Haar leaves no doubt about his admiration for the *Mount Laurel* doctrine and the judges that produced it. He has a deft way of capturing points of the story in a phrase that is just right; he describes the odious RCAs, for example, as a "safety valve" (p. 114), the kind of messy compromise that politicians regularly craft and that judges must learn to accept if they are to infiltrate the politician's turf in law reform cases. His characterization of the internal division between "the infantry of the trial courts and the strategic headquarters of the supreme court" (p. 32) puts into clear perspective a problem that bedeviled administration of the first *Mount Laurel* opinion. Cases under the *Mount Laurel* doctrine prior to 1983 were so numerous, so complex, and so never-

13. 510 A.2d 621 (N.J. 1986). *Hills* is often erroneously referred to as *Mount Laurel III,* though Mount Laurel township was then no longer a party to any exclusionary zoning litigation.

14. In addition to the two major cases discussed later in the text, *Holmdel Builders Assn. v. Township of Holmdel,* 583 A2d 277 (N.J. 1990) (upholding municipal authority to levy development impact fees to support *Mount Laurel* compliance) and *In re Warren Township,* 622 A.2d 1257 (N.J. 1993) (limiting residency preferences in compliance plans), *see, e.g.,* Prowitz v. Ridgefield Park Village, 584 A.2d 782 (N.J. 1991) (*Mount Laurel* units to be assessed for property tax purposes at controlled, rather than market, price). For a less helpful, although arguably correct, decision, see *Alexander's Department Stores, Inc. v. Borough of Paramus,* 592 A.2d 1168 (N.J. 1991) (COAH does not have ancillary jurisdiction to resolve conventional zoning disputes that derive from a municipality's certified fair share plan).

15. *See* KIRP ET AL., *supra* note 4, at 121. The authors attribute the quote to an interview in the *New York Times* but do not provide a citation. For one version of the remark, see Robert Hanley, *Some Jersey Towns, Giving in to Courts, Let in Modest Homes,* N.Y. TIMES, Feb. 29, 1984, at A1, reporting that Governor Kean, in an interview, described forced economic mixing as "a 'communist' concept."

ending that the lower courts at times all but subverted Justice Hall's mandate in order to make them go away. This explains why the second *Mount Laurel* decision concentrated all implementing power in three specially assigned trial judges, who would have primary loyalty to the *Mount Laurel* opinion and the process it mandated, without any other docket pressures. He also points out, with just the right touch of irony, that a success of the *Mount Laurel* doctrine was to force the breakdown of stereotypes about poverty and race in the sensitive area of land use, where an instinctive defense of home can blind otherwise fair-minded people to the callousness of their attitudes: "Whenever a town absorbs new low- and moderate-income housing and the sky does not come tumbling down, other communities will be that much more likely to take the leap themselves" (p. 191).

Understanding the Mount Laurel *Story*

But I do not mean to suggest that the success of *Suburbs Under Siege* is solely one of style, although the readable text and well-paced eloquence are certainly welcome. Professor Haar also offers a number of thoughtful insights into the *Mount Laurel* process itself. He notes, correctly, that *Mount Laurel II* does little to explicate the moral and ethical basis of the doctrine, a crucial judicial mistake attributable, at least in part, to "hubris" on the part of the chief justice (p. 48). He then continues with this summary passage, which reveals the central problem of politics and judicial legitimacy:

> With the wisdom born of the litigation that followed Mount Laurel II, it is clear that the court should have focused more intensely on educating the public. . . . Mount Laurel II appears unwilling to stoop to the concerns and queries of the average citizen. Indeed, the most resounding chord in the opinion is not the court's desire to explain the necessity for, or the limited or temporary nature of, the judicial intervention, but a determination to put steel into its Mount Laurel Doctrine. [p. 50]

Other useful insights abound. Haar correctly notes that New Jersey's Fair Housing Act and the ensuing COAH regulations codified the core, although not always the details, of the *Mount Laurel* doctrine (p. 71) — a view quite unlike the more conventional view of the Act, and of the *Hills* decision sustaining the Act, as a "sellout." He points out that there is a strong parallel between the role of the court-appointed "expert" or master in *Mount Laurel* cases and the conventional role of a planner in advising governments as they make land-use decisions,[16] although he does not pursue the implications of this by also pointing out that the more the court's work looks like conventional planning activity, the more it

16. P. 79.; *see also* p. 82 (emphasizing the political skills of the masters).

appears to the average citizen to be encroaching on political terrain. Haar provides a good, balanced summary and critique of the Fair Housing Act and the *Hills* decision, in which he largely avoids the winners-losers trap[17] — if the municipalities won, then the good guys must have lost. Haar also gets the *Holmdel* decision right, pointing out that by essentially writing into the Act an authorization for development fees to subsidize lower-income housing that nowhere appears explicitly in the legislative text, the decision continues and reaffirms the court's pre-Fair Housing Act pattern of making policy.[18]

Inevitably, I have a number of small- and medium-sized cavils about Professor Haar's recounting of the *Mount Laurel* story, many of which are explainable by the different vantage points he and I have on the case. Eventually, it would be good to have a *Mount Laurel* memoir written by one of the original legal team, but I do not want to detract from Professor Haar's accomplishment by nitpicking. Rather, I see his book as the start of a dialogue about the courts and land-use policy, and to that end I turn to two major themes, the public-private balance and the legitimacy issue, about which I do have serious reservations.

Profiting in the Public Interest

A recurring, and somewhat surprising, theme of Professor Haar's book is that the court wisely entrusted the prosecution of exclusionary zoning cases to private developer-plaintiffs, rather than to public-interest groups. The central compliance technique of *Mount Laurel II,* the builder's remedy, provided a huge profit incentive for private developers. Equally important, the case not only shifted the initiative in *Mount Laurel* litigation from public-interest plaintiffs to the private sector, it also dramatically reduced the risk of litigation. The court simplified and objectified the *Mount Laurel* rules so much that, in the infamous comment of one developer's attorney, defeating a municipality "is as simple as clubbing baby

17. Pp. 96-98. He does miss a subtle, but key, point, however. To the extent that there were clear winners and losers in *Hills,* the losers were those builders and public-interest plaintiffs who were unable to prevent courts from transferring their cases to the newly created Council on Affordable Housing, so as to avoid a long hiatus while the COAH drafted its substantive rules. This delay was not mandated by the Act, which permitted the courts to retain cases where there would be a "manifest injustice" in transferring them, *see* N.J. Stat. Ann. § 52:27D-316[a], a standard that easily could have been met by cases that had been in litigation for a decade or more and were, in some instances, literally within days of final judicial resolution. *See Hills,* 510 A.2d at 635 (noting that the final Cranbury Township hearing was scheduled for December 2, 1985, 35 days before oral argument in *Hills*). By the time the transferred cases began emerging from COAH in 1988 and 1989, the huge building boom of the 1980s was deflating rapidly, and a great deal of affordable housing that could have been built in inclusionary developments was lost or seriously delayed.

18. P. 120 (analyzing *Holmdel,* 583 A.2d 277 (N.J. 1990)).

seals."[19] Prior to *Mount Laurel II,* there had been a mixture of public and private plaintiffs; the actual *Mount Laurel* case had no private developers participating as parties until after the decision in *Mount Laurel I* in 1975. Between 1983 and 1986, more than a hundred private developer suits were filed against some seventy municipalities, and no new public interest suits were filed.[20]

The "Builder's Remedy"

Commentators have generally applauded the court's endorsement of the builder's remedy, and with some justification; co-opting the private housing market in an era of declining public subsidies for low- and moderate-income housing produced results in the early years after *Mount Laurel II* that would have been otherwise unobtainable.[21] But Professor Haar warns us that these results came at a price — "the builder's remedy narrowed the scope of latent solutions, and once unleashed, it was potentially powerful enough to distort the impact of the Mount Laurel Doctrine" (p. 45). He is certainly right about that. As I have explained elsewhere, the ability to provide land to build "inclusionary developments" in satisfaction of the builder's remedy became the be-all and end-all of the compliance process, so much so that inclusionary zoning is now welded permanently into the fair share rules of the Council on Affordable Housing.[22] Through a "vacant land adjustment"[23] and a fair-share calculation based on the concept of the "reasonable development potential"[24] of the municipality, the COAH rules essentially exclude *Mount Laurel* compliance where large, new inclusionary developments are not feasible, such as in most of the older, built-up parts of the state. This is certainly, in Professor Haar's language, a "distortion" of the intent of *Mount Laurel II* (p. 45).

Haar also recognizes the broader implications of the reliance on private sector builder-plaintiffs:

> [I]t became clearer, as lawsuits accumulated, that the builders were in there for their own profit, and that this was not an unalloyed good. Adam Smith (or perhaps Hobbes) was proven right again. Most builders were ready to make any kind of agreement with a municipality — even where the outcome fed the exclusionary quality of the

19. The quotation in the text is a paraphrase. Not surprisingly for a remark so flamboyant, it can be found in KIRP ET AL., *supra* note 4, at 105, rather than *Suburbs Under Siege.*

20. *See* Alan Mallach, *The Tortured Reality of Suburban Exclusion: Zoning, Economics, and the Future of the* Berenson *Doctrine,* 4 PACE ENVTL. L. REV. 37, 119 (1986).

21. *See* Martha Lamar et al., Mount Laurel *at Work: Affordable Housing in New Jersey, 1983-1988,* 41 RUTGERS L. REV. 1197, 1210 (1989).

22. *See* statutes cited *infra* notes 23-24.

23. *See* N.J. ADMIN. CODE tit. 5 § 93-4.2 (1998).

24. N.J. ADMIN. CODE tit. 5 § 93-4.2(e)-(g).

> zoning ordinance — as long as they obtained the zoning changes that would enhance their own profit. . . . "I had less uneasiness about the whole litigation process when a public interest group was the plaintiff, rather than a builder. Therefore I felt less of a need for the court appointed master in the public interest cases," explained one of the Mount Laurel judges. [pp. 63-64]

Professor Haar quickly puts this trenchant criticism aside, however. He describes the builder's remedy at one point as "the grand strategy for achieving social reform without dependence on the political actors within the executive and administrative branches who might have resisted the Mount Laurel Doctrine or implemented it in a hostile spirit."[25] Results count, in other words; the end justifies the means. He was right in his initial skepticism, however. There were other "latent solutions" to the problem of providing lower-income housing in the suburbs, and he not only misses an opportunity to explore why they remained "latent," he falls into what I regard as the most serious error in his overall telling of the *Mount Laurel* story. To understand why this is so, I need to drop back for a moment and introduce a specific example.[26]

Private Remedies in Action: Cranbury Township

Cranbury Township, which Haar mentions only in passing (p. 111), was a defendant in the *Urban League* litigation, one of the six cases that composed *Mount Laurel II*.[27] Cranbury Township presented a picture far different from the Mount Laurel Township

25. P. 146; *see also* p. 134 ("[T]he courts cleverly buttressed themselves by enlisting the business sector").

26. I note here in passing that *Suburbs Under Siege* does not dig into the storytelling of post-1983 events with the same thoroughness that it applies to telling the story of Mount Laurel Township. By the time of the *Hills* decision in 1986, Mount Laurel Township had settled its litigation and was no longer a significant player in the *Mount Laurel* story, and this leaves the storytelling without a focus. As a result, Professor Haar's discussion of the consequences of *Mount Laurel II* through implementation, legislation, and finally administrative procedures lacks the strong anchor in practical reality that informs the earlier part of the book. Much more attention needs to be given to the day-to-day implementation of the doctrine in the cases that became prominent after 1983. These cases can be told as stories, just as the Mount Laurel Township story is told, so that they are not known only from the slender evidence of the published judicial decisions. The lack of a strong, specific storytelling focus may be what leads Professor Haar astray in his enthusiasm for the market solution to the *Mount Laurel* problem, as I shall try to show by telling a bit more of the post-1983 *Mount Laurel* story.

27. Urban League of Greater New Brunswick v. Mayor of Carteret, 359 A.2d 526 (N.J. Super. Ct. Ch. Div. 1976), *revd.*, 406 A.2d 1322 (N.J. Super. Ct. App. Div. 1979), *modified*, 336 A.2d 713 (N.J. 1975). The narrative that follows in the text is based on my personal experiences during the *Urban League* litigation. I became co-counsel to the Urban League of Greater New Brunswick — it later changed its name to the Civic League of Greater New Brunswick — at the time of the remand and participated extensively in the subsequent proceedings. Documentation is available in the author's voluminous but unpublished litigation files in the case, which are available at Rutgers Law School for inspection by interested readers.

of 1970. Although Cranbury's land-use ordinances were hopelessly exclusionary — at least as Justice Hall would have understood the term — the town had better reasons to regret growth than did Mount Laurel. A small farming village surrounded by actively worked fields, its Main Street and adjacent residential district, dating from the turn of the nineteenth century, were listed on the National Register of Historic Places. "Preserving" Cranbury was an instantly marketable idea, the value of which could be understood readily by the average citizen of goodwill. Unfortunately for Cranbury, however, holding back time was not really an option: it was served by an adjacent exit on the New Jersey Turnpike, it was five miles or so due east of the burgeoning Route One Corridor area of office and research parks centered on Princeton University, and its elegant older homes made it a favorite for upper-level bureaucrats and private-sector lobbyists working in Trenton, the state capital, just a few miles to the south. Nor did Cranbury Township totally resist change, so long as it was in the form of tax-paying commercial development or upscale, large-lot subdivisions. Cranbury was, in short, an exclusionary community whose land-use ordinances stood in violation of the New Jersey Constitution, but in remedying that wrong there was a significant risk that the courts would do more harm than good by creating yet another example of a nice community ruined by sprawl development.

Prior to the decision in *Mount Laurel II,* Cranbury Township was in litigation on two fronts, against the Urban League plaintiffs — a public-interest group acting directly on behalf of lower-income people — and against a private builder's-remedy plaintiff whose principals included Carl Bisgaier, the lawyer who had brought the original *Mount Laurel* suit in 1970. Bisgaier and his colleagues, who remained committed to the social goals of the *Mount Laurel* doctrine, were out to prove that those goals could be combined with profitmaking in what might be seen as a form of socially responsible capitalism. Cranbury fought both plaintiffs fiercely.

After *Mount Laurel II,* however, it did not require rocket science to realize the profit potential of a builder's remedy. Cranbury, with its historic district, sylvan fields, and access to high-end employment, became a magnet for *Mount Laurel* lawsuits. Within a few months of the *Mount Laurel II* decision, eight additional developers sued Cranbury, offering a total of more than three thousand acres for development.[28] Had all of this land been developed as proposed, some 12,223 dwelling units would have been built at gross densities ranging from 4.8 to 10 dwelling units per acre; of

28. *See* Cranbury Township Comm. & Planning Bd., *Mount Laurel II* Compliance Program 1-2 (maps), tbl. 6 (Dec. 1984) (unpublished document on file with author) [hereinafter Compliance Program].

these, 2444 units would have been set aside for low- and moderate-income — that is, *Mount Laurel* — households,[29] more than the total number of *Mount Laurel* units that were eventually built statewide in the five years after 1983.[30] Cranbury, at the time of the 1980 Census, had a population of 1927 people and approximately 750 occupied dwelling units.[31]

The Urban League plaintiffs did not disagree that this amount of development was much more than a small community could realistically absorb over a short period of time, nor did they disagree that this amount of development would present potentially serious planning problems — including the destruction of valuable farmland. Had the Urban League been in the lawsuit by itself, these concerns would have been addressed with a view not only to building affordable housing but to the larger public interest as well. Each proffered site, and perhaps others, would have been examined by the plaintiff's experts for compliance purposes. But because none of the landowners or developers would have had a preemptive builder's-remedy claim in this alternative scenario, any one site could have been passed over had the Urban League and Cranbury chosen to do so in proposing a settlement to the court. Indeed, the Urban League would have been free to discuss with the township alternate ways of encouraging low- and moderate-income housing that did not involve inclusionary zoning at all.

This is exactly what happened in the neighboring township, Plainsboro, where for idiosyncratic reasons, the Urban League litigated by itself, without a single builder's-remedy claimant.[32] Plainsboro informed the Urban League that it would settle quickly to reduce litigation costs, so long as it could settle without a major infusion of new inclusionary developments. The town had grown rapidly from an agricultural village to a sprawl of garden apartments during the 1970s, and it had learned its planning lesson, even if a bit belatedly. An innovative settlement was concluded in due course that involved only 200 units in an inclusionary development — forty of which were for *Mount Laurel* households. The remainder of Plainsboro's fair share was to be met partly in a subsidized development consisting of 413 *Mount Laurel* rental units with no market rate units, and partly by taking development fees from new commercial developments in the Route One corridor and applying the money to buy down the cost of 120 rental units already in place

29. *Id.* at tbl.6, col. 7.

30. *See* Lamar et al., *supra* note 21, at 1210.

31. *Compliance Program, supra* note 28, at 4.

32. As with Cranbury, the Plainsboro narrative is drawn from my personal experience during the litigation and is documented in litigation files as explained *supra* note 27.

from the earlier phases of Plainsboro's growth — a kind of home-grown housing voucher program.[33]

In Cranbury, however, the builder-plaintiff sites drove out all strategies other than inclusionary zoning. No one could stop the builder plaintiffs from suing, and once they did, the supreme court had decreed, in effect, that at least one of them had valuable "rights." Worse, the glut of would-be builder's-remedy claimants made it impossible for the Urban League and any single builder plaintiff to settle with the township, because the losers were virtually guaranteed to challenge the settlement in court, eliminating any time-and-money incentive to settle in the first place. The Urban League had no choice but to sit by in frustration while the feeding frenzy proceeded apace, knowing that the defendant municipality was also sitting by, not in frustration, but in the enviable position of being able to avoid serious talk about settling a case that it could not win on the merits, hoping that the various plaintiffs would eventually exhaust themselves. In the end, it was not exhaustion but passage of time that mattered most, and Cranbury eventually did emerge as the winner. Cranbury was still in the midst of the court-supervised remedial process — violation of the *Mount Laurel* doctrine had already been determined by Judge Serpentelli — when the Fair Housing Act and the *Hills* decision transferred the whole mess to COAH.[34] COAH reduced the township's fair share number from 816 to 153, and most of the builder plaintiffs got nothing — including the Bisgaier group, which had borne the expense of litigation for years and which sold its site for development of expensive single-family homes on large lots when it became clear that it could not prevail with its inclusionary plan.[35]

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33. *See Urban League of Greater New Brunswick v. Mayor of Carteret, Consent Order Re: Plainsboro Township,* No. C-4122-73 (N.J. Super. Ct. Ch. Div. Apr. 22, 1985). This settlement later collapsed because the key subsidy for the 100% *Mount Laurel* development, tax-sheltered depreciation write-offs, was eliminated by Congress in the Tax Reform Act of 1986. *See* Tracy A. Kaye, *Sheltering Social Policy in the Tax Code: The Low-Income Housing Credit,* 38 VILL. L. REV. 871, 883 nn.62-64 (1993). But the principle behind the settlement remains sound: without a clutter of builder plaintiffs, a broader range of strategies can be considered seriously. The Plainsboro settlement could be roughly replicated today using the Low Income Housing Tax Credits that Congress eventually provided to replace the traditional tax-sheltering schemes. *See id.*

34. *See* Hills Dev. Co. v. Township of Bernards, 510 A.2d 621, 635 (N.J. 1986).

35. COAH eventually certified Cranbury's *Mount Laurel* compliance plan in 1987. *See* COAH, Mediation Report-Cranbury Township/Middlesex County, Audrey M. Winkler, Mediator, Aug. 24, 1987. The plan included an RCA transfer of 76 units to Perth Amboy, New Jersey, an old and poor port town at the mouth of the Raritan River; rehabilitation of 10 units of substandard existing housing; and two developments totaling 58 units. One was a senior citizen development, 100% low and moderate units, tucked in behind the historic Main Street shops and houses, adjacent to the public school and athletic field, and barely encroaching on the farm fields that stretched west from the village. The other was an inclusionary development of large, single-family homes on large lots, also sited as an extension of the existing village, and in this instance moving toward the highways that had already obliterated the rural character of the village in that direction. Most significant, the inclusionary —

The Urban League plaintiffs did try at one point to unclog the Cranbury litigation by supporting the township in a motion to strike the largest builder's remedy claimant on the ground that the developer, Lawrence Zirinsky, had used *Mount Laurel* as a "threat" to obtain other favorable, non-*Mount Laurel* development approvals before intervening as a *Mount Laurel* plaintiff. Professor Haar speaks favorably of the "threat" language in *Mount Laurel II* as a "further hedge[ ] about a remedy so powerful" (p. 45), but he does not connect it to the Cranbury experience. If he had, he might not have been so approving. To the astonishment of the other builder-plaintiffs, who thought that a public-interest party would, by definition, support them uncritically since they were offering to build lower-income housing, the Urban League argued that the court should define the "threat" exception to eliminate plaintiffs who did not come to the court "clean" — that is, whose first offer to the town was not for *Mount Laurel* housing. Unless the court adopted such a rule, the Urban League argued, the exact kind of tangle that was strangling the Cranbury litigation would result. Judge Serpentelli, perhaps understanding the supreme court's preference for private litigants better than the Urban League did, denied the motion. The "hedge," in other words, was flimsy and has not, so far as I am aware, had any significant use in the years since *Mount Laurel II*.

The Limits of Privatization

As for Professor Haar, there is no guessing about his admiration for the use of private litigants as the primary moving force in the *Mount Laurel* story, and this is the least successful theme of *Suburbs Under Siege*. Although Haar makes a gesture toward the public-interest bar by describing the "unusual combination of energies" that resulted when both public and private parties were bringing cases, he proceeds immediately to praise "[t]he rare coincidence of private- and public-sector interests [that] testifies to the ingenuity of Mount Laurel II in harnessing the expertise and profit drive of the private sector — the developer — in order to achieve a public end" (p. 63). It is the private sector, in other words, that he sees as essential to making the *Mount Laurel* doctrine a success. Nor is it simply that he sees the private sector as a useful addition to the mix; he appears to be deeply skeptical about the capacity of the public-interest bar to sustain this type of litigation. Thus, in a pas-

Mount Laurel — units in this latter project are four-family units fitted into structures that have the scale and massing of the adjacent single-family homes, so that they do not appear incongruous in context. Except for the RCA and the smaller fair share, Cranbury's compliance plan easily could have been accepted by the *Urban League* plaintiffs in 1984. But the hammerlock of the builder's remedy made that kind of negotiation impossible.

sage soon after the words quoted above, he criticizes public-interest plaintiffs for delaying compliance in one unnamed case for six years because "they were not . . . equipped to monitor the development process" (p. 64). He is certainly correct that compliance dragged on for years in many cases, but it did so for a variety of reasons — including municipal creativity in finding ways to slow the process — and these problems were not confined to the public interest cases.[36] Moreover, as the Cranbury experience demonstrates, the "unusual combination of energies" that Professor Haar applauds at least nominally — the mix of public-interest and developer plaintiffs — has at least as much potential for slowing down the process as it does for benefiting from the enforcement capacity of the private sector.

Professor Haar's enthusiasm for private remedies leads him to several debatable conclusions. He is much too generous, for example, in appraising the work of COAH. I doubt that there is any public-interest housing advocate in the state of New Jersey who would agree with him that COAH has adopted an "aggressive posture in pursuing the Mount Laurel doctrine" (p. 104). As Professor Haar recognizes and describes accurately elsewhere in his book (pp. 92-93), the Fair Housing Act was adopted only grudgingly by a legislature in a political bind: home rule notwithstanding, it had to do something to get the courts off the back of outraged municipalities. COAH was set up to dissipate constitutional pressure, not to further expand constitutional confrontation by pursuing aggressive new policies. As I have explained, however,[37] COAH incorporated into its rules a single-minded focus on measuring compliance through large-scale inclusionary developments constructed by private developers, and this is apparently what Professor Haar sees as COAH's "aggressive" stance. Maybe so, but only to the extent that the public's interest in affordable housing coincides with the private interest of large-scale developers. *Suburbs Under Siege* does not do

36. For one example, see *Urban League of Greater New Brunswick v. Mayor of Carteret, Restraining Order re: Old Bridge Township,* No. C-4122-73 (N.J. May 31, 1985) (Serpentelli, J.). The builder was Oakwood at Madison, which had won the first builder's remedy that the New Jersey Supreme Court approved, *see Oakwood at Madison, Inc. v. Township of Madison,* 371 A.2d 1192 (N.J. 1977). The development could not be built in the housing recession of the late 1970s, and the Urban League, investigating the status of the township's compliance in 1984 after *Mount Laurel II,* found that the township, whose name had since been changed to Old Bridge, already had approved a market rate "phase" of the Oakwood development, without making any provision for the required *Mount Laurel* units. Because the normal rule in *Mount Laurel* development is that the lower-income units must be phased with the market units, to prevent the developer from walking away at the end with the subsidized units unbuilt, the Urban League had little difficulty persuading Judge Serpentelli that stern measures were in order. But the episode demonstrates that in proving "Adam Smith (or perhaps Hobbes) . . . right again," as Professor Haar puts it (p. 63), there is no obvious reason to prefer private to public litigants in *Mount Laurel* cases.

37. *See supra* text accompanying notes 23-24.

much to identify, let along explicate, the inherent tension between these two interests.

Later, in commenting on the court's willingness to uphold the Fair Housing Act, which undercuts some of the remedies developed by the *Mount Laurel* judges, Professor Haar offers the astonishing comment that "[h]ad there been more visible support from public interest groups, the court might have struggled harder [in *Hills*] to make the actions of the three trial judges more broadly applicable and to elaborate still further the principles of its doctrine" (p. 98). What Professor Haar overlooks is that by embracing the builder's remedy, the private-sector remedy, so wholeheartedly, the court, in effect, drove the public-interest bar out of the *Mount Laurel* area. Although public-interest litigation often depends heavily on the unpaid labors of volunteer attorneys, planning experts, and others, it still is not free; the Urban League litigation was supported by a substantial grant from a New Jersey foundation to pay for depositions, travel expenses of witnesses, and so forth. Furthermore, volunteerism has its limits. To be done well, public-interest litigation requires paid counsel that can devote adequate time to the case, just as any private-interest litigant would prefer. Thus, it remains a total mystery to me why the supreme court was so willing to award private-sector *Mount Laurel* litigants a substantial financial "bonus" in the form of a builder's remedy, while at the same time explicitly denying civil rights attorney's fees to public-interest plaintiffs.[38]

The baneful results of this tilt toward privatization include some of those that Professor Haar himself notes, but which he ultimately seems willing to disregard in his admiration for the court's genius in co-opting the private sector. Criticizing the standard 4:1 ratio of market rate to *Mount Laurel* units as too rigid, he observes that "[a]s time passed, it became clear that the court's formula had not squeezed the developers hard enough" (p. 166). But if the builders are the only parties before the courts, who is to do the squeezing? Certainly not the builders, whose profit margins are at stake. Haar points out that the emphasis on the builder's remedy shrinks the range of possible solutions, which in turn exacerbates the public-relations problem that he criticizes the court for not dealing with effectively. Because the builder's remedy gobbles up land — four units of market-rate housing to build each *Mount Laurel* unit — inclusionary zoning is a fat target for anyone who is concerned about overdevelopment and sprawl. This in turn provides a conve-

38. The *New Jersey Rules of Court*, N.J. R. Ct. 4:42-9, lists all of those cases in which fees are recoverable, without including *Mount Laurel*. The unavailability of state fees is implicit in *Urban League v. Mayor of the Borough of Carteret*, 559 A.2d 1369 (N.J. 1989) (denying a fee claim under federal attorney's fee law).

nient cover for those whose exclusionary motives are less admirable. As Haar correctly notes, the *Mount Laurel* process "may be faulted for failing to stress rental housing" (p. 166). This is of critical importance to low-income families, because they often lack the cash reserves and credit history to qualify for even a subsidized home purchase. But this dearth of rental housing results not because, as Professor Haar suggests, the trial judges and masters failed to require it; it results because the private sector did not want to build it and would not participate — even for the reward of a builder's remedy — if rental was a condition.[39]

Moreover, reliance on the private sector causes some of the disinterest among public-interest groups that Professor Haar decries. It is true that many of those whose advocacy is on behalf of the seriously poor have lost interest in the *Mount Laurel* process, but the overemphasis on the builder's remedy bears a significant share of the blame. The typical builder's willingness to subsidize *Mount Laurel* units ceases at about the point where a household earns less than forty percent of the regional median income. Even though techniques are available to adjust the mix in an inclusionary development so that families below this income level can be made eligible, most developers simply balk. So *Mount Laurel* is left open to the criticism that it does not serve the interests of the "poorest of the poor," those whose plight makes the most appealing case for changing public policy. The criticism is at least in part justified, but Professor Haar misses an opportunity to explain how the court missed an opportunity to make things better by thinking harder about the role of public-interest agencies in the process.

A Role for Public-Interest Plaintiffs

The supreme court got it exactly backward, I would argue, and in applauding the court's approach, so does Professor Haar. Because "Adam Smith (or Hobbes)" is alive and well in the spirit of the business community, the court should have recognized that the natural seat of public-interest law reform is in the public-interest community (p. 63). The court should have taken steps to bolster the ability of civil rights organizations, legal services offices, and other civic groups to investigate, sue, and then monitor compliance with *Mount Laurel* orders, through the simple device of civil rights attorney's fees on the model of federal law.[40] In the extreme, one could argue that the builder's remedy, the most celebrated feature

39. Note, for example, that in the Urban League settlement with Plainsboro Township, *supra* note 33, the public-interest plaintiffs bargained for 413 of 453 new construction units to be rental rather than sales units, by relying on not-for-profit and public sponsorship and avoiding private market developers.

40. *See* 42 U.S.C. § 1988 (1994).

of the *Mount Laurel* doctrine, was unnecessary. All the court needed to do was to endorse the concept of inclusionary zoning. Public-interest plaintiffs then would have looked for appropriate inclusionary sites and cooperated with willing developers, retaining, along with the courts, some greater measure of discretion to avoid having to approve a development just because a builder had a "remedy."

But a court did not need to go as far as to take this extreme position. Public-interest and builder's-remedy claims could both have been allowed, had the court recognized that the builder's remedy — the inducement to sue — was unnecessary when there was already a competent public-interest litigant handling the case. In Cranbury, for example, the Urban League plaintiffs had been in the litigation for years; it was ludicrous even to consider rewarding the late-coming builders as if they were the ones responsible for proving Cranbury's ordinance unconstitutional.[41] Had it retained control of the litigation, the Urban League would have considered the various builder sites and proposed the best ones to the town for settlement, and Cranbury likely would have had affordable housing in the ground years earlier than actually occurred.

That the model I am describing would have worked is not just speculation — it *did* work. Piscataway Township, another township included in the *Urban League* suit, had experienced rapid growth because of a new interstate highway across its northern edge, and it was therefore suitable for inclusionary zoning solutions. Initially, however, no builder's-remedy plaintiffs were involved in the case because Piscataway, unlike Cranbury, was open to development. Developers did not need the Hobbesian *Mount Laurel* wedge to gain access to the community. Instead, the public-interest plaintiffs spent an agonizing period of discovery, poring over township tax maps with their planning expert, and eventually taking three full days of deposition testimony from the township's planner, to identify and evaluate every significant piece of vacant, developable land for possible inclusion in the court-ordered compliance plan. Only then did inclusionary developers begin to pay attention, but on the public-interest plaintiffs' terms — which included genuine concern for sound planning solutions.[42]

41. Judge Serpentelli did deny some would-be builder's-remedy plaintiffs the right to intervene, but on the kind of old-fashioned civil procedure ground that Professor Haar decries elsewhere, *see* p. 137, namely, that the intervention came on the eve of trial and would disrupt the discovery schedule.

42. *See* Urban League of Greater New Brunswick v. Carteret, Letter-Opinion, No. C-4122-73, July 23, 1985 (unpublished); Urban League of Greater New Brunswick v. Mayor and Council of Borough of Carteret, Judgment as to Piscataway, No. C-4122-73, Sept. 17, 1985. It is also interesting to note in this regard that the largest inclusionary developer in New Jersey, the K. Hovnanian Company of Red Bank, has seldom if ever, so far as I am aware, been a builder's-remedy plaintiff in a *Mount Laurel* case. Rather than assuming an adversarial role

If I am critical of Professor Haar's analysis of "public interest" and "market" solutions to the *Mount Laurel* problem, and I am, it also bears stating that his is the prevailing wisdom and mine the dissenting view. I have dwelt on it here at some length in part because Professor Haar's lifelong commitment to sound planning values, which ought to have made him skeptical of the builder's remedy, apparently was not enough to overcome the siren song of the quick and tangible results that could be obtained from the court's potentially Faustian bargain with the developers. This tells me that revising the conventional wisdom will not be easy. My concerns also relate directly to the "legitimacy" and "public relations" themes of his book, to which I now turn, because in my view the popular stereotype of the builder's remedy and, on occasion, the tangible evidence of its misuse — suburban sprawl development — have been a very large factor in the inability of the courts and the public interest community to sell the *Mount Laurel* doctrine as a legitimate exercise of public policy.

ACTIVIST COURTS: THE *MOUNT LAUREL* PROCESS

Suburbs Under Siege hits its stride at about the midpoint, where Professor Haar shifts his focus from narrative to critique; the heart of his thesis is found in Chapters Ten and Eleven, entitled, respectively, "Leadership in Institutional Reform: Rallying Support for a Vision," and "The Last Recourse: Why Judges Intervene." The two chapters should be considered in reverse order, however. The "Leadership" chapter, which is very brief, criticizes the New Jersey Supreme Court for not "selling" its *Mount Laurel* decisions effectively to the public. But selling the decisions assumes that the justices had a legitimate basis for rendering them in the first place, and so "Why Judges Intervene" is really the first and more important question.

A Theory of Judicial Activism

Professor Haar's answer is succinct:

> The Mount Laurel litigations bring to the fore the residual role of the courts in the checks-and-balances system of a constitutional democracy. Local governments, ordinarily endowed with total discretion in the exercise of zoning power, are found to be seriously and chronically in constitutional default. In such a state of affairs,

and engendering the animosity of the township — on whose goodwill the developer inevitably depends for numerous small matters during the course of development — Hovnanian typically came in after a *Mount Laurel* suit was finished, acquired the compliance site, and thereafter built what is generally regarded to be a very acceptable affordable housing product. Achieving *Mount Laurel* goals, in other words, is not dependent so much on the builder's remedy as it is on inclusionary zoning, which public-interest plaintiffs are quite capable of negotiating.

> whatever a court's adherence to the separation of powers as usually enunciated or whatever the loyalty to the conventional division of powers among the levels of government as typically argued, the strict rules of judicial insulation become inapposite. [p. 175]

The "usual," "conventional," or "typical" rules of separation of powers can be set aside, he argues, because it is both "appropriate" and "necessary" to vest in the courts "a residual role" (pp. 175-82). It is *appropriate* for four reasons: because a constitutional right is at stake (p. 176); because the courts are institutionally disinterested other than in the correct application of the rules of law (p. 176); because courts, unlike legislatures, are capable of acting as trustees for future generations against the "long-term, potentially irreversible, and frequently incalculable harms" of present-day political decisionmaking (p. 177); and because it is a peculiar characteristic of the judicial system that it can stimulate "reasoned discourse" about "a more generous vision of the social order" than can the political process (p. 177). It is *necessary,* in the *Mount Laurel* cases, because there is no reason to believe that the political system will correct the violation of the constitutional order on its own and because the decentralization of political power in state and local governments makes it impossible to bring a regional perspective to land use issues (p. 181).

Some of this framework is essentially unarguable. The dynamic of modern-day politics certainly places a premium on short-term fixes that can pay off before the next election rather than on long-term solutions — particularly if they carry short term costs — and land-use decisionmaking is extremely fragmented because of the tradition of deference to local control in this field. Beyond these basic points, however, agreement fades. Even if we can readily accept that judges are more likely to keep an eye on the interests of future generations, the future remains essentially unknowable, even to conscientious judges. Thus, it may not be obvious to the present generation that a judicial decision is legitimate simply because it is forward-looking. Nor, in connection with political fragmentation and the abuses of local control, is it correct to identify the state *courts* as the only institution with a sufficiently broad perspective to correct any perceived abuses. The governor and the state legislature have a statewide perspective, even if imperfect. To many people, these political institutions' acceptance of a decentralized land-use process reflects the legitimate resolution of the pushes and pulls of a myriad of interest groups. In the abstract, I would agree readily with Professor Haar that the enlightened New Jersey Supreme Courts of Justice Hall and Chief Justice Wilentz had the capacity to do a better job than the governors and legislatures of those times at reforming the abuses of land-use power — witness Governor Kean's "communistic" crack — but the "best" solution is not neces-

sarily the only solution that can claim to be a legitimate one in a complex world. On the factors thus far enumerated, Professor Haar's claims for the legitimacy of structural reform litigation and judicial decisionmaking have a slightly conclusory or makeweight character about them.

Professor Haar's broader claims are also problematic. For example, one has to approach his assertion that courts are "disinterested" with caution. The disinterestedness of judges has been the classic defense of the legitimacy of judicial review since the time of John Marshall and *Marbury v. Madison*.[43] But as Professor Haar himself carefully acknowledges, "pressed by the force of events, even the court may become an advocate for a particular position or side" (p. 176). His solution, imposing "curbs" on judges — "both traditional and adjusted for the new situation" — that will "confine *too extensive* an exercise of discretion" (p. 176; emphasis added), will not do much to persuade the skeptical observer that judges are truly "disinterested," at least without a much more thorough exploration of what may constitute "too extensive" an exercise of legitimate judicial power.

Finding the Constitutional Basis for Judicial Activism

The core of the problem with Professor Haar's justification for an activist judiciary, at least as revealed through the example of the *Mount Laurel* cases, lies in his first premise — namely, that there is an unredressed constitutional violation that will remain unredressed unless the court intervenes and acts for the benefit of the victims of such behavior. In principle, he is certainly correct. Our preference for legislative control in a democratic society notwithstanding, when the legislature disregards the constitution, as New Jersey's did in the eight years between *Mount Laurel I* and *Mount Laurel II* and even for some years thereafter, Professor Haar is surely right to say that the legislature has forfeited much of its claim to primacy. Judicial action becomes *necessary* — that is, legitimate — to vindicate the higher mandate of the constitution itself (p. 177). So, too, it is easier to accept a judge's slipping from disinterestedness to advocacy, for present as well as future generations, when such one-sidedness is on behalf of an accepted constitutional principle. Holmes and Brandeis were not disinterested when it came to the First Amendment, but their views are now accepted as legitimate nonetheless.

But is there an accepted constitutional principle that undergirds the vigorous and controversial activism of the *Mount Laurel* cases? The simple answer, and the one that apparently convinces Professor

43. 5 U.S. (1 Cranch) 137 (1803).

Haar that he need go no farther, is that in *Mount Laurel I* the New Jersey Supreme Court *held* that there was a constitutional principle that had been violated — the principle of regional "fair share" that Justice Hall found to be embodied in the constitutional concept of "general welfare." As a constitutional lawyer, I have no quarrel with the New Jersey Supreme Court's analytic use of the general welfare approach, but in accepting it as the basis for explaining the legitimacy of the court's activist stance in political terms to the lay public, Professor Haar inevitably commits himself to an argument that is, again, a bit circular. The New Jersey Constitution does not contain the phrase "fair share," and the phrase "general welfare" is, well, *general.* It can mean many things to many people, and one can certainly perceive how the average person in the street — particularly if that person is faced with an unpopular order to rezone in his or her backyard for development that he or she does not welcome — might think that the court interpreted the constitution the way it did in order to be able to pursue, as the modern-day conservative would have it, its liberal agenda.[44]

This problem of the relationship between judicial legitimacy and the general welfare theory has dogged the *Mount Laurel* process from the outset. I wrote about it in 1976;[45] less friendly critics have heaped scorn on the theory.[46] I regret that Professor Haar did not turn his formidable experience and analytic skills more fully to the problem. In saying this, I hope that I am not falling into the customary book-review mode of complaining that the author should have written the book that I think he should have written. Without a more probing inquiry into the condition precedent of a *popularly acceptable* constitutional theory crying out for enforcement, Professor Haar's very valuable analysis of the conditions subsequent that justify judicial activism simply does not persuade those who, unlike me, are not already persuaded.

The uncompleted task of Professor Haar's analysis, therefore, is to inquire whether a reformulation of the underlying constitutional obligation that animates the *Mount Laurel* doctrine might lay a better, stronger foundation for convincing the fair-minded citizen-in-the-street that judicial intervention was both appropriate and neces-

44. Application of the general welfare concept is, after all, essentially the doctrine of substantive due process, which has had scant legitimacy even in more sophisticated professional circles since the demise of *Lochner v. New York,* 198 U.S. 45 (1905). While substantive due process is still encountered fairly often in state courts, the lack of clear standards for its use ought to send state courts the same warning signals about legitimacy as are so clearly sent and received under federal law.

45. *See* John M. Payne, *Delegation Doctrine in the Reform of Local Government Law: The Case of Exclusionary Zoning,* 29 RUTGERS L. REV. 803, 808-19 (1976).

46. *See, e.g.,* Jerome G. Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation,* 14 SETON HALL L. REV. 851, 865 (1984).

sary in order to foster a just reordering of society's use of land.[47] Without limiting the possibility that other theories might also meet the test of legitimacy as I discuss it here,[48] I propose that the theory that cries out for reincorporation into the *Mount Laurel* doctrine is that of race discrimination.

Race and Exclusionary Zoning

A singular aspect of the first *Mount Laurel* case is that it totally eschewed race in favor of economic discrimination as the basis for its holding, although there was not much doubt, then or now, that racial concerns play a large part in suburban attitudes toward low-income housing. Hindsight suggests that the court may have made the wrong choice, at least insofar as protecting its own legitimacy is concerned. At the time, however, the focus on economic class rather than race seemed quite inspired. The law of race discrimination was the law of the Federal Equal Protection Clause, and by 1975 law reformers were anxious to keep their cases out of the federal courts to avoid the more restrictive rulings of the post–Warren Court era. It was also becoming clear that the U.S. Supreme Court would not prohibit economic discrimination on federal constitutional grounds,[49] and so placing the *Mount Laurel* doctrine on income-related state constitutional grounds made it virtually immune to federal court revision. By glossing over race, however, the New Jersey Supreme Court lost the opportunity to draw the clearest of moral lines, and hence to defend the legitimacy of its intervention on the compelling grounds that Professor Haar urges — namely, that the state constitution must be enforced, and the court must do it if no other institution will.

I do not wish to be naïve about this. I am not suggesting that by 1975, the people of New Jersey had achieved such a state of beatific colorblindness that we would all have thanked the supreme court for pointing out the racially discriminatory consequences of suburban exclusionary zoning and immediately complied. There would

47. Recall that Professor Haar, too, criticizes the court for failing to explain its constitutional theory adequately. *See* pp. 48-49.

48. I have suggested elsewhere that the shift from passive remedies in *Mount Laurel I* to "affirmative" remedies in *Mount Laurel II* implies that *Mount Laurel II* is based on an unarticulated constitutional right to shelter. *See* John M. Payne, *Norman Williams, Exclusionary Zoning, and the* Mount Laurel *Doctrine: Making the Theory Fit the Facts*, 20 VT. L. REV. 665, 683 (1996). Because of its speculative — some might say grandiose — nature, this theory might not survive my reformulation of Professor Haar's defense of judicial legitimacy, although I think my idea can be stated with sufficient clarity and moral force to pass the test. I do not pursue the right to shelter as an alternative theory here, however, because it is not fairly within the scope of Professor Haar's book. In any event, judicial legitimacy is for judges, not law professors; it is our professorial duty to concoct the fanciful ideas out of which legitimate judicial innovation may eventually result, somewhere way down the line, and that is the only appropriate context within which a right to shelter can be discussed.

49. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

have been a brawl, possibly even a bigger brawl than the one that ensued over the actual terms of *Mount Laurel I.* But that reaction, in whatever form, would have put the defenders of suburban exclusionary zoning much more on the defensive than did the actual *Mount Laurel* case. By 1975, two decades after *Brown v. Board of Education,*[50] the legitimacy of *judicial* enforcement of constitutionally based racial equality was broadly accepted, even if specific judicial decisions remained controversial. Also by 1975, it had become virtually impossible, except at the extremist fringes, to speak openly the language of racial discrimination, as had been the case in earlier decades. "I'm not a racist, but . . ." may still have been a cover for race-conscious thought, but the norm of *legitimate* public debate required at least formal adherence to the principle of nondiscrimination that *Brown* and the civil rights movement had taught us. It would have been difficult to deny the legitimacy of that principle when carried over into a race-based theory of the *Mount Laurel* doctrine.

From the earliest days of the *Mount Laurel* doctrine, perceptive commentators have recognized the perils of a theory that deemphasized race.[51] Simply put, there are so many more poor White families than there are poor minority ones that, absent a massive infusion of resources into producing affordable housing that has not happened and realistically could not have happened, it was foreseeable that the lion's share of the housing that could be produced would go first, whenever possible, to White households, which, if suspect because of their poverty, were nonetheless not so frightening to many middle-class suburbanites as poor Black families. These concerns came to pass. The available data, although far from perfect, reveal that minorities have not benefitted from the *Mount Laurel* process in anywhere near the proportion that they ought to have in a colorblind world.[52]

Race: The Warren Township *Opinion*

The deemphasis on race also leads Professor Haar into one of the rare errors of reportage in *Suburbs Under Siege.* He considers at some length the New Jersey Supreme Court's decision in *In re Township of Warren,*[53] in which the court held that the *Mount Laurel* doctrine prohibited municipalities from establishing priorities

50. 347 U.S. 483 (1954).

51. *See, e.g.,* Robert C. Holmes, *A Black Perspective on* Mount Laurel II: *Toward a Black "Fair Share,"* 14 SETON HALL L. REV. 944 (1984).

52. *See* Lamar et al., *supra* note 21, at 1256; Naomi Bailin Wish & Stephen Eisdorfer, *The Impact of* Mt. Laurel *Initiatives: An Analysis of the Characteristics of Applicants and Occupants,* 27 SETON HALL L. REV. 1268, 1302-05 (1997).

53. 622 A.2d 1257 (N.J. 1993).

for local — read White — residents in occupying newly available *Mount Laurel* units. Haar applauds the decision as evidence of the court's continued vigor as an engine for law reform. Insofar as the specific holding is involved, he is correct, but the full story is more complex and not so encouraging.

The *Warren Township* plaintiffs initially challenged two provisions in the Warren Township substantive certification and proposed two separate legal theories to explain how each provision was invalid. The plaintiffs challenged the residency requirement and, in addition, a provision in the township's certified plan permitting it to transfer fifty percent of its *Mount Laurel* obligation — 166 units of housing — to New Brunswick through an RCA.[54] They alleged that both provisions violated both the *Mount Laurel* doctrine and the race discrimination provisions of the Federal Fair Housing Act.[55] The challengers lost on both issues and on both theories in the appellate division of superior court, where the case was first heard, and they appealed to the supreme court. Under New Jersey practice, there is an appeal as of right only when there is a dissent in the appellate division, and the dissenting judge in the *Warren Township* case dissented only on the residency issue. The petitioners therefore had to seek leave to appeal as to the RCA provision, which presented the racial issue in its starkest form, as the lower-income housing was being transferred from a virtually all-White suburb to an urban municipality with a significant minority population. Because the court had to hear the other branch of the case as of right, and the petitioners had raised the race issue there as well, the petitioners were confident that the justices would hear the entire case. Not so. The court refused to touch the RCA issue.[56] While the court included an extensive — and quite helpful — dictum about the applicability of Title VIII to *Mount Laurel* issues in the residency preferences opinion, it expressly declined to hold that the residency preferences violated Title VIII, instead explicitly resting the decision only on the *Mount Laurel* ground.[57]

The court, in other words, appears to remain deeply ambivalent about the relationship between race, exclusionary zoning, and affordable housing. The longer I stay in this business, the more convinced I become that this is a mistake. Housing mobility is one of the keys to reducing race consciousness in our society, because mobility offers members of minority groups access to the good schools and good jobs that have built the American middle class and be-

54. *See Warren Township*, 622 A.2d at 1258-61, 1278.

55. 42 U.S.C. §§ 3601-3631 (1994). The Fair Housing Act is also known as Title VIII of the Civil Rights Act of 1964.

56. *See* 606 A.2d 369 (N.J. 1992) (denying certiorari).

57. *See Warren Township*, 622 A.2d at 1276, 1277.

cause racially integrated neighborhoods force all of us to deal with the race issue as people rather than as stereotypes. Professor Haar's careful analysis of the legitimacy of judicial activism reinforces these convictions of mine, because it convinces me that the morality of a constitutional rule requiring municipalities to exercise their land-use power in a racially fair way would command broad, if sometimes grudging, respect as a legitimate exercise of judicial power. Such a rule therefore would achieve greater and better results than has the complex, hard-to-explain *Mount Laurel* doctrine. Alas, however, Professor Haar misses the opportunity to make this point to the wide audience his book will command, instead giving the constitutional theory of the *Mount Laurel* doctrine a more respectful obedience than it in fact deserves.

I suggest, in other words, that the legitimacy of judicial activism in the *Mount Laurel* cases rests on a slender reed, if that reed is merely the court's interpretation of the general welfare clause of the New Jersey Constitution. Make no mistake about it, it is the popular view of legitimacy that counts for these purposes, not the exquisitely spun theories of scholars and judges, no matter how convincing those theories may be to other scholars, judges, and professionals, myself included. So I would add a major qualification to Professor Haar's exploration of when it is appropriate and necessary for courts to intervene in matters of social policy. The legitimacy of doing so, I would argue, is related directly to the clarity and precision with which the court can articulate an underlying constitutional principle that a fairminded person would find obvious. This is not to say that soft constitutional principles, such as the general welfare clause, cannot be enforced or can only be enforced in unaggressive ways. But a court, mindful of its own finite stock of legitimacy, should interfere with political choices only in proportion to its confidence that the constitutional mandate is clear and unambiguous. The general welfare approach of the *Mount Laurel* cases has failed this test. In practice, the fair-share rules are too complicated to be readily understood, too arbitrary and counterintuitive on occasion to be perceived as fair — the sprawl problem — and, despite their superficial objectivity, too subjective to be anchored unambiguously in the vague language of the constitution.

Representation and Exclusionary Zoning

There is a way to reformulate the general welfare approach, however, and most of its elements are suggested by Professor Haar's legitimacy analysis. He argues, for example, that one reason why judicial activism is appropriate is that it can stimulate a broad public debate on matters of social policy that might otherwise be ignored if the status quo of entrenched interest groups is allowed to

govern (p. 177). He is certainly right about this as a matter of practical politics. One of the great achievements of the *Mount Laurel* cases was that they forced the legislature to consider the consequences of exclusionary zoning, even though the interest group that benefited — poor people — was relatively powerless and the interest group that was burdened — suburbanites — was the dominant political voice in statewide politics. As a matter of law, however, and particularly in providing an argument that judicial intervention is appropriate and legitimate, Professor Haar proves too much. If the source of legitimacy in judicial activism is that the court is enforcing a constitutional norm, then it would seem to follow that the constitutional norm provides the answer, not the starting point, for a new dialogue. If the court is disinterestedly doing what *Marbury* courts do — resolving disputes in accordance with law — how much leeway is there for the legislature, or various pressure groups, to decide after suitable dialogue not to follow the court's pronouncement? Not all that much, if judging in constitutional cases is to remain *judging* and not become the work of a council of revision.

Professor Haar also argues for the necessity of judicial intervention when political power is territorially dispersed and "[n]o one agency in front of the court, acting alone, has the governmental authority or ability to clear up the situation created by the multitude of local authorities responsible only to local constituencies" (p. 181). As I noted above, however, it simply is not correct to identify the judiciary as the only statewide institution capable of bringing a regional perspective to bear.[58] But if we take these two points and combine them with Professor Haar's further observation that, both before *Mount Laurel I* and between *Mount Laurels I* and *II,* the statewide political system was manifestly disinterested in the problem of exclusionary zoning (pp. 177-81), we may then have a way of defending the legitimacy of the court's general welfare approach.

Approached with a view toward making the application of the general welfare concept obvious, as I proposed above, the constitutional violation that is the essential precondition to Professor Haar's theory of judicial legitimacy is not the failure to provide poor people with a "regional fair share" of housing opportunities, but rather the failure to provide them with a political forum in which they can fairly compete with other interest groups for their "fair share" of society's beneficence. Rather than a "dialogue" between the court and the people, as Professor Haar envisions, I suggest that the court can and should *mandate* a fairer dialogue among the people themselves, *all* of them, by mandating a reconsideration of the forum in which the debate takes place. So long as land use power, and hence the power to control the creation of housing af-

58. *See supra* Section: A Theory of Judicial Activism.

fordable to lower-income groups, is delegated to municipalities unconditionally, those municipalities will have not only the power to exclude but the ability to ignore the voices of those now excluded.

The constitutional right that is implicated in this approach to the problem of exclusionary zoning is the right to have fair participation in the political process — the right, as the late Richard Babcock described it, to play "the zoning game"[59] on the same playing field as everyone else. The remedy for such a reformulated right is much more straightforward than the substantive implementation of "fair share" rules that has preoccupied the *Mount Laurel* process for the last twenty years. All that is required is that the court order the state to reclaim the delegated zoning power from the gaggle of fragmented, parochial municipalities and either exercise the power itself, redelegate it to new state or regional planning agencies, or redelegate it to municipalities subject to tighter standards that protect the interests of prospective as well as present residents of the decisionmaking community.[60] This is, undoubtedly, a softer remedy than the *Mount Laurel* fair-share rules, if those rules were fully implemented, but that of course is the point. By building a very aggressive judicial remedy on a hard-to-explain constitutional base, the supreme court virtually guaranteed that controversy would be maximized and that much of the focus of the controversy would be shifted to the supposed *illegitimacy* of judicial activism, rather than remaining where it belongs, on the callousness of ignoring the needs of poor people. The representation theory, by contrast, would justify judicial activism on a ground that fair-minded people could understand and accept — namely, that in a democracy the willingness to lose a political fight depends on having the chance to win the battle on some other occasion. Under the regime of exclusionary zoning, that could not happen.[61]

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59. *See* RICHARD F. BABCOCK, THE ZONING GAME (1966).

60. I made this argument to no avail more than twenty years ago. *See* Payne, *supra* note 45. The majority opinion in *Oakwood at Madison, Inc. v. Township of Madison*, 371 A.2d 1192, 1219 n.41 (N.J. 1977), characterized that argument as "a highly novel idea" but did not suggest following it. The supreme court also took note of the approach during the briefing that led up to *Mount Laurel II*, *see* John M. Payne, *Housing Rights and Remedies: A "Legislative" History of* Mount Laurel II, 14 SETON HALL L. REV. 889, 899-900, 931 (1984), but none of the parties was willing to embrace it and the court made no mention of it in the subsequent opinion.

61. I am grateful to my colleague, Professor Eric Neisser, for pointing out an interesting parallel to this argument. The recent controversy involving the President's "Don't Ask, Don't Tell" policy on gays in the military and the passage through Congress at lightning speed of the so-called Defense of Marriage Act, 28 U.S.C.A. § 1738C (West 1994 & Supp. 1997), indicate that Americans remain deeply troubled about departures from traditional norms of sexuality. Yet the U.S. Supreme Court's decision two years ago in *Romer v. Evans*, 517 U.S. 620 (1996), striking down a Colorado initiative that effectively denied proponents of gay rights access to conventional political processes, caused barely a ripple of protest. Fair process, it would seem, has independent value in the American system.

Arguably, the representation approach that I am suggesting can be teased out of the history of the *Mount Laurel* doctrine. As Professor Haar's narrative describes quite accurately, the New Jersey Supreme Court and its three designated trial judges, after the requisite period of *Sturm und Drang,* convinced the politicians of New Jersey that the *Mount Laurel* decision would be enforced vigorously. In the face of judicial orders rezoning specific towns, the legislature put aside traditional home rule concerns and created a state-level decisionmaking institution, the Council on Affordable Housing, which brings together — imperfectly — municipal and housing advocates to hash out ground rules within which municipalities must then act in the exercise of their delegated zoning powers, though compliance with the Act is voluntary. As a housing advocate, I now have a political forum within which to lobby, scheme, and intrigue, just as any other interest group does, with recourse to the cabinet officer who oversees COAH and, on those occasions when the stakes are high enough — usually just before an election — to the office of the governor herself.

But at what cost was this access purchased? Instead of the decade of heated debate about the legitimacy of the court's acting at all — a debate the continuing legacy of which is evident in that the phrase *"Mount Laurel"* still arouses knee-jerk opposition — might it not have been preferable to have attended more carefully to the legitimacy problems up front, fashioning the doctrine to maximize both its legitimacy and its effectiveness? Of course, this is hindsight. Given the choice of repeating the *Mount Laurel* process as it was or doing nothing at all, I unhesitatingly would cast my vote with Justice Hall and Chief Justice Wilentz and Professor Haar. But we do have the benefit of hindsight, and I would caution the reader understandably swept up in the enthusiasm of Professor Haar's commitment to judicial activism to take his defense of judicial legitimacy as a starting point rather than a roadmap, at least insofar as *Mount Laurel* is Exhibit A.[62]

Selling Judicial Activism

Finally, let me comment briefly on Professor Haar's third overarching theme, the failure of the New Jersey judiciary to explain adequately its *Mount Laurel* doctrine to the public, to convince them of its legitimacy and, correlatively, of the legitimacy of the court itself. While I certainly share Haar's view that the *Mount*

62. The argument for the legitimacy of judicial enforcement of race-based equality is independent of the representation argument made here. The mandate for racial equality has a strong, explicit foundation in the federal and state constitutions and is not subject to a popular override to the extent that less explicitly protected interests may be. *See, e.g.,* Hunter v. Erickson, 393 U.S. 385 (1969) (holding unconstitutional a referendum on open housing law).

Laurel doctrine was a public relations disaster,[63] I disagree with his argument that the court should have waded more vigorously into the world of talk shows and op-ed columns. To be fair to Professor Haar, I do not think that that degree of engagement is what he has in mind. But that in turn is my underlying point, for selling a controversial issue is an all-or-nothing process. Politics is a tough business, as I learned when I strayed from the classroom and the courtroom to lobby on behalf of affordable housing issues — and specifically in opposition to a constitutional amendment that would have reversed *Mount Laurel.* A state senator once reprimanded me at a public hearing for having the temerity to oppose his anti-*Mount Laurel* bill, on the grounds that as a teacher at the state university, I worked for the legislature and should therefore obey the boss's — that is, his — lead. Imagine how judges would fare in even the outer orbits of this world — keeping in mind, as Professor Haar points out, that Chief Justice Wilentz and Justice Pollock both ran into reconfirmation troubles as a result of their participation in the *Mount Laurel* case.

The problem, ultimately, is the same problem of judicial legitimacy. In order for judges to act boldly, as both Professor Haar and I believe they should, they must convince the public at large that they are acting within the special competence of judges, rather than as unelected — and therefore illegitimate — politicians. Selling their product ultimately connects judges to the political, rather than to the judicial, side of our system of governance and thus undercuts their legitimacy. Hence my preceding argument: reformist, activist judges must place their decisions on clearly understandable and easily acceptable bases, such as fair representation or racial equity, so that the decisions sell themselves.

Conclusion

To sum up, then, I disagree with Professor Haar's celebration of the role that private litigants can play in structural reform litigation, and I have reservations about the extent to which the *Mount Laurel* doctrine, as actually formulated and defended, can sustain all of his claims for the legitimacy of judicial activism. The two criticisms, moreover, are related: the perceived self-interest of private builder-litigants undercuts the perceived legitimacy of the entire process, particularly when the absence of public-interest litigants requires the judges to rely extensively on planning masters to gain a balanced picture.[64] When the process no longer looks very much like litigation, doubters are more likely to ask why the decision be-

63. This is my phrase, not Haar's. *See* John M. Payne, *Rethinking Fair Share: The Judicial Enforcement of Affordable Housing Policies,* 16 Real Estate L.J. 20, 27 (1987).

64. *See supra* text accompanying note 16.

longs to an — unelected — judge at all. Law reform is still *law,* even if the law in question is heavily infused with policy and planning expertise.

But it is also important to emphasize our broad areas of agreement. I fully agree that there is a legitimate role for the courts to play in stimulating social reform — I do not subscribe, in other words, to the "hollow hope" thesis,[65] because I have seen the results in New Jersey — and I also agree that there is a great deal of room for creative thinking about the role of private actors in the process. Inclusionary zoning is a marvelous addition to the armament of a housing advocate, so long as it is the public interest that controls and not the private developer. Professor Haar's detailed and thoughtful exploration of the *Mount Laurel* story helped me to focus on how much has been achieved and how much remains to be done. His work offers the start of a dialogue that can result in a further refinement of the *Mount Laurel* doctrine, that can suggest new and better ways to defend it, and that ultimately can take the cause of fair housing to heights yet unimagined.

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65. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991).

PUBLIC CHOICE REVISITED

*Daniel A. Farber**
and
*Philip P. Frickey***

PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY. By *Maxwell L. Stearns*. Cincinnati: Anderson Publishing Co. 1997. Pp. xxxvii, 1035. $54.95.

Although not the first book on public choice for a legal audience,[1] Max Stearns's *Public Choice and Public Law*[2] is the first full-scale textbook for law school use.[3] An ambitious undertaking by a rising young scholar, the book provides law students with a comprehensive introduction to public choice.

Public choice — essentially, the application of economic reasoning to political institutions — has become a significant aspect of public law scholarship. Indeed, in his Foreword, Saul Levmore hails public choice as "[t]he most exciting intellectual development in law schools in the last decade" (p. xi). Be that as it may, the publication of the first textbook surely marks an important stage in the development of a subject. It is an apt occasion to evaluate the ways in which public choice can best contribute to legal education and scholarship.

Our goal in this review, consequently, is not merely to assess the Stearns book, but to see what light it sheds on this broader question. In Part I of the review, we accompany Stearns on a tour of public choice and public law. The book provides a good cross section of the major writings of legal scholars interested in public choice. For readers familiar with the field, Part I provides an op-

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1. *See, e.g.*, JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

2. Maxwell Stearns is an Associate Professor at the George Mason University School of Law.

3. A briefer treatment of public choice, suitable for use as a supplement but not for a complete course, is DAVID W. BARNES & LYNN A. STOUT, THE ECONOMICS OF CONSTITUTIONAL LAW AND PUBLIC CHOICE (1992). Besides its brevity, this work differs from the Stearns book in that it takes the form of a traditional casebook, with its discussion of public choice mostly added in the form of textual notes.

portunity to examine Stearns's organization and choice of readings. For others, it provides a primer on the topic. Building on Stearns's materials in Part II, we offer some thoughts about how public choice can best inform legal scholarship. A similar debate about the utility of public choice has been raging in political science,[4] and we believe that this debate has generated some useful insights about the possible contributions of public choice to understanding legal issues. Indeed, some of the leading public choice scholars in political science have now revamped their claims for the theory as a result of this debate.[5] Legal academics such as Stearns have not yet had time to absorb these developments and thus may be asking more from public choice theory than its best practitioners believe it can realistically offer. Finally, in Part III, we consider how public choice can contribute to the education of law students. One of the questions raised in Levmore's Foreword is the extent to which public choice should be integrated into existing courses, as opposed to receiving a separate place in the curriculum (pp. xiv-xv). Our own view, unlike Levmore's, is that public choice is likely to be most useful when integrated into existing courses, but that materials like Stearns's can serve a beneficial function for more advanced students.

I. Public Choice and Public Law: A Guided Tour

Instead of using a casebook format, *Public Choice and Public Law* offers a series of lengthy excerpts from scholarly articles, almost all from law reviews, followed by extensive notes and explanatory text by the author. Unlike the snippets of articles that most law-school casebooks offer, the substantial portions of original works provided by Stearns give authors a fair chance to elaborate their views in their own words. Stearns's notes explore the readings in detail, with citations to a broad segment of the scholarly literature.[6] By following Stearns through his tour of public choice, we can get a good sense of the current state of legal scholarship in the field.

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4. *See* The Rational Choice Controversy: Economic Models of Politics Reconsidered (Jeffrey Friedman ed., 1996) [hereinafter The Rational Choice Controversy]; Donald P. Green & Ian Shapiro, Pathologies of Rational Choice Theory: A Critique of Applications in Political Science (1994). "Rational choice" is a somewhat more comprehensive term that includes both public choice and game theory.

5. See text accompanying notes 55-67 *infra*.

6. Not the least of the book's virtues is the 25-page bibliography, which should be invaluable to students and scholars who want to explore the literature more deeply. Pp. 977-1002. The bibliography cites approximately 600 works, though some concern jurisprudence or constitutional theory rather than public choice. Another very useful source for legal scholars is Perspectives on Public Choice: A Handbook (Dennis C. Mueller ed., 1997) [hereinafter Perspectives on Public Choice].

The book is divided into three segments: Chapter One introduces the use of rational choice models of political institutions; Chapter Two covers social choice theory deriving from Arrow's Theorem; and Chapter Three surveys selected applications to public law. We follow that organization in this section.

A. *Rational Choice Models*

As Stearns points out in his Preface, public choice is not a monolithic field (pp. xvii-xviii). It derives from three different academic movements, each with a separate home base: the Chicago School, which emphasized the tendency for the regulatory process to be coopted by special interests; the Rochester school, which stressed "the arbitrariness and unpredictability of governmental outcomes, at least if the preferences of the legislators or their constituents are employed as a baseline"; and the Virginia School, which studied how constitutional frameworks could shape the future development of public policy (pp. xviii-xix). Further, some public choice models are based on standard microeconomics, while others are based on game theory or on the work of Kenneth Arrow and his followers (pp. xix-xx). Not surprisingly given the field's complex origins, even its name is unsettled: public choice, social choice, rational choice, and positive political theory have each been favored at one time or another by various authors.[7]

What holds this diverse movement together is a common methodology based on the concept of rational decisionmaking: simply put, political actors, like economic ones, make rational decisions designed to maximize the achievement of their preferences. This maximization assumption makes it possible to use mathematical techniques of various kinds, many of them borrowed from economics, to model political behavior. Less formally, it allows the application of economic insights to political behavior. These economic insights can result in powerful conclusions about the political system.

One such economic insight concerns the possibility of free riding. A rational person would avoid investing in the production of a benefit if virtually the same benefit could be enjoyed without the investment. This simple point has manifold implications in economics, ranging from the instability of cartels — because individual members of the cartel have an incentive to cheat — to the inadequate market supply for public goods such as clean air — because individuals prefer to enjoy the clean air without having to pay for the pollution control equipment. It also has a powerful analogy in

7. *Cf.* Daniel Farber & Philip Frickey, *Foreword: Positive Political Theory in the Nineties,* 80 GEO. L.J. 457, 458-60 (1992). Often, an author using a particular term would attribute slightly different connotations to the other terms on the list.

politics, first pointed out by Mancur Olson.[8] A legislative enactment may benefit everyone in a group, perhaps everyone in the country, but each can enjoy a statute's benefits without having contributed to the lobbying effort. Hence, there is a temptation to free ride and let other people pay the price to pass the new legislation. As it turns out, the free-riding problem is inversely related to the size of the group — for example, when the issue is air pollution, it is much easier to mobilize a handful of car companies than the urban population. (Group size is crucial for two reasons: (1) given the same total benefit to the group, size is inversely related to the magnitude of any individual's stake; and (2) size increases transaction costs.) The result is a skew in politics giving greater influence to special interests — relatively concentrated groups with high individual stakes — than to the diffuse interests of taxpayers, consumers, and citizens generally. Given two groups with roughly equal but opposing interests, the smaller group has an innate advantage.

The key to this argument is that political actors behave rationally in the sense that they maximize their expected personal welfare, taking into account both the costs and benefits of political activities. Clearly, there are possible alternatives to this view: people may attempt to optimize outcomes but suffer from systematic cognitive defects; their conflicting, incoherent, or unstable goals may make optimizing impossible; strong emotional currents may render them incapable of thinking rationally about consequences; or they may behave rationally in some noninstrumentalist sense — for example, by following a Kantian ethical edict. Notwithstanding these potential alternatives, public choice theory rests on the premise that instrumental rationality is an effective basis for predicting political behavior, if not an entirely realistic psychological model.

Given its centrality to public choice, the rationality assumption clearly warrants careful examination, and Stearns begins Chapter One with a group of articles debating its validity. At one extreme, Judge Abner Mikva rejects the premise of self-interested welfare maximization in politics, remarking that even in the notoriously venal Illinois legislature he had found examples of public-regarding conduct.[9] At the other extreme, Michael DeBow and Dwight Lee provide a thoughtful defense of the assumption that "people will allocate their limited means . . . to maximize their personal satisfaction."[10] In the middle, the book includes excerpts from our own

8. P. 16 (discussing MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965)).

9. *See* p. 38 (excerpting Abner Mikva, *Symposium on the Theory of Public Choice: Foreword,* 74 VA. L. REV. 167 (1988)).

10. P. 45 (excerpting Michael E. DeBow & Dwight R. Lee, *The Jurisprudence of Public Choice: A Response to Farber and Frickey,* 66 TEXAS L. REV. 993 (1988)).

work, arguing that both ideology and self-interest play a role in the political system.[11]

Voting provides one of the greatest challenges to the rationality assumption. It is not clear that voting can be usefully explained as an effort to maximize the achievement of some goal. Recall that the temptation to free ride increases with the size of the group, and here the group consists of the entire electorate. An individual vote has almost no chance of influencing a national election. Indeed, it would hardly be worth the trouble of standing in a voting line on the minuscule chance of casting the single decisive vote in a Presidential election! Of course, it is possible that people simply like to vote, that voting is a form of personal consumption, with pulling the lever in the voting booth playing much the same role as jiggling the joystick in a video game. But this explanation seems distinctly unhelpful: it does little more than pronounce that people vote because it is something they want to do.

Stearns discusses several possible methods of saving the "consumption" explanation from tautology. One possibility is that people vote on the gamble that other people will choose to stay home, thereby increasing the likelihood that they will cast the decisive vote. On the other hand, individuals may vote as a signal to others that there is no point in playing this cat-and-mouse game, thus encouraging people with contrary political views to stay home. Or, perhaps people pursue extremely risk-averse strategies or are misled into thinking that their votes count (pp. 67-69). In any event, Stearns himself questions whether the "voting paradox" is really important:

> We might all agree that from the perspective of instrumental rationality, voting lies at the outer edge of human conduct. But so what? Whatever the reasons for popular voting, the fact is that many people vote. More importantly, most activities in which people engage, including those that are the subject of public choice, can be explained with models that are premised upon more intuitive understandings — and manifestations — of rationality. [p. 69]

In particular, Stearns argues, even if we cannot model voters, we can model the behavior of elected officials on the assumption that their sole goal is reelection. His rationale is that politicians who fail to follow the model "quickly move off the radar of political analysts, and of public choice scholars, if their principles prevent an electoral victory" (pp. 71-72). Hence, "[i]f those candidates who are elected behave *as if* they are primarily motivated by the desire to be re-elected (regardless of their actual and initial motivations),

11. Pp. 5-35 (excerpting Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEXAS L. REV. 873 (1987)); pp. 58-62 (excerpting Daniel A. Farber & Philip P. Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEXAS L. REV. 1013 (1988)).

public choice modeling built upon the electoral goal postulate is likely to remain robust."[12]

The voter's paradox is not necessarily a fatal flaw in public choice theory, but as we see in Part III of this review, it has received considerable attention from political scientists, and for good reason. Voter behavior is only a subset of public political conduct, which includes making campaign contributions, joining interest groups, and monitoring political affairs. If we cannot predict voting, it is not clear that we can expect to do much better in predicting these other forms of behavior, and thus we leave many of the inputs into the political process as unexplained "black boxes." Moreover, if we cannot explain *why* people vote at all, we have no reason to think we can account for *how* they vote. At best, we are left with a partial explanation of the overall political process. Furthermore, we may not be able to rely entirely on natural selection among politicians to ensure that only the most reelection-oriented survive. Depending on people's motivations for entering politics, at any given time the political process might contain a large number of short-term players who nevertheless hold considerable political power.[13] More fundamentally, if we have no workable model of political inputs, the assumption that politicians try to maximize their chances of reelection has limited predictive value.

As Stearns observes at the end of his discussion of the voting paradox, the voting-paradox debate raises a more general issue about empirical validation: "[I]t may well be harder than it first appears to test public choice modeling empirically" (p. 72). If the assumptions of public choice theory are not completely realistic, and if it does not generate testable empirical predictions, just what claim does it have to validity? This partial disconnect between modeling and empirical data raises important methodological issues, to which we will return in Part II. In any event, whether this disconnect is a serious flaw depends in large part on what we expect public choice theory to accomplish.

For the moment, however, we can put aside the voter's paradox and indulge the assumption that politicians, at least, are instrumentally rational. Let us also put aside the question of empirical validation and simply ask whether public choice theory has anything

12. P. 72. On the same theory, presumably, one might counsel hospital administrators to act on the assumption that all patients are long-term residents of the hospital, because short-timers will "quickly move off the radar."

13. Indeed, the current move toward term limits markedly increases the likelihood of this outcome. *See* Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator,* 81 CORNELL L. REV. 623, 647-48 (1996). One can even imagine a process of reverse selection, in which voters favor politicians whose past records suggest that they are willing to take principled but seemingly inexpedient stands, so that politicians might take risky, unpopular stands, gambling on achieving a higher office but increasing the risk of losing their current positions.

interesting to say about issues of public law. The book's next batch of material will reassure the student who has such concerns. Stearns closes the first chapter with three case studies that help illustrate the theory's utility: the line-item veto, the nondelegation doctrine, and the scope of judicial review. The discussion of the line-item veto is illustrative and confirms that public choice can provide intriguing insights.

Glen Robinson's article about the line-item veto[14] makes an effective analogy to economic bargaining models. Robinson points out that the President and Congress are in a position of bilateral monopoly. The President cannot obtain legislation without Congress, but given the difficulty of overriding vetoes, as a practical matter Congress needs the President's consent to obtain what it wants (p. 103). As Robinson observes, economists have studied bilateral monopolies extensively, but their predictions are cloudy (p. 105). After considering some of the strategic possibilities open to both players, Robinson argues that "the effects of an item veto authority are more complex than they have been made out to be" (p. 107). He concludes that "[t]he complexities confound any simple predictions about effects; probably the most reliable prediction would be that the item veto would be only marginally useful in curtailing private goods legislation" (p. 107).

The other excerpt about the line-item veto, written by Stearns himself,[15] takes the strategic analysis a step further. Robinson's model implicitly assumes that only a single piece of public-interest legislation is on the table at any given time. Legislators must either attach their riders to this one bill or present them as separate enactments. But, as Stearns points out, multiple public-interest proposals actually are pending simultaneously, so legislators have a choice about which proposal to use as a vehicle (p. 97). By threatening to use the line-item veto if legislators attach riders to anything but his favored bill, the President can extract support for his bill as the price of obtaining passage of the rider. The end result is the passage of the same amount of special-interest legislation despite the line-item veto, but the President has much greater leverage over general legislation vis-à-vis Congress (p. 98). The strategic process could be more complicated still: for example, if the President regards the riders as too costly, he might tend to favor bills that require little leverage of this kind, leading him back in the direction of the general legislation favored by Congress.

14. Pp. 101-09 (excerpting Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 VA. L. REV. 403 (1988)).

15. Pp. 77-100 (excerpting Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385 (1992)).

The reader may or may not have confidence in the ability of public choice theory to predict the effects of the line item veto. But public choice does illuminate the complexity of predicting the effects of even the simplest procedural or institutional changes.[16] If nothing else, public choice reveals the assumption that the line item veto will reduce pork-barrel legislation as highly simplistic.

B. *Arrow's Theorem*

Chapter Two is devoted to Arrow's Theorem and its possible implications for political institutions. Some background on Arrow's Theorem may be useful before turning to Stearns's treatment of the subject. Arrow was interested in the measurement of social welfare. Essentially, he asked whether, given only individual rankings of outcomes, it is possible to derive a ranking of those outcomes for society as a whole. Arrow placed very modest restrictions on the ranking technique. Beyond some technical requirements necessary to set up the problem, he added only two requirements for a technique to qualify as a social welfare measure. First, the technique had to be nondictatorial. Obviously, it would be easy to construct a ranking of societal preferences by simply picking a dictator and adopting that person's ranking. Whatever one might think of this as a form of government, it clearly does not qualify as a measure of social welfare. Hence, Arrow required that no one person's preferences be decisive. This minimal form of egalitarianism, however, is not enough to connect the resulting social-preference ranking with social welfare. To provide such a link, Arrow also required that the technique satisfy the Pareto standard. That is, if at least one person in society prefers outcome 1 over outcome 2, and no one else has the opposite preference, then society as a whole prefers outcome 1. Again, this is a very weak requirement — it says nothing about what happens when 240 million people prefer outcome 1 and only one person prefers outcome 2.

Arrow's specifications thus amount to the barest possible qualifications for a social welfare function. Quite remarkably, however, he proved that no method of combining individual preferences can satisfy these two qualifications along with the technical requirements.[17] The technical requirements themselves are seemingly modest. Arrow's technical requirements are as follows:

16. As actually implemented, the "line item veto" turns out to be anything but simple (and in fact is far from being a true line item veto). For a discussion of the complexities of the current statutory scheme, see Elizabeth Garrett, *Accountability and Restraint: The Federal Budget Process and the Line Item Veto* (applying public choice to project some possible consequences) (forthcoming).

17. For a fuller discussion of Arrow's theorem, see DENNIS C. MUELLER, PUBLIC CHOICE II 384-99 (1989).

Minimum Rationality. If society prefers outcome *A* to outcome *B,* and outcome *B* to outcome *C,* then society prefers *A* over *C.*

Independence of Irrelevant Alternatives. If *C* is not on the agenda, whether *A* is preferred to *B* should not depend on how either one compares with *C.* This is really a disguised guarantee that outcomes are based solely on how alternatives are ranked, rather than on how intensely they are desired.

Universal Applicability. The method has to work — that is, produce a definite outcome — for any possible combination of preferences, not just particular distributions of preferences among the group.

Arrow was also interested in voting, and his theorem has important implications regarding voting mechanisms. Voting, like social welfare measurements, may be considered a way of determining the "public interest," and at the very least, it ranks alternatives based on how they fare in an election. The immediate consequence of Arrow's Theorem is that voting mechanisms must fail at least one of Arrow's criteria. In most voting situations, the sticking point is minimum rationality. It turns out that even in very simple situations it is possible for the electorate to choose outcome *A* over outcome *B,* and outcome *B* over *C* — but for outcome *C* to beat outcome *A* (p. xii).

This cycling of outcomes raises some obvious questions about democratic institutions. For example, is majority rule too capricious to deserve the central role it has sometimes played in political theory? Putting aside this normative question, we also find puzzles about the actual behavior of legislatures. Specifically, because legislatures rarely exhibit cycling, we may wonder how legislatures are able to produce stable outcomes. This inquiry tends to lead toward the sophisticated use of game theory.[18]

For political scientists, Arrow's Theorem is only the starting point in an attempt to model legislatures. Presumably, well-tested models of the legislature would be useful in considering public law issues, but Stearns does not explore the efforts of political scientists to provide such models. Indeed, at one point he goes so far as to warn the reader to "[b]eware the 'sophisticated' model" (p. 718). Rather than exploring these more sophisticated models by political scientists, Stearns excerpts two law review articles on social choice models of legislative voting. The first, by Saul Levmore, explores the question of why legislatures generally follow certain decisionmaking procedures, such as a sequence of motions and amendments.[19] Levmore proposes that, where cycling does not exist, legislative rules are designed to identify the "true" winner — called

18. For a survey of some later efforts, see FARBER & FRICKEY, *supra* note 1, at 47-51.

19. Pp. 258-94 (excerpting Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox,* 75 VA. L. REV. 971 (1989)).

the Condorcet winner for historical reasons. Other times, legislative rules are designed largely to paper over the possibility of cycling. Specifically, Levmore suggests that legislative procedures may have evolved through applying the following guidelines:

> (1) employ the motion-and-amendment process when there are few alternatives because it promises to find any Condorcet choice without encouraging unavoidable dissatisfaction; (2) when there are numerous alternatives likely to be proposed, facilitate a switch to succession voting because a Condorcet winner is quite unlikely and the switch will make it difficult for the chair to manipulate the order of recognition to unfairly influence the outcome; and (3) when succession voting exposes unavoidable dissatisfaction, tinker with the order in which proposals are considered.[20]

Levmore concludes that he has "produced . . . a strong positive theory which explains a remarkable number of decisionmaking rules. "Moreover," he adds, the theory is "accompanied by an evolutionary theory, built around the idea of dissatisfied majority coalitions, which explains how things came to be as they are" (p. 294).

Although intriguing, Levmore's speculations have the disadvantage of being unprovable, as we know nothing about the history of core parliamentary rules (pp. 259-62). Although, as Levmore says, "it is easy to imagine" (p. 270) that something like his evolutionary mechanism operated, we really have no way of knowing, particularly since Levmore does not give much thought to alternative explanations. But more important, in terms of its usefulness for teaching purposes, Levmore's hypothesis is disassociated from any larger research agenda about legislative structure or procedure of the kind developed by political scientists. In particular, most political scientists consider Condorcet winners quite rare; indeed, one theorem shows under plausible assumptions that no Condorcet winner exists if the issue space is multidimensional.[21] Nor is it easy to see why the rules should be designed primarily to produce Condorcet winners if one by chance exists, because almost any set of rules will do so if legislators are sophisticated and vote strategically (p. 282 n.136).

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20. P. 285. Succession voting, mentioned in guideline 2, is a fill-in-the-blank process in which proposals are considered in a preset order — for example, dates from earlier to later. Pp. 272-76. The Condorcet winner beats every other alternative in pair-wise voting. It is thus the "top" choice.

21. This result is known as the chaos theorem, because it seems to imply that all outcomes cycle, leaving the legislature with no stability. *See* PETER C. ORDESHOOK, GAME THEORY AND POLITICAL THEORY: AN INTRODUCTION 76-82 (1986). Much effort has been devoted to explaining why this instability does not obtain in reality. *See* FARBER & FRICKEY, *supra* note 1, at 48-57; Peter Ordeshook, *The Spatial Analysis of Elections and Committees: Four Decades of Research, in* PERSPECTIVES ON PUBLIC CHOICE, *supra* note 6, at 250-56.

Building on Levmore's theory, Stearns moves on to an excerpt from one of his own articles.[22] Stearns undertakes to compare the voting procedures used in legislatures and courts with respect to Arrow's criteria, with the aim of clarifying the relative strengths and weaknesses of these institutions (p. 305). The hypothesis is that courts use different voting rules than legislatures because courts are sacrificing different items out of Arrow's list of criteria.[23] The legislature is designed — *á la* Levmore (p. 323) — to seek a Condorcet winner when one exists, but legislatures give up on the decisiveness criteria, which means that often the legislature will produce no action whatsoever. Stearns asserts that because courts must *always* decide cases (p. 329), they sacrifice the possibility of finding the Condorcet winner (pp. 329-38). More generally, the Arrovian "requirement of rationality in Supreme Court decisionmaking is subordinated to the requirement that the Court decide all cases before it" (p. 348).

This theory may somewhat outstrip the evidence. The notion that the mandate to decide every case can explain basic features of the judicial system seems a bit like the tail wagging the dog. It has the additional disadvantage that the tail is flawed, inasmuch as the Supreme Court is not in fact subject to any formal requirement to make an affirmative decision in *every* case.[24] On the contrary, the decision rule is the same as that of the legislature: the status quo — in the form of the lower court judgment — stands unless a majority of Justices votes to change the result; thus the occasional notation of cases "affirmed by an equally divided Court." Alternatively, when, for whatever reason, no majority exists to decide a case, it can be reset for argument the following Term, in theory a process that could continue indefinitely. (The Court also has the option of remanding for consideration in light of a completely inscrutable opinion, which has the same practical effect as making no decision at all.) Of course, if the Court frequently failed to issue any decision at all, it would be subject to grave criticism. But this is not necessarily different from Congress, whose failure to pass an appropriations bill can shut down the government and cause considerable consternation. So, the distinction between courts and legislatures regarding the decisiveness criteria is less stark than Stearns suggests.

Our point is not that the Levmore and Stearns arguments have possible flaws, but rather that their speculations about institutional

22. Pp. 295-354 (excerpting Maxwell L. Stearns, *The Misguided Renaissance of Social Choice,* 103 YALE L.J. 1219 (1994)).

23. *See supra* text accompanying notes 17-18.

24. Like Stearns, we are putting aside the cases where the Court simply fails to grant certiorari. P. 329 n.156.

processes, while intriguing, may be too idiosyncratic to introduce students effectively to the subject. The book provides a somewhat broader look, however, as it moves on to consider some institutional implications of public choice. Here, the selections include: an effort by Levmore to explain bicameralism, also based on the pivotal importance of Condorcet winners;[25] a well-known essay by political scientist Ken Shepsle describing "legislative intent as an oxymoron" on the ground that Arrow's Theorem eliminates the concept of a coherent set of legislative preferences;[26] and two papers about the possibility of cycling in Supreme Court decisions presenting multiple issues.[27] These papers do provide students a somewhat broader exposure to social choice theory.[28]

C. *Applications to Law*

The final section of the book, Chapter Three, considers applications of public choice to a broad range of issues, ranging from the doctrine of stare decisis to antidiscrimination law. Most of the selections cover one of three general areas: the functioning of the judiciary, the concept of legislative intent, and constitutional issues. The first two areas are not our focus in this review. Research on the judiciary is somewhat peripheral to the main body of public choice scholarship — though by no means unimportant — and the two of us have already written more than enough about the subject of legislative intent, some of it reprinted in the book (pp. 641-70). Consequently, we will concentrate here on the constitutional area, which probably holds the greatest interest for most readers. Because the book includes excerpts on such a broad range of constitutional topics, it would be difficult to provide a comprehensive yet coherent description. Instead, we will focus on two areas of particular interest relating to the structure of government: federalism and term limits.

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25. P. 386 (excerpting Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INTL. REV. L. & ECON. 145 (1992)).

26. Pp. 393-408 (excerpting Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as an Oxymoron*, 12 INTL. REV. L. & ECON. 239 (1992)).

27. Pp. 418-64 (excerpting Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) and Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986)).

28. Although each of these papers is individually interesting, it would probably be more useful to give students a coherent picture of the current state of thought among public choice theorists about institutional structures and procedures, rather than a handful of papers dealing with isolated problems. The extensive attention given to the procedures used by courts, here and elsewhere in the book (pp. 477-551, 724-876), is probably a tribute to the continued fascination that we in the legal academy have with the judiciary, while the public choice literature as a whole pays more attention to legislatures—and, secondarily, to popular elections.

The topic of federalism is represented by an article by Jon Macey about federal deference to local regulators.[29] For example, Congress allows Delaware law to govern the internal affairs of most major corporations (p. 878 n.11). Macey asks why federal legislators would ever allow states to regulate, rather than exercising their power to preempt. After all, preemption would allow federal legislators to capture *all* of the political gains to be obtained from legislating on a topic (p. 878). In short, it would appear, "deference to state regulators simply allows local lawmakers to capture for themselves the political support available for supplying regulation to rent-seeking constituents" (p. 880). Macey's theory is that "Congress will delegate to local regulators only when the political support it obtains from deferring to the states is greater than the political support it obtains from regulating itself" (p. 878). Like a business franchiser, Congress sometimes finds it more profitable to subcontract rather than vertically integrating and taking over the field. Macey suggests that this will be true when: (1) a particular state like Delaware "has developed a body of regulation that comprises a valuable capital asset"; (2) the most politically appealing alternative varies sharply on a geographic basis; or (3) "Congress can avoid potentially damaging political opposition from special-interest groups by putting the responsibility for a particularly controversial issue on state and local governments" (p. 879). Under all other circumstances, however, "obtaining a federal law will be the strategy of choice for most interest groups seeking to obtain wealth transfers" (p. 880). In particular, "interest groups will favor federal law over state law because states face stiffer competition from one another than the federal government faces from other sovereign nations" (p. 882).

In sum, Macey maintains:

> From a public-choice perspective, the federalist system can only be viewed as a mechanism that provides a complement rather than a substitute for federal law as a mechanism by which interest groups can exchange political support for wealth transfers. Deferring regulatory matters to the state legislatures must take its place alongside the other strategies by which federal politicians can offer wealth transfers to interest groups in exchange for political support. [p. 894]

Or, as Stearns puts it, "[i]n Macey's analysis, federalism is not a doctrine with independent political content, but is instead a handy label politicians attach to outcomes that they have reached for quite independent reasons" (p. 895).

29. Pp. 877-94 (excerpting Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265 (1990)).

Federalism is an increasingly important area, both in constitutional law[30] and public choice scholarship,[31] and Stearns is to be commended for including it in his coverage. The Macey article, however, gives only a partial view of this developing body of literature. While Macey's Chicago School perspective gives little weight to institutional factors, much current research is dedicated to exploring the institutional supports for federalism, including the structure of American political parties, competition between states to offer the optimal package of regulations, taxes, and services, the influence of state governments as federal lobbyists, and the role of the judiciary as enforcers of the federalist bargain.[32] Perhaps a fuller coverage of these institutional issues will be warranted in later editions.

Stearns does address one question of institutional design — the issue of term limits. Will term limits affect the behavior of legislators, and if so, will it make them more or less inclined to follow the lead of special interests? Linda Cohen and Matt Spitzer address this topic through game theory.[33] Unlike many selections in the book, their paper offers a classic example of public choice research; although lacking in mathematics, it gives students the genuine feel of typical work by public choice theorists. Cohen and Spitzer carefully specify their models, explicitly discuss each significant assumption, and then trace the logical implications of each model. Although they provide variants, there are essentially two basic models.

The first model explores the tendency of politicians to favor projects with short-term benefits over long-term projects with greater public benefits (pp. 930-39). The key assumption, which Cohen and Spitzer support with some empirical evidence, is that politicians primarily seek reelection and that voters primarily assess candidates based on a candidate's past performance rather than predictions about the future. In other words, voters engage in retrospective voting. Given these assumptions, politicians devalue long-term projects for two reasons. Most obviously, benefits that accrue after the politician leaves office provide him with no payoff. Less obviously, the payoff from winning any one election is partly the chance to run as an incumbent in later elections. The value of this payoff, of course, depends on the number of potential future elections a politician has left to win at any given time. For example,

30. *See, e.g.*, Printz v. United States, 117 S. Ct. 2365 (1997); United States v. Lopez, 514 U.S. 549 (1995).

31. *See, e.g.*, Symposium, *The Law and Economics of Federalism*, 82 MINN. L. REV. 249 (1997).

32. These issues are discussed in the contributions to the Minnesota symposium, *id.*

33. Pp. 925-60 (excerpting Linda Cohen & Matthew Spitzer, *Term Limits*, 80 GEO. L.J. 1992)).

a project whose benefit accrues in a politician's last term before retiring provides no reelection payoff at all and is therefore politically worthless to him. The upshot is that politicians discount future benefits too heavily. Cohen and Spitzer go on to show that term limits accentuate this effect — more benefits take place after the politician has left office or when there are relatively few future elections left to be won (pp. 936-39).

The second Cohen and Spitzer model illustrates an important game theory concept known as unraveling (pp. 937-38). In its baldest form, the problem is this. Suppose a legislator can only serve for three terms. After his second reelection, the legislator no longer faces the possibility of losing an election and therefore has no reason to care about the opinion of the electorate. Instead, she will cater to special interests who can provide her with benefits after she leaves office. The electorate will respond by refusing to reelect her a second time. The politician thus knows that her first reelection campaign will be her last, so her second term will be free from any electoral discipline. The electorate will respond by refusing to reelect even once, so we are left with a one-term legislature, during which every legislator is a lame duck who is free from any responsibility to the electorate and devotes himself to serving special interests.

Of course, this model is greatly oversimplified, and Cohen and Spitzer relax their assumptions to consider more realistic scenarios. Nevertheless, they find, the general conclusion remains intact: "Other things being equal, term limits should induce legislators to spend more time servicing special interests and personal interests than they do at present" (p. 951).

Unlike some public choice scholars, Cohen and Spitzer are cautious in drawing normative conclusions. As they point out, they define a special interest as "any minority of the constituency that would not be served in a world of full information" (p. 958). Thus, serving a special interest could include both "taking money for terminating fraud investigation" and "standing up for what is 'right'" (p. 958). Cohen and Spitzer predict "more looting and graft, mixed with an increased number of principled stands against the electorate" (p. 959). Their concerns under the first model are less ambiguous, because they feel strongly that legislators are already too present-minded (p. 959).

The Cohen and Spitzer models are hardly bulletproof. Their assumptions have some empirical support but are subject to dispute. Moreover, it is possible that term limits would change the rules of the political game enough to undermine their assumptions even if they are now valid — for example, voters might switch away from the retrospective voting that Cohen and Spitzer's first model as-

sumes. Or, as Cohen and Spitzer admit, other structural changes such as strengthening of legislative ethics rules might counter some of their projections (pp. 944-45). As Stearns points out, responsiveness to district electorates may also lend itself to pork barrel legislation, which term limits might usefully diminish (pp. 963-64). But despite these and other possible replies to their argument,[34] the Cohen and Spitzer paper is an excellent example of how public choice theory can help us think through the complex consequences of institutional changes.

II. Public Choice in Legal Scholarship

Under any but the most formalist view of legal analysis, an improved understanding of how government works can aid public law scholarship. The question is whether — and how — public choice can contribute to that understanding. In addressing this question, we begin by examining a recent heated controversy about the explanatory power of public choice among political scientists. Unlike many such debates, this one generated as much light as heat. Based on some of the insights generated by this debate, we then use some recent important work by legal scholars to illustrate how, in our opinion, public choice can best be integrated into legal scholarship.

A. *The "Pathologies" Debate and the Limits of Theory*

The debate opened in 1994 with the publication of Donald Green and Ian Shapiro's book, *Pathologies of Rational Choice Theory*.[35] Setting out to examine the public choice literature on its own terms, Green and Shapiro ask what that literature has revealed about politics, and conclude "that exceedingly little has been learned."[36] Although admitting that intellectually elegant models had been created, they find little in the way of empirical payoff: a "large proportion of the theoretical conjectures of rational choice theorists have not been tested empirically," and "[t]hose tests that have been undertaken have either failed on their own terms or garnered theoretical support for propositions that, on reflection, can only be characterized as banal."[37] In short, they vigorously disagree with Stearns's assessment that public choice offers "rich and falsifiable theses about collective decisionmaking" (p. xxii).

34. For the contrary view about the desirability of term limits, see Einer Elhauge, *Are Term Limits Undemocratic?*, 64 U. Chi. L. Rev. 83 (1997). *See also* Garrett, *supra* note 13, at 639 (critiquing the Cohen and Spitzer model but concluding for other reasons that term limits will not decrease the power of special interests).

35. Green & Shapiro, *supra* note 4.

36. *Id.* at x.

37. *Id.* at 6.

In their survey of the empirical evidence, Green and Shapiro cover a broad range of topics: the voter's paradox, prisoner's dilemmas and free-riding, legislative behavior, and spatial theories of electoral competition. They accuse public choice researchers of a number of methodological pathologies, including (1) developing models to fit the data, rather than testing models by making predictions, (2) failing to test competing explanations, (3) making vague or ambiguous predictions that cannot readily be falsified, and (4) mining the historical record for confirming data.[38]

Green and Shapiro's analysis of the voter's paradox is illustrative. As we saw in Part I, one possible explanation for voting is that the act itself is gratifying — that is, has consumption value. Green and Shapiro point out, however, that no one has offered independent evidence of this consumption value apart from voter turnout itself — the fact to be explained. They also observe that it seems peculiar that people do not obtain equal consumption value from other actions such as jury service or writing letters to legislators. An equally unproven explanation is that political leaders are aware of who votes and offer selective incentives to individual voters. Or, perhaps voters have inflated estimates of the likelihood of casting the tie-breaking vote, though no evidence of such a cognitive error has been produced.[39] More recent efforts to resolve the voter's paradox involve game theory. In some game theory models, "voters simultaneously decide whether to vote based on their strategic anticipation of others' actions [producing] an equilibrium result in which many people turn[ ] out."[40] The problem is that the results depend entirely on the assumption that voters are perfectly informed about the voting costs of other citizens and about the exact level of support of the candidates.[41] Turnout disappears with more realistic assumptions about voters. Nor are Green and Shapiro impressed by the argument that voting is a uniquely low-cost activity that consequently offers an unusual chance to express ideological preferences: "Can it be said of Latin American elections, in which voters spend hours in polling lines, sometimes amid threats of violence, that turnout is a low-cost activity? What of the more than 100,000 African-Americans who persevered through the intimidation and poll taxes of the Jim Crow South and voted in the national elections of the 1950s?"[42] Finally, they consider the fall-back assumption that, while public choice cannot explain the existence of high turnout, it can explain marginal variations in turnout relating

38. *See id.* at 33-46.

39. *See id.* at 51-56.

40. *Id.* at 57.

41. *See id.* at 57-58.

42. *Id.* at 58-59.

to the closeness of the election or the costs of voting — for example, bad weather. They find the theory's empirical predictions about these marginal effects to be either banal or unconfirmed.[43]

In sum, Green and Shapiro conclude, "[r]eaders interested in the determinants of voter turnout . . . will derive little insight from the empirical work in the rational choice tradition."[44] It is difficult, they contend, to see how rational choice theory could be disconfirmed given the range of maneuvers open to account for the data, including "post hoc insertion of idiosyncratic tastes, beliefs, and probability assessments as explanatory devices."[45] Nor do they find the voter's paradox to be an isolated failure of public choice theory. They find similar failings in the literature on the related problem of free riding and collective action, a problem that is basic to the Chicago School's prediction of undue influence by concentrated special interests.[46]

Given Stearns's stress on problems of cycling, it is also worth considering Green and Shapiro's empirical evidence on the subject. They begin by deconstructing purported historical examples of cycling offered by William Riker and others.[47] Green and Shapiro find little empirical evidence on the question of whether institutional arrangements affect instability,[48] nor even testable predictions on this question.[49] Perhaps most tellingly, they find that the experimental evidence fails to confirm clearly a central prediction of voting theory: that outcomes should be found in the "core" when one exists.[50] Moreover, seemingly extraneous factors, like perceptions of fairness, differences in the gaming talents of the participants, and cognitive difficulties, seem to affect outcomes heavily.[51] Indeed, the dispersion of outcomes seems to be only a little larger in games without a core, where cycling should be rampant.[52] None of these findings, of course, disprove Arrow's Theorem; by definition, mathematical theorems cannot be falsified empirically. What is unclear is whether Arrow's Theorem and its successors lead to useful falsifiable predictions about how actual legislatures behave under varying conditions.

43. *See id.* at 59-68.

44. *Id.* at 68.

45. *Id.* at 69.

46. *See id.* at 72-97.

47. *See id.* at 109-11.

48. *See id.* at 113.

49. *See id.* at 117-19.

50. *See id.* at 127-28.

51. *See id.* at 129-31.

52. *See id.* at 135.

Green and Shapiro's conclusion, in a nutshell, is that public choice has failed to produce usable empirical knowledge. They find little payoff in terms of understanding actual political behavior. They call upon public choice theorists "to get closer to the data so as to theorize in empirically pertinent ways," and to open their eyes to competing hypotheses about human behavior stemming from social sciences other than economics.[53]

Although Stearns does not cite *Pathologies of Rational Choice Theory,* leading researchers in the field have taken the book seriously. Public choice theorists were quick to respond to the accusation that they had failed to live up to their own methodological standards that required scientific theories to deduce falsifiable predictions subject to rigorous statistical testing. Perhaps the most interesting feature of the responses is the extent to which leading public choice scholars themselves rejected these "scientific" aspirations in favor of a more humanistic approach.[54] Consider the views of three leading public choice scholars: John Ferejohn, Morris Fiorina, and Ken Shepsle.

Ferejohn, in an essay coauthored with Debra Satz,[55] argues that Green and Shapiro's "conception of what constitutes a contribution to knowledge is too narrow; it excludes much good social science."[56] Specifically, the essay argues, social science theories serve other important purposes besides producing valid empirical predictions. First, a good theory may make problematic previously unexamined phenomena — like voter turnout — creating a new research agenda. Second, a theory may unify apparently unrelated phenomena or shed light on deep structural similarities that might otherwise escape understanding.[57] For example, pointing to studies of the reelection motive of legislators, the essay applauds the research for demonstrating the existence of an underlying causal mechanism for seemingly unrelated phenomena: "Even if none of these studies had provided an improved statistical account of any specific behavioral phenomenon, they would remain outstanding additions to our understanding of congressional behavior and organization."[58]

Fiorina takes a similar position. He argues that the "notion of empirical research that 'contributes to our understanding of poli-

53. *See id.* at 203.

54. For an overview, see Jeffrey Friedman, *Introduction: Economic Approaches to Politics, in* THE RATIONAL CHOICE CONTROVERSY, *supra* note 4, at 1-24.

55. John Ferejohn & Debra Satz, *Unification, Universalism, and Rational Choice Theory, in* THE RATIONAL CHOICE CONTROVERSY, *supra* note 4, at 71.

56. *Id.* at 72.

57. *See id.* at 72-76.

58. *Id.* at 76.

tics' is far more general than the idea of testing a specific theoretical proposition."[59] For example, he says, "it boggles the mind that anyone would deny the empirical contributions that resulted from the work of Mancur Olson."[60] Olson's theory provided an explanation of a familiar phenomenon — the unequal representation of different interest groups in the political process. In doing so, he sparked a new research agenda about why people join groups, and he provided the basis for imaginative accounts of larger-scale events like the periodic surges in congressional power. Thus, Fiorina says, we need a broader conception of what constitutes an empirical contribution:

> Every empirically based modification, generalization, or even rejection of Olson is an empirical contribution stimulated by his work. Every extension of his ideas to new areas is an empirical contribution. Every incorporation of his ideas in larger explanatory accounts is an empirical contribution. Even seeming counter-examples that lead people to see matters in a new light are empirical contributions.[61]

Besides their overly demanding concept of empiricism, Fiorina says, Green and Shapiro also overlook several important aspects of public choice itself. First, public choice is a general perspective, not a unified theory, so there is a large diversity of scholarship embodying many different models: "every manner of disagreement — theoretical, substantive, methodological — can be found" in public choice.[62] Second, public choice is not intended as a monocausal explanation. Instead, it is offered with an implicit "all other things being equal" clause. For example, Olson's work does not predict the absence of collective organizations, but merely that, all things being equal, larger, diffuse groups are more difficult to organize than small concentrated ones.[63] Finally, no public choice model is intended as a comprehensive explanation of an institution. Instead, each offers a partial view focusing on significant features of the institution. As a result, "there will never be a single . . . model of a real presidential campaign, of the U.S. Congress, or of the federal regulatory process. What we are engaged in is the construction of scores of models that focus on different aspects of political institutions and processes."[64]

Like Fiorina and Ferejohn, Shepsle faults Green and Shapiro for having too narrow a view of public choice and too restricted a concept of valid research. Given the undeveloped nature of political

59. Morris P. Fiorina, *Rational Choice, Empirical Contributions, and the Scientific Enterprise, in* THE RATIONAL CHOICE CONTROVERSY, *supra* note 4, at 90.

60. *Id.*

61. *Id.* at 91.

62. *Id.* at 87.

63. *See id.* at 88-89.

64. *Id.* at 89.

science, he says, "a theory may remain a live prospect, even though it is not a very good theory, because it trumps alternatives" — which, he adds, should be a source of modesty for public choice theorists.[65] Moreover, one should be "charitable toward relatively soft assessments" of theories given the great difficulty of rigorous statistical testing.[66] Finally, Shepsle says, Green and Shapiro underestimate the extent to which public choice scholars have responded constructively to criticism by incorporating cultural explanations into their models and generalizing their models to include human cognitive limitations.[67]

The upshot of these responses is a significant modesty about the aspirations of public choice theory. A public choice model may give us insights into commonalities between different phenomena; it may suggest new avenues for empirical research; and it may provide insights into how particular aspects of institutions function. Public choice theory will not, however, give us a unified model of even a single major political institution that accounts for all aspects of its behavior, let alone a model of the political system as a whole. Nor will public choice allow us to evade a realistic appreciation of the complexities of human behavior, whether those complexities become complications of the model itself, as Shepsle suggests, or serve instead as implicit, "all things being equal" conditions, as Fiorina suggests. In short, we can hope for insights from public choice theory, but we are not going to get The Truth About Politics anytime soon.

From the point of view of legal scholars, the ideal interdisciplinary theory would have several characteristics. It would be simple — so that even law professors could use it. It would be unequivocal in its predictions — so we could easily use the predictions to evaluate the consequences of legal rules. It would explain all or most human behavior within some clearly specified field of activity — so we would know when to apply it. Finally, it would produce verified but counterintuitive predictions — so that it would reveal something startling about legal rules. As is evident from the debate over Green and Shapiro's book, public choice is not this dream theory. But that does not mean that it is useless from the point of view of legal scholars. Instead, it means that we must be more realistic in our expectations for interdisciplinary scholarship. As we will see, despite its shortcomings, public choice has been used to good effect to illuminate legal issues.

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65. *See* Kenneth A. Shepsle, *Statistical Political Philosophy and Positive Political Theory, in* THE RATIONAL CHOICE CONTROVERSY, *supra* note 4, at 217.

66. *See id.* at 219.

67. *See id.* at 220-21.

B. *Fruitful Encounters Between Law and Public Choice*

Stearns lauds public choice for providing "a powerful set of analytic tools with which to evaluate the most pressing problems that face public policy makers, lawyers, bureaucrats, and judges" (p. xxiii). In light of the *Pathologies* debate, however, the reader may wonder whether public choice really does have anything useful to contribute to public law. We believe the answer is yes. In this subsection, we discuss three recent, and in our opinion, successful uses of public choice insights in public law scholarship. Our purpose is not merely to pass out plaudits, but to use these examples to explore the conditions under which public choice is likely to prove most useful in legal scholarship.

Our first example is Jerry Mashaw's recent work on pre-enforcement review of administrative regulations.[68] In the past few decades, rulemaking has played an increasingly central role in administrative regulation, and courts have responded by allowing immediate judicial review of regulations — without waiting for application of the regulation to specific situations. Today, there is considerable dissatisfaction about the "ossification" of the rulemaking process, a problem that may be partly due at least to overzealous judicial review. As a result, agencies increasingly abandon rulemaking for other — often less desirable — regulatory techniques.[69] Mashaw suggests that we might usefully restructure judicial review to decrease the incentive for private interests to exploit judicial review as a form of obstruction.

Specifically, Mashaw argues that limiting pre-enforcement judicial review would dramatically improve the incentives of private parties. To explore this possibility, he uses simple game theory models, working through two pre-enforcement review games and one who-will-sue game.[70] These models demonstrate that a firm will almost always bring pre-enforcement suit if there is no penalty for noncompliance with the regulation during the litigation. If there is a penalty for noncompliance, the game becomes more complicated, because it becomes likely that some firms will comply rather than sue. This successful compliance may increase the likelihood that a court will uphold the regulation — and hence the likelihood of a penalty against noncompliers. Challenges to regulations do not disappear, but the likelihood of challenges becomes sensitive to parameters such as the probability of success.

At least in some settings, Mashaw suggests, shifting the timing of review would have valuable consequences. It would push regu-

68. MASHAW, *supra* note 1, at 158-80.

69. *See id.* at 158-66.

70. *See id.* at 167-74.

lated parties toward devoting their energies to a good-faith effort to comply rather than toward elaborating arguments about the impossibility of compliance. It would make judicial review more realistic, because review could be based not only on the record before the agency but on evidence about the real-world implementation of the regulation. It would eliminate unnecessary judicial review where compliance costs turn out to be lower than expected by industry. But Mashaw does not offer pre-enforcement review as a panacea. He concedes that pre-enforcement review may be suitable where the need for legal certainty is especially high — for example, when environmental regulations require complex interactions between different levels of government.[71]

Our purpose here is not to endorse Mashaw's proposal,[72] but rather to highlight his fruitful use of game theory. The decision of one firm to sue depends on the strategic decisions of other firms, and game theory is designed to clarify just such complex interactions. But Mashaw wisely does not place sole reliance on his models. Instead he draws on his own learning as an expert on administrative law to assess the significance of the conclusions. Thus, he melds his legal expertise with public choice techniques.

Our second example also deals with interactions between courts and agencies. In a substantial body of work culminating in a recent book,[73] Bill Eskridge argues that statutory interpretation by courts inevitably involves value judgments that evolve over time. For this reason, he conceptualizes courts as participants in a dynamic interaction with agencies and Congress, rather than being aloof from the rest of the governance system. Eskridge makes apt use of public choice models to assess the way in which the *Chevron* doctrine[74] affects interactions between the branches of government. He models statutory interpretation as a sequential game involving median legislators in both houses, the President, agencies, and the courts. His analysis suggests two conclusions. One conclusion is rather banal: the *Chevron* doctrine increases presidential power to shift policy over time (pp. 190-93). The other conclusion, however, is more intriguing. The models suggest that "even if judicial preferences about statutory policy were completely unrelated to legislative pref-

71. *See id.* at 174-80.

72. For criticisms, see Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-Enforcement Review of Agency Rules,* 58 OHIO ST. L.J. 85 (1997); Jim Rossi, *Public Choice Theory and the Fragmented Web of the Contemporary Administrative State,* 96 MICH. L. REV. 1746 (1998) (reviewing MASHAW, *supra* note 1).

73. WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994).

74. The *Chevron* doctrine, named after Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), requires courts to defer to reasonable agency interpretations of statutes. *See* ESKRIDGE, *supra* note 73, at 161-64.

erences . . . aggressive judicial review would not necessarily be countermajoritarian because it would create a new default position relatively less influenced by presidential preferences."[75] It is this capacity to produce novel insights that make public choice a potentially useful tool.

Our final example is drawn from the work of an economist, rather than a law professor. Interestingly enough, it is less oriented toward formal modeling and more toward empirical evidence than the last two examples. William Fischel provides an in-depth analysis of takings law in his recent book, *Regulatory Takings.*[76] One of his intriguing suggestions is that the application of takings law should be more stringent for local governments than for higher levels of government. His argument, which he only sketches, rests on the propensity of local governments to break their commitments, because the long-term effects of such betrayals will fall upon future residents of the community, who often come from elsewhere, rather than the community's current residents and their descendants.[77] Competition between localities for residents and businesses mitigates this effect, but the restraining effect of competition fails to operate in some settings, particularly those involving the regulation of immobile capital. In contrast, higher levels of government are more inclusive and less able to externalize costs on outsiders. Although Fischel's argument is rooted in public choice theory, what makes it plausible is the body of empirical evidence, ranging from the anecdotal to the econometric, that Fischel presents about the tendency of local government to impose costs on outside owners of fixed assets.[78]

We consider each of these examples to be a successful use of public choice theory in legal scholarship. Though one may well quarrel with each author's ultimate conclusions, each effectively uses public choice to expose a previously neglected dimension of a legal issue, whether it be the effect of timing rules on litigation against agencies, the relationship between judicial review and subsequent legislative action, or the relevance of a jurisdiction's size to the propensity toward overregulation of land use. By highlighting some neglected structural aspect of a situation, each author pro-

75. ESKRIDGE, *supra* note 73, at 167. By countermajoritarian, Eskridge means that the outcome is farther away from the ideal points of the legislature, which means that the outcome would be less likely to receive the sanction of the Article I lawmaking process.

76. WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995).

77. *See id.* at 131-35.

78. *See id.* at 289-324. One particularly striking example involves studies of rent control regulations for mobile homes in some California communities that prevent owners of mobile home parks from utilizing any "exit" options while leaving them at the prey of localities with high concentrations of tenants. *Id.* at 309-24.

vides a basis for an innovative modification of existing legal rules. Each author also shows a sensitivity to cross-cutting normative issues — for example, the tension between our commitment to the democratic process and our desire to block special-interest legislation. None of the authors attempt to give the public choice findings more weight than they can reasonably carry.

Notably, we think, each work is by an author with a deep, long-standing immersion in both the field of law and the relevant public choice literature, not someone who has merely read a few Supreme Court cases and knows the term "rent-seeking." At least in the right hands, then, the tools of public choice theory can make a genuine contribution to public law scholarship.

These uses of public choice may be less ambitious than the fondest hopes of some of its early advocates in legal scholarship. But these applications of public choice are consistent with the more modest aspirations expressed in responses to Green and Shapiro. As we saw, Ferejohn, Fiorina, and Shepsle praised public choice more for its ability to offer illuminating explanations of particular phenomena than as a source of certainty about governmental functioning, while admitting that — at least as yet — its predictive powers are limited. The legal scholarship discussed in this subsection harmonizes with the views expressed by Peter Ordeshook, another prominent public choice scholar, in the *Pathologies* debate:

> Thus, rather than approach the construction and assessment of models as though we were *scientists* discovering basic laws of the universe, we should try to solve specific problems in specific contexts with an understanding that different models may be best suited for different situations. Every bridge is a special problem in engineering. We also need to appreciate that certain aspects of reality cannot yet be subjected to abstract theoretical analysis, or even to fully coherent empirical analysis. Crude rules of thumb, intuition based on experience, simple insight, and "mindless statistical analysis" will be an essential part of our enterprise.[79]

We leave it to political scientists to decide whether Ordeshook's advice is suitable for their discipline, but we have little doubt that his views about the uses of public choice are entirely on target with respect to legal scholars.

III: Public Choice in the Classroom

One implication of our discussion is that public choice has influenced legal scholarship in some important ways and, if applied with appropriate modesty, may have even more significant influence in the future. As in at least the early days of law and economics, how-

79. Peter Ordeshook, *Engineering or Science: What is the Study of Politics?*, *in* The Rational Choice Controversy, *supra* note 4, at 187.

ever, it is much more daunting to analyze how public choice can be domesticated for the law school classroom. It may be a hit in the glitzy Broadway of the faculty lounge, but how will it play in the Peoria heartland of the classroom?

Few law professors have developed sophistication with public choice. Those who have may find Stearns's book an excellent vehicle for teaching a seminar or course devoted to the subject. Levmore, for example, reports that he used portions of the book in manuscript form and found much student enthusiasm for the materials (p. xiii). Even sophisticates, however, may face some structural difficulties. Unlike Richard Posner's *Economic Analysis of Law*[80] and, to a lesser extent, Mitchell Polinsky's *An Introduction to Law and Economics,*[81] Stearns's book is constituted largely of lengthy excerpts of law review articles, with numerous questions and comments interspersed. Both the Posner and Polinsky books are in monograph form, eschewing reprinting the work of others. Accordingly, as the products of one mind and organizational structure, they provide a more integrated and overarching look at their subject. In our experience pondering the presentation of law-and-materials to students, books of the Posner-Polinsky format tend to lend themselves more easily to classroom use. We have not taught out of Stearns's book, however, and in any event have no desire to belabor this matter of pedagogical taste.

We doubt that we have much useful pedagogical advice to offer to sophisticates who have dedicated at least some of their scholarly agenda to the relationship of public law and public choice. Obviously, these professors are well equipped to take on Stearns's book as teachers and follow Levmore's advice that public law and public choice should be offered as a methodological course, much like law and economics, feminist legal theory, and so on (pp. xiv-xv). Will such methodological courses supplant traditional substantive courses? For the moment, we doubt that a revolution in the law school curriculum along these lines is about to happen. Frankly, we also doubt that, as yet, many law professors have come to share Levmore's judgment that "[t]he most exciting intellectual development in law schools in the last decade is surely the arrival and growth of public choice theory" (p. xi).

The much more daunting question is what the professor who finds public choice analysis helpful in analyzing public law should do in the classroom, if she is unable or unwilling to offer a course or seminar dedicated solely to the relationship of public law and public choice. The obvious alternative to the focused, methodological approach is what Levmore himself calls the "trans-substantive" ap-

80. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992).

81. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (2d ed. 1989).

proach, in which an area of law is enriched by interdisciplinary analysis (p. xv). Our preference for this undertaking is exemplified by the two casebooks we have edited, which both attempt to weave public choice analysis into various topics of public law that are at the core of the fields the books cover.[82] But even in situations in which a teacher of public law is using a casebook that provides no linkage to public choice, she has a rich array of articles — many of them excerpted by Stearns — from which to pick and choose illustrations in which public choice provides useful analysis.[83]

For example, when one of us taught a basic course in statutory civil rights a few years ago, using a casebook that did not mention public choice analysis, he found it helpful to illuminate the Supreme Court's shifting approaches to the interpretation of these statutes through public choice analysis. That was not a difficult task: Bill Eskridge had published an article that provided a roadmap for analyzing these jurisprudential meanderings through straightforward, easily understood public choice analysis — the sort of thing that lends itself to intuitive diagrams on the blackboard.[84] The teacher never assigned the article to the students, but instead did a bit of the rabbit-out-of-the-hat act the first time the topic seemed logically to present itself in class. The students were fascinated by it and themselves returned to that analysis at later points, often without the need for any suggestive questions from the podium. This approach worked well because the insights were intuitive, required no sophisticated mathematics or modeling, and were of general interest to students because they provided a sharper window on basic lawyerly questions, such as the extent to which the Supreme Court has demonstrated the apparent capacity to engage in strategic statutory interpretation and the factors that would seemingly influence the exercise of strategic discretion.

Similarly, in teaching environmental law, one of us has found it useful to introduce the Chicago School model of interest group influence. Environmental law seemingly serves the diffuse social interest in environmental quality at the expense of concentrated industry interests. It thus presents something of a puzzle for the Chicago School. Bringing in the Chicago School model serves two purposes. First, it invites students to consider the ways in which

82. *See* DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (2d ed. 1998); WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (2d ed. 1995). We organized and presented the materials in a way that, we hope, allows the professor who does not desire to present public choice analysis simply to skip over it.

83. Ironically, the success of Stearns's book in the economic marketplace is endangered by this "free riding," in which his book serves as a sort of teacher's manual for those teaching public law.

84. *See* William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613 (1991).

special interests may have succeeded in reshaping environmental legislation to serve better their own interests.[85] Second, it raises the question of how our society has managed to overcome the transaction costs and free-rider barriers to environmental legislation. Part of the answer may be the role played by environmental groups in the process of creating and implementing environmental law.[86] An appreciation of the role of these groups can improve students' understanding of the dynamics of environmental law.

Our guess is that this episodic approach is the most frequent scenario by which public choice is making its way into the classroom. To be sure, it is a somewhat intellectually impoverished pedagogy when compared to a class dedicated to public choice. But if done carefully, it broadens the intellectual content of the law school classroom in a way that demonstrates to students a meaningful linkage between the practice of law and interdisciplinary insights. Unfortunately, the messages law students receive about law-and- analysis are often not the ones professors are attempting to send. A class dedicated to law-and- analysis threatens to suggest to law students that the professor is grudgingly employed in a professional school while attempting to replicate graduate-school curricular offerings that have no obvious utility to the practicing bar. Much the same problem arises from poorly integrated law-and- insertions into traditional courses: the message is something like, "we will now spend ten minutes on something intellectually interesting, unlike our basic casebook material, and unlike what lawyers really do for a living."

The trans-substantive approach provides a number of ways to combat this problem. For example, one of us introduces many of the topics in the Legislation course through the use of a case study of the adoption of the Civil Rights Act of 1964,[87] followed by an examination of *United Steelworkers v. Weber*,[88] a well-known case addressing whether Title VII of the Act forbids voluntary affirmative action in private employment.[89] One lesson extracted from *Weber* is that there are at least three potential perspectives to give meaning to a statute — the textual perspective, focusing on statutory language; the institutional perspective, focusing on the legislature in general and the legislative history of the statute in particular; and the contextual perspective, focusing on the factual and legal

85. The classic discussion of this phenomenon is BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981).

86. For further exploration of these issues, see Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORG. 59, 59-61, 65-72 (1992).

87. Pub. L. No. 88-352, 78 Stat. 241.

88. 443 U.S. 193 (1979).

89. *See* ESKRIDGE & FRICKEY, *supra* note 82, at 1-34, 71-87.

situation in which the parties find themselves years after the statute was drafted and enacted. The instructor then has the class examine materials presenting three models of the legislative process — one focusing on problems of rational choice, such as Arrow problems; another examining interest group formation and activity, including free-rider problems; and a third assessing the deliberative capacities of the legislative process.[90] The first two models seemingly undercut the attractiveness of focusing on the institutional perspective in interpreting statutes. The legislature ends up looking like an institution capable of reaching majoritarian decisions that are arbitrary for Arrovian reasons and lack any coherent underlying purpose. To the extent that any organizing intent lies behind a statute, moreover, the interest group transactional model posits that it merely reflects a systematic skewing of political power in favor of small, well-organized interests. The third — deliberative — model is more normatively attractive, but strikes many students as descriptively implausible.

This conversation is designed to debunk the institutional perspective on giving meaning to statutes. At that point, the instructor then briefly has the class debunk the other two perspectives as well. Students are usually able to bring something from their undergraduate liberal-arts education of assistance here. For example, the notion of plain textual meaning is subject to a variety of objections, such as deconstruction theory, the theory that textual autonomy cannot be divorced from authorial intent, and the notion that textual meaning requires an understanding of the interpretive community engaged in assessing it. Similarly, the notion that judges can achieve pragmatic contextual outcomes is challenged by studies measuring the impact of judicial decisions and by basic law-and-economics analysis of the inefficiency of some areas of the law. One major goal of the exercise is to demonstrate that learning from allied fields is, indeed, relevant to the practice of law, when legal practice is understood as including an important component of formulating arguments in an ongoing dialogue within a professional community where interpretive theory remains essentially contested.

In a Legislation course that focused not only on statutory interpretation but on structural issues such as term limits and on process issues such as campaign finance reforms, an even stronger case can be made for introducing public choice theory at the beginning of the course. Once the theory has been explored in some depth, the teacher can return to the public choice models throughout the course when confronting, for example, regulation of lobbying, single-subject rules, the appropriations process, and so on. Similarly, a constitutional law course that focused on the structural is-

90. *See id.* at 44-61.

sues of federalism and separation of powers might benefit from the conceptual framework provided by public choice theory.

There are surely a variety of ways in which teaching materials might attempt to overcome the difficulties of presenting law-and-materials so that students appreciate their relevance. Stearns has made a noble effort to overcome these difficulties. His book focuses on a number of topics of obvious significance even to lawyers who narrowly conceive their professional purview — the legislative veto, the nondelegation doctrine, statutory interpretation, stare decisis, constitutional structure, and so on. Furthermore, his questions often attempt to push students toward the integration of insights gleaned from public choice into legal doctrine. Only time will tell whether his methodological structure, or our trans-substantive and sometimes episodic preferences, will prevail in the curricular marketplace. Similarly, it remains to be seen whether public choice scholarship will take the pragmatic route we recommend.

We believe that public choice does have something to contribute to law schools. Both in terms of teaching and scholarship, public choice may turn out to function in several different ways. It may penetrate legal analysis only superficially, by contributing a few basic concepts about interest group influence or vote cycling, which legal academics can then invoke in their scholarship and pass on to their students, probably using the episodic approach. But this approach misses the opportunity to take advantage of the rich and sophisticated work now being done by political scientists in the public choice mode.[91] Another possibility is that legal scholars will merely translate the findings of political scientists into recommendations for legal reform, using methodological courses to teach students how to "apply" public choice results to legal issues. Though better than the first approach, we believe that this approach to teaching and scholarship suffers from the opposite weakness, because it limits the opportunities for legal academics to bring their own expertise to bear on problems. In our opinion, the best, although most difficult approach, is to try to integrate a fairly sophisticated understanding of public choice with a nuanced appreciation of the dynamics of the legal process. In the classroom, this approach lends itself to trans-substantive use of public choice materials; in scholarship, to a fruitful pragmatic melding of public choice and legal analysis.[92] But regardless of whether the reader shares our view about the best approach to this kind of interdiscipli-

91. We highly recommend PERSPECTIVES ON PUBLIC CHOICE, *supra* note 6, as an accessible but sophisticated survey of this body of learning.

92. The kind of work we have in mind is exemplified by the scholarship discussed *supra* in section II.B.

nary venture, the Stearns book will provide a valuable introduction to efforts to apply public choice to public law.

PUBLIC CHOICE THEORY AND THE FRAGMENTED WEB OF THE CONTEMPORARY ADMINISTRATIVE STATE

*Jim Rossi**

GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW. By *Jerry L. Mashaw.* New Haven, Connecticut: Yale University Press. 1997. Pp. 209. $28.

Since World War II, public choice theory — defined broadly as the application of the assumptions and methodology of microeconomics to describe or predict the way public officials exercise power — has grown from a fledgling movement, gaining mainstream acceptance and respect for its insights into voting behavior, judicial decisionmaking, and other public actions.[1] Although a theory first explored by economists and political scientists, public choice's normative insights have earned credibility in recent years in academic legal literature.[2] Public choice's acceptance in the law school curriculum is demonstrated by the recent publication of

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1. Public choice insights have also contributed to the understanding of private decisionmaking in areas such as bankruptcy and corporate law. *See* David A. Skeel, Jr., *Public Choice and the Future of Public-Choice-Influenced Legal Scholarship,* 50 VAND. L. REV. 647, 672-73 (1997) (reviewing MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997)).

2. *See, e.g.,* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); *Symposium on the Theory of Public Choice,* 74 VA. L. REV. 167 (1988). Law review articles discussing or deploying public choice ideas are far too numerous to catalogue here, but some representative examples not otherwise discussed in this review include Linda Cohen & Matthew Spitzer, *Term Limits,* 80 GEO. L.J. 477 (1992); Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act,* 75 N.C. L. REV. 1305 (1997); Saul Levmore, *Bicameralism: When Are Two Decisions Better Than One?,* 12 INTL. REV. L. & ECON. 145 (1992); Erin O'Hara, *Social Constraint or Implicit Collusion? Toward A Game Theoretic Analysis of Stare Decisis,* 24 SETON HALL L. REV. 736 (1993); Pablo T. Spiller & Emerson H. Tiller, *Decision Costs and the Strategic Design of Administrative Process and Judicial Review,* 26 J. LEGAL STUD. 347 (1997); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice,* 83 CAL. L. REV. 1309 (1995); Lynn A. Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications,* 80 GEO. L.J. 1787 (1992).

course material on the topic.[3] However, despite public choice's self-proclaimed positive nature — as a descriptive and predictive tool — it continues to have its share of vigorous opponents, who "angrily reject its pessimistic model of human behavior, and suspect its analysis of being driven by an underlying dislike of regulation and redistribution."[4]

Theories of administrative law have also been the subject of much discussion in the legal literature over the past half-century. Many contemporary scholars have attempted to weave administrative law statutes and cases into overarching theories of bureaucracy. At the same time both bureaucracy and administrative law have had a fair number of vigorous critics, some rejecting delegation as inherently antidemocratic,[5] others condemning the actions of bureaucrats as without common sense,[6] still others decrying theories of bureaucracy as incoherent and illegitimate[7] or the administrative state as unconstitutional.[8]

It thus seems that public choice and administrative law share a common subject matter and vigorous opposition. Jerry Mashaw seeks to address both in *Greed, Chaos, & Governance: Using Public Choice to Improve Public Law.* Mashaw, a Sterling Professor of Law at Yale Law School, has had a major influence on federal administrative law for nearly three decades. His first two books, on the social security disability claims process[9] and the 1970s due process revolution,[10] are cited regularly in the administrative law and public administration literature. A later book on the National Highway Traffic Safety Administration's (NHTSA's) failed auto safety program, coauthored with David Harfst, led the charge against judicial ossification of the administrative rulemaking process and secured Mashaw's reputation for using case-study analysis

3. *See* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY (1997).

4. Edward L. Rubin, *Public Choice and Legal Scholarship,* 46 J. LEGAL EDUC. 490, 490 (1996). One administrative law scholar ascribes to public choice theory "general skepticism about activist government in all its forms." Thomas W. Merill, *Capture Theory and the Courts: 1967-1983,* 72 CHI.-KENT L. REV. 1039, 1053 (1997).

5. *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (criticizing Congress's tendency to delegate lawmaking authority to bureaucrats).

6. *See* PHILIP K. HOWARD, THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA (1994) (providing anecdotal accounts of how bureaucrats lack common sense).

7. *See* Gerald E. Frug, *The Ideology of Bureaucracy in American Law,* 97 HARV. L. REV. 1276, 1377-80 (1984) (decrying as "self-contradictory" models of bureaucratic legitimation).

8. *See* Gary Lawson, *The Rise and Rise of the Administrative State,* 107 HARV. L. REV. 1231 (1994) (arguing the post-New Deal administrative state is unconstitutional).

9. *See* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).

10. *See* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE (1985).

of bureaucracy to shed light on administrative law.[11] *Greed, Chaos and Governance,* more than any of Mashaw's other works, attempts to explore systematically the normative issue of bureaucracy and its role in a tripartite system of governance.[12]

In Part I, I introduce public choice theory and its now-common association with a pessimistic view of public law, Mashaw's bête noire. In Part II, I summarize Mashaw's applications of public choice theory to the modern administrative state, placing his contribution in the contexts of his previous work and the current genre of administrative law scholarship. As I will suggest, although his policy recommendations are tentative, they are related by the use of public choice tools as a mirror for evaluating myths associated with one of the most cherished institutions in our democracy — the legislature.

Mashaw's applications of public choice theory are lucid, reasonable, and often convincing; his is an important contribution toward recognizing defects in the legislative process and giving both public choice and administrative law broader legitimacy. Like Daniel Farber and Philip Frickey, authors of one of the first legal books with a public choice theme,[13] Mashaw is not sanguine about the coherence of using public choice to build grand theories of government or administrative law and searches instead for a middle ground approach.

For Mashaw, public choice is most insightful for public law when it yields usable knowledge, a realism that requires us to listen to "whatever truths modern public choice theory is telling us without succumbing to the excessively negative vision it so often supports" (p. 31). Farber and Frickey, who adopt the neorepublican framework[14] as a unifying perspective in their practical reason approach to integrating public choice and public law, see public choice theory as consistent with pursuit of the public interest.[15] For Mashaw, who distances himself from neorepublicanism and other unifying intellectual perspectives of administrative governance, public choice's self-proclaimed positivism also does not imply normative skepticism about pursuit of the public interest. As I suggest in Part III,

11. *See* JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

12. The book elaborates and extends themes Mashaw developed more than a decade ago in the Rosenthal Lectures at Northwestern University Law School, delivered in February 1986.

13. *See* FARBER & FRICKEY, *supra* note 2, at 116-18 (distancing their examination of public choice from grand theory and espousing a practical reason stance).

14. By "neorepublican" I mean the view, associated with modern civic republican or deliberative democratic theories of governance, that self-interest is not the sole motivating factor for individuals and that at least sometimes individuals will avail themselves of a public-regarding deliberative process.

15. *See* FARBER & FRICKEY, *supra* note 2, at 9-11.

Mashaw's realism is truer to the positivism and method of public choice theory, understood on its own terms, than the efforts of those, such as Farber and Frickey, who utilize public choice tools from a unifying practical reason perspective. Mashaw's fidelity to realism, however, may come at some cost; absent a unifying perspective of administrative governance outside of public choice theory, we can expect little more than rampant pessimism or fragmented lessons from public choice.

I. Public Choice Theory and the Rise of Pessimism About Public Law

Greed, Chaos and Governance, in large part a synthesis of several previously published journal articles,[16] addresses several applications of public choice theory and also distances public choice from both its most ardent critics and its most ideological proponents. At the outset, it should be made clear that Mashaw does not set out to glorify public choice theory. Instead, Mashaw attacks head-on many well-accepted public choice analyses, including justifications for textualist judicial interpretation of statutes — advocated by Judge Frank Easterbrook[17] — and arguments against delegation to administrative agencies — advocated by Peter Aranson, Ernest Gellhorn, and Glen Robinson[18] and, more recently, David Schoenbrod.[19] Yet, at the same time, Mashaw uses public choice to make several tentative policy recommendations.

Mashaw's starting point is the dismal antiregulation, antidelegation stance often ascribed to public choice theorists. This reputation, in part earned by public choice's association with one of its

16. *See* Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law,* 54 Tul. L. Rev. 849 (1980); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law,* 65 Chi.-Kent L. Rev. 123 (1989); Jerry L. Mashaw, *Improving the Environment of Agency Rulemaking: An Essay on Management, Games, and Accountability,* Law & Contemp. Probs., Spring 1994, at 185; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions,* 1 J.L. Econ. & Org. 81 (1985) [hereinafter Mashaw, *Prodelegation*]; Jerry L. Mashaw, *Textualism, Constitutionalism, and the Interpretation of Federal Statutes,* 32 Wm. & Mary L. Rev. 827 (1991). Related works by Mashaw that surface from time to time in the book include Jerry Mashaw, *As If Republican Interpretation,* 97 Yale L.J. 1685 (1988) [hereinafter Mashaw, *As If Republican*]; Jerry L. Mashaw, *Explaining Administrative Process: Normative, Positive, and Critical Stories of Legal Development,* 6 J.L. Econ. & Org. 267 (1990) [hereinafter Mashaw, *Explaining Administrative Process*]; Jerry Mashaw, *Imagining the Past; Remembering the Future,* 1991 Duke L.J. 711.

17. *See* Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System,* 98 Harv. L. Rev. 4 (1984) [hereinafter Easterbrook, *1983 Forward*]; Frank H. Easterbrook, *Statutes' Domains,* 50 U. Chi. L. Rev. 533 (1983) [hereinafter Easterbrook, *Statutes' Domains*].

18. *See* Peter H. Aranson et al., *A Theory of Legislative Delegation,* 68 Cornell L. Rev. 1 (1982).

19. *See* Schoenbrod, *supra* note 5.

first cousins, the Chicago School of economics,[20] is reinforced by two primary research agendas: the economist George Stigler's "greed" research agenda, which describes regulation as driven primarily by private rent-seeking behavior;[21] and the "chaos" research agenda, associated primarily with Kenneth Arrow, an economist who early in his career offered a modern proof of the instability of democratic processes.[22]

According to Mashaw, "the way we, as citizens, articulate and understand our most cherished political ideal, democratic governance, has been a product largely of our changing understandings of how human beings *do* behave within particular institutional settings, not changing ideas of the moral underpinnings of democracy itself" (p. 3). To illustrate this thesis, Mashaw turns to the political science of the founding of the Republic and the progressive New Deal era, and then to the modern political science from which public choice theory has sprung. After looking at history, Mashaw characterizes today's "political life . . . as a world of greed and chaos, of private self-interest and public incoherence" (pp. 3-4). This vision provides a challenge for designers of public institutions by making all public action "deeply suspect" (p. 4). Moreover, Mashaw suggests, this negative vision *already has* shaped our understanding of public life.

The insights of modern public choice theory can be traced to James Madison, who was influenced by David Hume and (probably) the French mathematician the Marquis de Condorcet.[23] In

20. There is an apparent tension here, for the Chicago School would suggest that transaction costs may inhibit private economic markets from moving resources to their most highly valued use. *See* R.H. Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960). Yet political markets have sufficiently low transaction costs so as to render political structures indeterminate in predicting the outcome of capture. *See* GEORGE J. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (1975) [hereinafter STIGLER, CITIZEN AND STATE]; George J. Stigler, *The Theory of Economic Regulation,* 2 BELL J. ECON. & MGMT. SCI. 3 (1971) [hereinafter Stigler, *Economic Regulation*]. Other first cousins include the Rochester School, which builds on William Riker's early work to emphasize how governmental outcomes are arbitrary and unpredictable, and the Virginia School, which builds on the early work of James Buchanan and Gordon Tullock to emphasize the distinction between constitutional rules and positive law. *See* STEARNS, *supra* note 3, at xviii-xix.

21. *See* STIGLER, CITIZEN AND STATE, *supra* note 20; Stigler, *Economic Regulation, supra* note 20. Stigler was awarded a Nobel Prize for his work on interest group theory in 1982.

22. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963). Arrow was awarded the Nobel Prize jointly with John Hicks in 1972, although for work on general equilibrium theory, not Arrow's collective choice research. James Buchanan received the award in 1986, for his pioneering work — with Gordon Tullock — on political economy, which is perhaps most consistently identified as the magnum opus of the early public choice movement. *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

23. *See* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA 268-69 (1988) (discussing the influence of Hume's *Idea of a Perfect Commonwealth* on Madison). Thomas Jefferson and Madison were familiar with Condorcet. *See* Maxwell L. Stearns, *The Misguided Renaissance of Social Choice,* 103 YALE

Federalist No. 10, "popular democracy's tendencies to instability, oppression, and ineffectualness are set forth as the major problems to be solved when constructing a government that can and will protect individual rights" (p. 4). Madison intended to "eschew what many thought democracy to be about — local autonomy, direct citizen participation, and the sovereignty of popular majorities" (pp. 4-5). Thus, the triumph of the Federalist-era political science is often seen as the triumph of representative over direct democracy in our constitutional structure.[24]

In the New Deal era, the dominant view of human nature (the "is") also influenced normative theories of democratic governance (the "oughts"). By this time, both courts (slow to adapt the Constitution to new societal needs and demands) and representative legislative bodies (perceived as corrupt and incompetent since the turn of the century) had fallen into disrepute. Initially, progressive political scientists returned to the anti-Federalist idea of the referendum, primarily to bypass the inertia of conservative legislatures, but this did not continue for long. Soon, social psychologists' dire visions of irrational drives, passions, and prejudices seemed borne out by historical events, such as the democratic rise of fascism in Italy and Germany.

The New Deal response was an emerging field of positive theory: management science. The industrial revolution had heralded organized intelligence in the corporation as a cure for social ills. According to Mashaw, "[w]hile representative assemblies had failed to further Madison's 'permanent interests of the community,' those interests might yet be furthered by rational planning. Public administration thus was the key to meeting public demands while avoiding the dysfunctions of either popular or representative democracy" (p. 7). Led by the vision of reformers such as Felix Frankfurter,[25] Louis Brandeis,[26] and James Landis,[27] apolitical administrative agencies were a New Deal solution to the perceived failures of markets and, perhaps more important, the perceived ills of democracy.

As Mashaw observes, the Federalist and New Deal political sciences converged. Both were suspicious of popular democracy for the same reason — the perceived tendency of citizen passions or interests to produce majoritarian tyranny. But, unlike the Federal-

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L.J. 1219, 1221 (1994); *see also* Iain McLean & Arnold B. Urken, *Did Jefferson or Madison Understand Condorcet's Theory of Social Choice?*, 73 PUB. CHOICE 445 (1992).

24. Contrast the view of the anti-Federalists, based on a fundamentally different view of human nature. For them, direct participation was seen as enhancing civic virtue. P. 5.

25. *See* FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 145 (1930).

26. *See* LOUIS D. BRANDEIS, THE CURSE OF BIGNESS (Osmond K. Fraenkel ed., 1934); BRANDEIS ON DEMOCRACY (Philippa Strum ed., 1995).

27. *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS (1980).

ist era, political science in the 1950s and 1960s gave rise to a new positive theory: the theory of public choice. Public choice theory, according to Mashaw, "seeks to explain, or at least to 'model,' 'rational public choice' within the typical institutional environment of the modern welfare state" (p. 10). The unifying thread of modern public choice theory is that "[w]e must always seek to understand political outcomes as a function of self-interested individual behaviors" (p. 11). In other words, the political sphere is a market in which voters and representatives, like consumers and firms, act as if they are rational, maximizing individuals pursuing their self-interests.[28] There is a market for collective social action. Like private economic markets, the collective social action market is also subject to market failure, particularly when chaos results or there is widespread abuse for private gain. Public choice theorists gear much of their institutional design work toward correcting these failures.

Today's public choice theorists regard many majoritarian processes as chaotic. Kenneth Arrow's Impossibility Theorem — which asserts that it is impossible to structure a voting scheme without making a choice which is imposed or dictatorial[29] — illustrates how normal majoritarian voting processes may fail to translate individual preferences into a collective preference. Most voting systems have developed ways to constrain choice to avoid the pitfalls identified by Arrow, but these institutional solutions admittedly entail a choice between incoherence, known formally as cycling,[30] or some form of unfairness. Of particular interest to modern studies of bureaucracy, Arrow's theorem illustrates the awesome power associated with agenda setting.

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28. Mashaw flatly rejects the arguments of those who disavow public choice theory because of its assumption that citizens are self-interested. P. 27. Recent research in psychology suggests that the problem of self-interest may be more difficult than either Mashaw or critics of the self-interest assumption recognize. Jonathan Baron, for example, has found that citizens, believing that they are acting in their self-interest, in fact regularly commit cognitive errors by acting altruistically or cooperatively. *See* Jonathan Baron, *The Illusion of Morality as Self-Interest: A Reason to Cooperate in Social Dilemmas,* 8 PSYCHOL. SCI. 330 (1997).

29. Arrow's theorem basically illustrates that no scheme of voting on individual ordinal ranking of pairs can simultaneously meet the requirements of minimum rationality, the Pareto standard, nondictatorship, independence of irrelevant alternatives, and universal applicability. *See* FARBER & FRICKEY, *supra* note 2, at 38-39. There is no need to reproduce the Impossibility Theorem, a generalization of the eighteenth-century proof known as Condorcet's Voting Paradox, here. In his book, Mashaw nicely illustrates Condorcet's Voting Paradox and the contribution of Arrow's proof. Pp. 12-13; *see also* Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government,* 75 IOWA L. REV. 949 (1990).

30. Arrow's theorem implies cycling only where certain conditions are present. For example, cycling does not occur if members of the decisionmaking group have *unipeaked* preferences, which may occur when legislators implicitly or explicitly agree in advance to rank their choice on similar liberal-to-conservative ideological scales. *See* FARBER & FRICKEY, *supra* note 2, at 48-49; DENNIS C. MUELLER, PUBLIC CHOICE II 67-73, 94 (1989).

In addition, according to modern public choice theorists, the political process is driven by private greed. As Mashaw notes, public choice has grown up to tell a "downright depressing" story about legislatures and bureaucracy (p. 15). George Stigler applied interest group theory to the study of bureaucracy and brought "greed" to the forefront of the modern political science research agenda, helping to secure public choice's reputation as *the* modern dismal science.[31] According to the rent-seeking research agenda, private interest groups seek to use the political process to shift resources from the general public to their members. For example, logrolling allows trading across issues in the political process. As described by public choice theorists, logrolling can help to solve some of the cycling problems Arrow identified.[32] Logrolling, however, raises its own set of problems. By trading across a variety of issues, a bare majority can enact policies that benefit it, but whose net costs to the minority create a loss for society as a whole (pp. 16-18).

Mashaw observes that the intellectual history of public choice theory is long and thoroughly interdisciplinary.[33] But contemporary public choice theory sounds a much more dismal theme than its intellectual predecessors:

> Whereas Federalist and New Deal political science feared only those expressions of popular will unmediated by the rationalizing influence of either a representative assembly or an expert bureau, contemporary theorists despair of expressing the will or preferences of the people through any device whatever. For them, our public laws capture instead only a particular concatenation of private preferences made politically relevant by the dynamics of self-interested behavior on the part of voters and officials alike. The 'public' in 'public law' identifies only the nature of the power that is put in the service of private ends. Legislation elaborates norms without normativity; it expresses neither the passionate commitments nor the reasoned judgments of a political community. [p. 21]

While some of the insights of public choice theory were implemented by optimistic activists in the 1960s and 1970s — making agency statutory mandates more specific, circumscribing enforce-

31. *See* STIGLER, CITIZEN AND STATE, *supra* note 20; Stigler, *Economic Regulation, supra* note 20.

32. Logrolling, for example, might allow the voters considering three distinct funding issues to vote on all three issues in the covert of a single funding bill, thus trading their votes across the different budget items. By avoiding comparison of each item, logrolling avoids cycling.

33. For example, Arrow's twentieth-century contribution owes much to Condorcet, one of Madison's contemporaries. Likewise, Stigler's contribution was shared by Madison in FEDERALIST No. 10 and has a rich parallel in liberal and Marxist political science, as well as in the work of David Hume and Condorcet. *See supra* note 23 and accompanying text.

ment discretion, and enhancing participation in rulemaking[34] — public choice theory has been invoked from the Carter administration forward to justify pessimism about government and public law. The last twenty years have seen movement, supported by arguments from public choice, toward parliamentary-style government, balanced budget amendments, term limits, public finance of elections, sunset laws, Office of Management and Budget rule review, and deregulation. Mashaw writes:

> The striking thing about the public choice literature . . . is the degree of 'government failure' it finds. Indeed, the message is generally not about the ameliorative steps needed to improve the political marketplace. It is instead a message about why political markets *cannot* work to satisfy the democratic wish, that is, to provide the people with the government that they want. Modern positive political theory provides a much bleaker picture of political life than virtually any of its influential predecessors. [p. 12]

The overriding message of conventional public choice theory, Mashaw suggests, is to return to the principles of the Federalists or, better yet, the anti-Federalists: constrain government radically and place trust in the market, voluntary associations, and community-based government.[35]

Together, the orthodox greed and chaos research agendas provide a coherent thematic vision for applying public choice ideas to public law, but the vision is pessimistic about government generally and bureaucracy in particular. Public choice theory, understood exclusively through the greed and chaos lenses, provides strong reinforcement to the market and consensus-based reforms so popular in recent years at the federal and state levels.[36] Apart from such reforms, which focus primarily on dismantling the mechanisms of bureaucratic governance, the future for administrative law on this understanding of public choice is dismal.[37]

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34. For a critique of some of the institutional aspects of the participatory revolution in administrative law, see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. Rev. 173 (1997).

35. One recent administrative law scholar, agreeing with Mashaw's assessment, finds support in post-1980 judicial doctrine. *See* Merill, *supra* note 4.

36. *See* Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 Geo. Wash. L. Rev. 479 (1995); *see also* Howard, *supra* note 6.

37. Bruce Benson, succumbing to a similar reading of the public choice literature, writes, "the real problem of bureaucracy is unquestioned acceptance of the belief that government can solve most perceived problems, which allows bureaus to be established and expanded." Bruce L. Benson, *Understanding Bureaucratic Behavior: Implications from the Public Choice Literature*, 2-3 Economia delle Scelte Pubblice 89, 114 (1995). This dismal view nicely dovetails with Niskanen's classic hypothesis that bureaucracies will attempt primarily to maximize their budgets and sizes. *See* William A. Niskanen, Jr., Bureaucracy and Representative Government (1971).

II. MASHAW'S APPLICATION OF PUBLIC CHOICE TOOLS TO THE MODERN ADMINISTRATIVE STATE

Mashaw's book does not endorse the bleak view of democratic governance portrayed by many modern public choice theorists. Instead, the book attempts to extract usable knowledge from public choice tools by putting them to constructive use as a basis for institutional reform. Three applications form the core of Mashaw's project: (a) use of public choice tools to defend rationality review of legislation by courts and to critique the dominant public choice argument in favor of textualist statutory interpretation; (b) use of public choice tools to build a positive theory of delegation of political decisionmaking authority to agencies; and (c) application of game theory to suggest abolition of preenforcement review of agency rulemaking.

A. *Public Choice and the Nature of Judicial Review of Legislation*

Mashaw begins with the institution his earlier works addressed with cynicism: the courts. *Bureaucratic Justice* criticized judicial review of social security disability cases as largely ineffectual.[38] *Due Process in the Administrative State* scolded courts for constitutionalizing participation in the administrative state through due process doctrine.[39] In *The Struggle for Auto Safety,* Mashaw and Harfst argued that the judiciary was largely responsible for NHTSA's failure to adopt rules regarding automobile safety.[40]

One would not, based on his earlier books, think Mashaw a fan of the courts. Yet, as he argues in this book, judicial review of legislative action is not necessarily incongruous with public choice. Mashaw deploys public choice arguments both to justify rigorous rationality review of statutes and to debunk those who invoke public choice theory to demand textualist interpretation of statutes by judges. In both instances, Mashaw attempts to ground normative arguments about the institutional role of judicial review of legislation in public choice terms; his arguments are related by his implicit recommendation that legislation be subjected to judicial constraints similar to those applicable to actions by contemporary administrative agencies.

1. *The Case for Rationality Review*

Courts in the twentieth century have struggled endlessly with the issue of when a court may strike down a statute simply because

38. *See* MASHAW, *supra* note 9, at 185-90.

39. *See* MASHAW, *supra* note 10, at 254-71.

40. *See* MASHAW & HARFST, *supra* note 11.

it is arbitrary — that is, irrational or unreasonable. In the post-New Deal era, courts have displayed almost universal deference to legislation. Courts almost always accept a statute if its ends are legitimate — if it can be said to have any rational basis. Against the grain of most public choice commentators — as well as courts and administrative law scholars — Mashaw, in public choice terms, staunchly defends reinvigorating a more substantive rationality review of legislative decisionmaking.[41]

It is not surprising that public choice theory might justify activist judicial review of legislation. The contributions of Arrow and Stigler have led to widespread perceptions that legislation is either completely arbitrary or the product of special interest deals. For example, those who view statutes through Arrovian or interest group lenses — particularly William Riker[42] and Frank Easterbrook[43] — regard rigorous judicial review of legislation as necessary to preserve individual liberty.

Mashaw's defense of rationality review of legislation contrasts with the strong public choice argument for rationality review. Mashaw maintains that judicial failure to entertain rationality analysis suffers the same fault that Holmes recognized with *Lochner:* it privileges one view of legislation — the view that it reflects the general will — criticized widely by public choice theorists writing after Arrow. Yet in defending rationality review of statutes, Mashaw does not suggest a return to *Lochner.* Rather, Mashaw suggests that courts review statutes for "public regardingness" (p. 67). This approach would suggest

> judicial review of the adequacy of a statute's beneficial purposes when judged in the light of its harmful effects. Any citizen should be entitled to an explanation of why her private harm is at least arguably outweighed by some coherent and plausible explanation of the public good. [p. 68]

Courts should uphold a statute as long as a "coherent and plausible" public purpose can be identified (p. 75). In Mashaw's view, rationality review of legislation is inevitable and should be pursued regardless of the extant doctrinal subterfuges applied by courts and

41. Mashaw can only defend rationality review to the extent public choice allows him to do so. Public choice theory supplies a relatively weak sense of rationality. For the public choice theorist, rationality is taken to mean "transitivity" or lack of cycling, as Arrow's theorem predicts. In other words, collective actions are irrational if they fail to yield consistent results from the aggregation of individual preferences. Mashaw, however, has in mind a more robust sense of rationality review.

42. *See* WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE (1982); William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislators,* 74 VA. L. REV. 373 (1988).

43. In this book, Mashaw responds to Easterbrook's writings from the years before he became a judge on the U.S. Court of Appeals for the Seventh Circuit. *See* Easterbrook, *1983 Foreword, supra* note 17; Easterbrook, *Statutes' Domains, supra* note 17.

litigants.[44] Moreover, Mashaw argues, public choice theory, particularly interest group theory, can provide a pro-democratic argument for rationality review in contexts in which the legislative process has failed to produce public-regarding democratic results.

However, as Einer Elhauge has argued, interest group theory, applied on its own terms, fails to provide a meaningful baseline for evaluating "what level of petitioning effort is normatively proportional to each group's interest."[45] In other words, public choice theory itself cannot provide a measure of "public regardingness," independent of some set of criteria for evaluating the success or failure of the political process. Mashaw's public choice argument in favor of substantive rationality review seems logical and plausible, and is nicely complemented by recent attempts to justify rigorous judicial review of legislation following *United States v. Lopez*.[46] Public choice theory, however, does not make explicit an adequate set of normative criteria for evaluating the political process, and thus fails to provide a meaningful measure of public regardingness.

2. *Public Choice Against Textualism*

Mashaw also attacks a widely endorsed public choice argument in favor of textualist statutory interpretation. Reacting to a view associated most closely with Frank Easterbrook, public choice arguments allow Mashaw to explore the risks and costs of textualist interpretation of statutes.

New Deal public interest legislation invited courts to discern the general reform purpose that motivated the statute and to promote that purpose in individualized cases (p. 83). Initially, in the 1950s, New Dealers found the legal process approach of Hart and Sacks particularly attractive, a way of rationalizing designers of statutes as "reasonable people pursuing reasonable purposes reasonably" (p. 84). Sometime in the 1960s, however, this optimistic vision began to unravel and eventually was replaced by a cynicism that continues through the present:

> In the 1990s governmental efforts tend to be viewed as inevitably flawed. Public policy reform is directed almost exclusively at limiting direct government expenditure and preventing the implementation of

44. On the pervasive application of subterfuges in due process and equal protection contexts, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

45. Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 49 (1991).

46. *See* Philip P. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication and* United States v. Lopez, 46 CASE W. RES. L. REV. 695 (1996) (observing that judicial requirement of legislative findings can work to promote congressional deliberation); Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731 (1996) (endorsing limited judicial requirement of legislative findings as an intermediate level of process review).

> costly regulatory policies. Institutional reform consists largely of privatization, desolution, and downsizing — and of creating roadblocks to regulatory initiative. [p. 84]

The 1990s pessimists' views of statutory interpretation contrast with those of New Dealers. Instead of consulting a statute's purposes, 1990s courts might doubt that a statute, little more than the "vector sum of organized political forces" (p. 84), even has public purposes. On this modern view,

> [a] court, or any interpreter, confronting such a statute will surely be puzzled about how to proceed. At best it may be engaged in the enforcement of compromise among contending special interests. At worst it may be implementing legal rules whose only coherent explanation is the political advantage provided to legislators. [p. 85]

As Mashaw observes, this approach is certain to create a crisis for purposive statutory interpretation. At the very least, it is absurd for the interpreter of such statutes to fill in gaps. Instead, such an interpreter might be led to focus more on the plain meaning of the statute, as some suggest the Burger and Rehnquist Courts have done.

A predominant approach in the political science literature — often associated with Easterbrook — is to understand legislation as a contract or deal. Easterbrook contends that statutory interpretation is nothing more than the enforcement of an arms-length bargain. Statutes therefore should be construed to cover only those domains of human conduct explicitly anticipated in the statutory language. By applying doctrines of strict constructionism to statutory language, courts ensure that interested parties get precisely what they bargained for in the political process.[47]

One problem with Easterbrook's approach, Mashaw notes, is that it is based on Gary Becker's view of legislation, which predicts that such deals will enhance — not reduce — general welfare.[48] "If one believes that private contracting among individuals and firms is socially beneficial (the invisible hand), to put those contracts in legislative rather than contractual language is a mere formal change that should not alter the aggregate welfare effects" (p. 89). Easterbrook, however, does not have an explanation for why legislative deals are inherently evil. And, while Easterbrook does say that contracts should be strictly construed, even this overstates contract doctrine. So, Mashaw suggests, understanding legislation as a

47. *See* Easterbrook, *1983 Foreword*, *supra* note 17, at 15-18; Easterbrook, *Statutes' Domains*, *supra* note 17, at 544-51. The position attributed to Easterbrook precedes his appointment to the bench. He since has softened his position by acknowledging some use of legislative history to explain ambiguous language or to show "that a text 'plain' at first reading has a strikingly different meaning." *See In re* Sinclair, 870 F.2d 1340, 1344 (7th Cir. 1989).

48. *See* Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983).

deal can just as easily lead us back to purposivism as strict constructionism. For Easterbrook's application to succeed, at a minimum public choice needs a normative theory for explaining why interest-group-generated legislation is bad. Easterbrook himself harbors much skepticism about public interest goals, but this skepticism is not a necessary condition to the application of public choice tools.

Mashaw has raised a plausible criticism of Easterbrook's position, but his own argument in favor of substantive rationality review suffers a similar defect in its failure to make explicit a normative set of criteria for public regardingness. While Mashaw does not, like Easterbrook, claim that all interest group legislation is inherently suspect, he does believe that such legislation will require reversal if a coherent and plausible explanation of its public regardingness cannot be given. Public choice theory cannot, on its own terms, provide an adequate set of criteria for making this determination.

This normative limitation with public choice analysis aside, Mashaw addresses another problem with Easterbrook's approach. Much of the current attention to statutory interpretation has been generated by Justice Scalia's attacks on the use of legislative history,[49] attacks that can be rationalized in public choice terms. Plain meaning, according to Scalia, reinforces the legislative process as it was envisioned in the Constitution and thus enhances the democratic process as a whole. Voting theory, particularly the work of Kenneth Shepsle suggesting the impossibility of mapping collective decisions onto individual preferences,[50] provides some support for Scalia's views.

However, the authors who write collectively under the pseudonym McNollgast, in contrast to Shepsle, argue that nothing in voting theory undermines the usefulness of legislative intent to aid judicial interpretation of statutes.[51] In practice, contra Arrow, legislative decisions do not cycle endlessly until they are cut off by some arbitrary feature in the legislative process; instead, congressional organization excludes certain preference orderings from the agenda and gives certain people veto or dictatorial powers with respect to the progress of a bill. Focusing on the agency side of public choice analysis thus aids the search for legislative intent. Public choice tools would suggest focusing on the enacting coalition while discounting cheap talk and statements by the minority. For exam-

49. Scalia's first published attack on the use of legislative history is *Hirschey v. Federal Energy Regulatory Commn.*, 777 F.2d 1, 6 (D.C. Cir. 1985) (Scalia, J., concurring).

50. *See* Kenneth A. Shepsle, *Congress is a 'They,' Not an 'It': Legislative Intent as an Oxymoron*, 12 INTL. REV. L. & ECON. 239 (1992).

51. *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter & Spring 1994, at 3. The professors who comprise McNollgast are Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast.

ple, statements by the President early in the legislative process should be given weight, but later statements should be discounted.

Using game theory and inspired by McNollgast, Mashaw goes on to argue that the legislature rarely is able to correct interpretive mistakes in laws. First, he suggests, procedural hurdles and limited time and resources may make correction improbable. Second, and more insightful, even if the legislature can act to correct a mistake with which it disagrees, "it will almost never end up with its original policy reinstated, even if not a single member of the legislature has altered his or her preferences."[52]

Therefore, Mashaw concludes, public choice theory has failed to provide a decisive methodology for interpreting statutes. Indeed, many of its ideas — such as Easterbrook's notion of legislation as a deal and voting theory's chaotic characterization of legislation — have proven "seriously unhelpful" (p. 104). Nevertheless, Mashaw acknowledges some lessons from public choice, particularly a focus on the speaker, notions of dynamic evolution, and the application of game theoretic tools. His most notable lesson is that judicial interpretation can make it impossible in many cases for the legislature to overturn the policy imposed by the judiciary; in most cases, it will preclude the legislature from reenacting the original policy.

The use of public choice to attack textualist approaches to statutory interpretation is related to Mashaw's public choice argument in favor of rationality review. The conventional view is that

> [r]ationality review is strongly antimajoritarian because it forecloses the implementation of the will of the majority. It is thus a danger to democracy and requires extremely strong justifications, none of which have ever been wholly successful. Judicial interpretation of statutes by contrast is not only inevitable, it can be structured to be prodemocratic, that is, to enforce the true will of the majority. Moreover, should the judiciary err, the injury to majoritarian governance is remediable by the legislature itself. [pp. 104-05]

Against this conventional approach, Mashaw suggests another alternative: courts should use rationality review to strike down statutes rather than to interpret them. According to Mashaw,

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52. P. 102 (emphasis omitted). William Eskridge and John Ferejohn model the Article I, Section 7 Game, *see* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992), which Mashaw utilizes to suggest that "interpretation of the law establishes a status quo point that will have the stability that our form of government gives to any existing state of affairs." P. 103. The game goes something like this: Assume the House, Senate, and President are each involved in new legislation. Each has slightly different preferences, but they can compromise and adopt a policy. Basically, if the interpretation leaves at least one of the House, Senate, or President better off, any one of these can take action to block its revision. Thus, tripartite division and the presentment clause favor the status quo. Judicial interpretation of statutes, Mashaw recognizes, has agenda-setting effects in the legislature: "[E]ven when the legislative process can overturn an interpretation, it literally cannot escape the force of the interpreter. Interpretation has rearranged the status quo and thus reconfigured the structure of subsequent legislative bargaining." P. 103.

> a court overturning a statute on irrationality grounds may invade legislative prerogatives for public choice hardly at all. By contrast, a court misconstruing the legislature's statutes may often disempower it from implementing anything very close to the legislators' most preferred policy. [p. 105]

Maxims such as "construe statutes to avoid serious questions of constitutionality" are often, Mashaw suggests, more strongly countermajoritarian than substantive judicial review. Courts will, under Mashaw's normative application of public choice theory, have an active role in reviewing legislation for rationality, but they must construe legislative intent cautiously.[53]

The approach Mashaw proposes for judicial review of legislation is remarkably similar to the process by which modern courts generally review policymaking by administrative agencies: courts reluctantly interpret statutes, instead deferring to agency interpretations of law, but exercise rigorous rationality review with the possibility of reversal. Mashaw seems to suggest that modern democracies can learn from the growth of the administrative state by reflecting on how the traditional lawmaking body — the legislature — might react when subjected to judicial oversight similar to agencies. He uses public choice ideas as a mirror, forcing us to reflect alternative institutional restraints upon our traditional image of the legislature.

Mashaw's applications of public choice tools as a way of critiquing legislatures move the debate forward considerably. His critique depends upon a set of analytical tools outside of conventional public choice theory. Specifically, some of the insights of what has come to be known as "positive political theory"[54] — rational choice and game theoretic analysis of political institutions — allow him to transcend the dismal lessons of the orthodox greed and chaos research agendas. For example, McNollgast's research, which posits assumptions about the behavior of institutions rather than individuals, assists Mashaw in debunking conventional public choice arguments. Although well-accepted in the political science of institutions, there is little agreement as to whether contemporary public choice theory is sufficiently capacious to accommodate positive political theory as an analytical approach alongside the greed and chaos research agendas.[55] Public choice and positive political theory share a common subject matter, but public choice theory

53. In this sense, Mashaw's proposal to reinvigorate substantive rationality review of legislation for public regardingness differs from Jonathon Macey's argument that courts interpret statutes in a public-regarding way. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model,* 86 COLUM. L. REV. 223 (1986).

54. *See* Daniel B. Rodriguez, *The Positive Political Dimensions of Regulatory Reform,* 72 WASH. U. L.Q. 1 (1994).

55. *See* Daniel A. Farber & Phillip P. Frickey, *Forward: Positive Political Theory in the Nineties,* 80 GEO. L.J. 457, 458-63 (1992).

provides no methodological account of how assumptions about individual behaviors are linked to institutional behaviors; on the other hand, positive political theory often posits assumptions about institutions, such as the *legislature,* without necessarily reconciling these with findings about how individual behavior, such as that of the *legislator,* is aggregated into institutional phenomena. Nevertheless, Mashaw sees enough similarities between positive political theory and public choice that he is comfortable applying these tools side by side.[56]

B. *Public Choice and Legislative Incentives for Delegation*

Mashaw's deployment of public choice tools to evaluate myths associated with legislatures also allows him to provide a rationale for delegation to administrative agencies. His view contrasts remarkably the bleak visions of bureaucracy espoused by many other public choice theorists. According to the "greed" research agenda, at the core of the orthodox public choice explanation of legislative incentives for delegation

> [B]ureaus are conceptualized as being as susceptible to private interest influence as legislatures, and may assist the latter in obscuring the true nature of legislative action from the general public. By passing vague statutes that seem to be in the public interest, but then pressuring agencies to favor their supporters, legislators can have it both ways. They can take credit for good government while pandering to the special interests. Moreover, administrative institutions generate their own bureaucratic aims. They may function much like interest groups themselves by trading favors to powerful legislators (projects in the home district, help for a valued constituent) for aggrandizement of bureaucratic budgets or prerogatives. [p. 21]

Louis Jaffe and Theodore Lowi, writing in the 1960s, were early critics of delegation to agencies under broad legislative grants of power.[57] In the early 1980s, Peter Aranson, Ernest Gellhorn, and Glen Robinson gave these arguments grounding in the public choice literature.[58] And, in the late 1980s and early 1990s, this approach to criticizing delegation to administrative agencies was revived in the writings of David Schoenbrod.[59]

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56. *See* Mashaw, *Explaining Administrative Process, supra* note 16, at 280 (noting distinctive methods but concluding that public choice and positive political theory share "a core general presumption that political behavior is to be explained as the outcome of rational (and often strategic) action by relevantly situated individuals within some set of defined institutional boundaries").

57. *See* LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (1969).

58. *See* Aranson et al., *supra* note 18.

59. *See* SCHOENBROD, *supra* note 5.

These critics of delegation, who borrow heavily from public choice ideas, have inspired a significant defense of delegation, primarily among those Mashaw tends to view as "idealists."[60] Mashaw, no idealist, has also been an active voice in defending delegation, relying heavily on public choice tools. Public choice theory envisions the use of principal-agent models for examining the role of agencies. The "McNollgast hypothesis" asserts the following: electorally accountable officials must place the implementation of public policies in the hands of administrators who have their own designs, but they can still continue to control bureaucrats through legislatively imposed administrative process requirements.[61] Yet McNollgast argues that Congress faces two major obstacles in controlling agencies: (1) information asymmetry, and (2) the erosion of an original legislative coalition over time.[62]

Mashaw suggests that the McNollgast hypothesis should not undermine public choice arguments in favor of delegation. If it is assumed that legislators have some independent preferences, the McNollgast hypothesis can be decoupled from the notion that legislator preferences are a function of constituent or interest group preferences. This move, made possible by the technique of positive political theory, may be inconsistent with other public choice ideas, but it does allow the use of agency theory to survive by assuming that "[t]he legislators (principals) who vote for programs . . . prefer that administrators (agents) carry out their instructions as specified in the statute."[63]

Using this principal-agent approach, Mashaw presents an argument for broad delegation of political decisionmaking authority to administrative agencies. Critics of delegation have provided two main lines of argument: Lowi argued against delegation on authoritativeness grounds, asserting that statutes are the only legitimate

60. The "idealist" delegation vision, which Mashaw most closely associates with modern deliberative democrats, holds that administrative procedure "contributes . . . to the construction of an operationally effective and symbolically appropriate normative regime." P. 108. Mashaw — always searching for empirical grounding — does not have faith, however, in such idealist solutions. Instead, he suggests, the time is ripe for a realist revolution in administrative law.

61. *See* Matthew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989) [hereinafter McCubbins et al., *Structure and Process*].

62. *See* McCubbins et al., *Structure and Process, supra* note 61, at 435-40.

63. Pp. 121-22. Thus, Mashaw concludes, in salvaging the principal-agent model, that "major insights into the structure and processes of federal administrative agencies as they actually operate are unlikely to flow from viewing agency structure and process primarily in terms of the monitoring and sanctioning problems that legislative controllers have with federal bureaucracies." P. 129.

vehicle for making law;[64] John Hart Ely[65] and Justice Rehnquist,[66] by contrast, argued against delegation on accountability grounds, positing that legislatures are institutionally more likely than bureaucrats to engage in accountable decisionmaking. The public choice argument against delegation articulated by Aranson, Gellhorn, and Robinson lends support to the latter view. In their view, public choice theory predicts that there are two circumstances in which legislators should be willing to confer broad authority on agencies: (1) if a policy stands to benefit one group while imposing substantial costs on another, in which case delegation to an agency allows legislators to claim credit and pass blame; or (2) if opposing groups are unable to agree, in which case delegation allows legislators to punt responsibility for the decision altogether. They conclude, however, that such delegation will not likely enhance welfare, but instead will produce "private benefits . . . at collective cost."[67]

Mashaw maintains that the prodelegation position looks at least as good on welfare and accountability grounds as do calls for reforms to statutory drafting made by critics of delegation. He argues that three problems plague Aranson, Gellhorn, and Robinson's claim that delegation to administrators systematically reduces welfare: (1) they equate democracy with legislative majoritarianism; (2) they treat the agency costs of delegation without considering the information and decision costs, which may be higher for a legislature than an administrative agency; and (3) they analyze logrolling without considering how agency changes the logrolling game (pp. 142-45).

Mashaw then attempts to present an affirmative case for delegation.[68] First, challenging the welfare reduction argument, Mashaw observes that delegation can help reduce the sum of decision, agency, and error costs (pp. 148-52). Second, against the political accountability argument, Mashaw contends that delegation can enhance the responsiveness of political decisions to the desires of the general electorate through accountability to the President, who is more responsive than the legislature to diversity in voter preferences and better able to avoid voting cycles.[69] Implicit in Mashaw's

64. *See* Lowi, *supra* note 57.

65. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

66. *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting); Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring).

67. Aranson et al., *supra* note 18, at 63.

68. Mashaw first articulated the argument in public choice terms in a 1985 article. *See* Mashaw, *Prodelegation*, *supra* note 16.

69. *See* Pp. 152-56. Even if Congress were to adopt specific legislation, Mashaw observes, discretion by agencies would still be necessary. Mashaw creatively posits a "Law of Conservation of Administrative Discretion": because the amount of discretion in a system is always

prodelegation argument is the assumption that the Constitution does not require the legislature to enact all laws, but instead requires only that lawmaking be done by a representative institution, such as the legislature or President.[70]

Mashaw's prodelegation arguments — as well as his discussion of judicial review of legislation — should suggest that public choice ideas provide powerful ways of critiquing legislatures as well as administrative agencies. Although predominantly used to critique the institution of bureaucracy, public choice theory harbors no necessary alliance with antibureaucratic sentiments. As Mashaw illustrates, public choice ideas also provide some compelling arguments in favor of delegation of political decisionmaking authority to administrators, although this conclusion is qualified; Mashaw is careful to suggest that public choice does not provide any compelling answer to the question of whether delegation is welfare-enhancing or welfare-reducing.[71]

Yet, although public choice modeling may not provide a compelling formal answer to this question, public choice does provide some powerful tools for argument. Mashaw's criticisms of Aranson, Gellhorn, and Robinson are convincing, but his reluctance to engage the argument that delegation to administrative agencies can, in certain circumstances, enhance welfare proves disappointing. Mashaw argued in a previous article that "it makes sense to have the delegation device available for use when and if it would reduce the sum of decision, error, and agency costs."[72] In addition to the literature addressing the costs of congressional decisionmaking, which Mashaw discusses, there is a rich literature criticizing Congress's perceived legitimacy in the eyes of the public.[73] Moreover, as some civic republican scholars have suggested, dele-

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constant, squeezing discretion out of the system in one place merely causes it to migrate elsewhere. P. 154.

70. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 145-46 (1995). Redish attacks Mashaw's argument, suggesting that it is problematic as a matter of both constitutional law and political theory. *See id.* at 143-49. Of course, Redish's response, reinvigorating the nondelegation doctrine, has its own problems. One flaw with the nondelegation doctrine is that the judiciary is "institutionally incapable of creating and applying a delegation doctrine." Richard T. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi,* 36 AM. U. L. REV. 391, 393 (1987).

71. For example, Mashaw writes:

> Public choice can help us to better understand how certain choice procedures structure or allocate decisional powers. It can help us to see possibilities for strategic behavior and strategic equilibria that yield likely outcomes in particular decision processes having particular structures and stakes. But it cannot itself tell us anything about whether those outcomes will be welfare-enhancing or welfare-reducing.

P. 157.

72. Mashaw, *Prodelegation, supra* note 16, at 92.

73. *See, e.g.,* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS (1995).

gation to administrative agencies may enhance welfare.[74] Although public choice theory, on its own terms, may not suggest that delegation to bureaucrats is always welfare-enhancing, sophisticated application of public choice tools might allow development of theories explaining in which contexts delegation is most likely to enhance social welfare. As with his earlier discussions of rationality review and statutory interpretation, in discussing delegation to administrative agencies Mashaw has adopted a critical stance towards public choice theory, albeit one that draws on public choice tools, rather than an approach that uses public choice to construct a theory that explains, in more than a very sketchy sense, under what conditions delegation to administrative agencies is normatively desirable.

C. *Public Choice, the Timing of Judicial Review, and Separation of Powers*

Insights from public choice theory can also help evaluate the role of courts in reviewing agency action. Since the 1960s, the American administrative state has undergone a paradigm shift away from adjudication and toward rulemaking as the principal mechanism for agency action. A major difference between judicial review of policies made through case-by-case adjudicative proceedings and judicial review of rulemaking is the ability of parties to challenge rules prior to their enforcement in individualized cases. Beginning with the Supreme Court's 1967 decision in *Abbott Laboratories v. Gardner,*[75] which articulated the standards for preenforcement judicial review of administrative rules, courts have liberally permitted preenforcement review of final rules that mandate a substantive standard of conduct.

Over twenty years ago, Paul Verkuil predicted problems with this approach:

> In the past, when a rule was reviewable only after enforcement, considerable time could elapse before the rulemaking procedures and the factual basis for the rule were tested. As a result, review of the circumstances surrounding the rule's enactment was secondary and somewhat obscured by time; the main issue was the rule's application to the particular respondent before the court. But with a final order requirement tied more closely to notions of finality and ripeness, rulemaking review can take place almost instantly and the focus on the rulemaking process may be much sharper. In this sense, earlier review means closer review, which itself leads to a vigorous judicial scrutiny of the rulemaking model.[76]

74. *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State,* 105 HARV. L. REV. 1511, 1543-54 (1992).

75. 387 U.S. 136 (1967).

76. Paul R. Verkuil, *Judicial Review of Informal Rulemaking,* 60 VA. L. REV. 185, 205 (1974).

In 1990, Mashaw and Harfst chronicled some of the adverse effects of judicial review on rulemaking at the NHTSA,[77] adding to the growing literature that laid the blame for ossification of agency rulemaking at the feet of the judiciary. Unlike others, who advocate easing the standard of review, Mashaw and Harfst suggest that courts refrain from reviewing a rule until after the agency has applied the rule against a private entity.[78]

Today's reformers, Mashaw observes, view rulemaking more as part of the problem than the solution. Those who criticize courts for ossifying agency rulemaking chronicle how judicial review has adversely affected agency rulemaking as an external constraint on agency decisions.[79] For Mashaw, "[g]ame theory dramatizes the power of external legal and political controls on the administrative process. More important, the standard understandings of 'the problem' besetting agency rulemaking look very different when approached from the strategic perspective game theory provides" (p. 160). Game theory places focus on *when* judicial review should be pursued, not, as others have suggested, on the standard or scope of review.[80]

Most writing in the ossification literature agrees that "the real impediment caused by judicial review is uncertainty" (p. 165). As Mashaw observes:

> Because the courts are relatively uninformed about what is important among the many issues thrown up by parties seeking review of a rule, and because they are technically and scientifically unsophisticated in analyzing the issues that they perceive to be critical to a rule's 'reasonableness,' the perception in the agencies is that anything can happen. This produces defensive rulemaking, if not abandonment of the rulemaking process. [p. 165]

The results may have been motivated by private interests pursuing various stratagems, such as delay. Focus on incentives for such behavior — incentives that might be built into the institutions of administrative governance — could prove insightful.

To illustrate how these incentives affect the behavior of litigants and courts, Mashaw develops a rulemaking review game. This game assumes that "to the extent that an opponent of rulemaking (regulatory or deregulatory) perceives the use of an external obsta-

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77. *See* MASHAW & HARFST, *supra* note 11.

78. *See id.* at 245-47.

79. *See, e.g.*, Thomas O. McGarity, *Some Thoughts on 'Deossifying' the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *The Unintended Effects of Judicial Review of Agency Rules: How Federal Courts Have Contributed to the Electricity Crisis of the 1990s*, 43 ADMIN. L. REV. 7 (1991). For a slightly different story, see Jim Rossi, *Redeeming Judicial Review: The Hard Look Doctrine and Federal Regulatory Efforts to Restructure the Electric Utility Industry*, 1994 WIS. L. REV. 763.

80. *See* McGarity, *supra* note 79, at 1453-54 (recommending replacement of "hard look" with a more deferential metaphor).

cle to rulemaking to have a higher expected value than failing to use it, that external constraint will be activated."[81] Under current law, rules by agencies like NHTSA or the Federal Energy Regulatory Commission are immediately appealable to a court of appeals. At the same time, there is typically a lead time, sometimes significant, before the rule becomes effective. Thus, following adoption of a rule, a firm faces a decision whether to begin immediately to work toward securing compliance or to appeal.

To simplify this game, Mashaw presents the choice faced by a private firm or interest group as compliance or noncompliance with the new rule. Initially, he assumes no penalties for noncompliance because the rule is not effective or an appeal stays enforcement. Given this assumption, firms do not view themselves as in a game with the agency; rather, they view their position vis-à-vis other competitors. Here the dominant strategy for all parties, Mashaw illustrates, is not to comply with the rule but to seek judicial review: "It would appear that with preenforcement review no manufacturer would ever comply prior to the deadline. Presumably they would always seek judicial review because suit at least delays, and may eliminate, the need to comply" (p. 168).

Mashaw then takes the analysis to the next level. The judicial review game presents a free-rider problem; it is in the interest of someone to sue, but each manufacturer will want to avoid bearing these costs itself. This can be solved in a variety of ways. In practice, it most commonly is solved by the formation of an industry association or some other interest group. Without such a solution, a new game may be played regarding who will sue. This game, Mashaw observes, does not produce a dominant strategy, but produces a classic "chicken" problem. Each player, while not itself suing, would like to bluff the other into suing. But, given that each is better off if it sues than it would be if no one sues, it might be rational for a player to chicken out and sue.[82]

The game changes again, Mashaw illustrates, if there is a penalty for noncompliance pending the determination of the validity of a rule. Here Mashaw maintains that his analysis teaches three lessons. First, "without a penalty for noncompliance the balance of the benefits or costs from litigating or complying will strongly favor litigation" (pp. 173-74). Second, the presence or absence of a penalty will not be a determinative predictor of challenges. Mashaw observes that,

81. P. 166. Mashaw speaks in terms of straightforward costs and benefits; he does not attempt to model exceptional preferences, such as the firm opposed to all government regulation or the good citizen. P. 167.

82. Of course, to maintain credibility for future bluffs, it may be possible that neither would sue. Nevertheless, as Mashaw illustrates, the probability of at least one suit is 0.91. P. 170. The same type of analysis applies to beneficiaries.

> even with a penalty that is greater than the sum of compliance costs and market share losses, an actor whose disbenefits from compliance were only slightly greater than [those faced by another actor] would still find it rational to bring suit or, what is the same thing, to fail to comply and resist enforcement by raising the potential validity of the rule as a defense. [p. 174]

Third, it suggests that a focus on the stringency or scope or standard of review as a source of the problem of ossification may be misguided. "Judicial stringency is but one factor bearing on the likelihood of success in appealing a rule and on the payoffs to appeal versus compliance. The timing of review and the conditions on its availability also shape that calculation, as does the level of compliance costs" (p. 174).

Thus, Mashaw's analysis leads him to recommend efforts to ease compliance burdens, as John Mendeloff has recommended in the Occupational Safety and Health Administration (OSHA) context.[83] Mashaw does not believe, however, that easing compliance burdens alone will solve the problem of too little rulemaking; it will also be necessary to eliminate preenforcement review. To begin, the lengthening of time periods and reduction of a penalty can help to reduce compliance costs. Further, echoing his previous observations with David Harfst, Mashaw writes:

> Time and again, National Highway Traffic Safety Administration regulations foundered on the shoals of practicability or reasonableness. Yet over time it became clear that many of the technological problems that convinced courts to remand rules to the agency could be solved. Moreover, they might have been solved much earlier had attempts at compliance preceded resort to the judiciary.[84]

Mashaw's argument in favor of eliminating preenforcement review is insightful and original. Nevertheless, there are some problems with the argument. Specifically, Mashaw may have underestimated some of the benefits associated with preenforcement review of rules by courts. As Mark Seidenfeld has argued:

> From the standpoint of social welfare, Mashaw's game theoretic analysis is incomplete. It fails to address when compliance with a rule might be detrimental rather than beneficial. It also fails to incorporate other indirect effects that delaying judicial review might have on the overall rulemaking process. If an agency adopts a rule that it cannot justify both legally and as a matter of policy, the regulatory system should avoid forcing compliance. To the extent that judicial review

83. *See* JOHN M. MENDELOFF, THE DILEMMA OF TOXIC SUBSTANCE REGULATION: HOW OVERREGULATION CAUSES UNDERREGULATION AT OSHA 115-16 (1988).

84. P. 178. Mashaw does temper his recommendation: "While preenforcement review may have been particularly dysfunctional in the context of standard setting at the National Highway Traffic Safety Administration, it may be extremely important to permit preenforcement review elsewhere, for example, of EPA air quality standards." P. 180.

> filters out such bad rules from good ones, pre-enforcement review benefits society.[85]

While Seidenfeld does not reject the abolition of preenforcement review in all circumstances, he concludes that "the factors that go into the balance of whether pre-enforcement review of a rulemaking is warranted are too diverse to permit a simple answer that either pre-enforcement or post-enforcement review is always best."[86] Mashaw's confidence that public choice theory can compel reform here seems mysterious, as he believes it does not allow us to draw general welfare conclusions in the delegation context.

Finally, without any specific reforms in mind, Mashaw builds a political oversight game as a means of relating his various applications of public choice theory and addressing legislative veto of agency rulemaking. He observes that "[u]ncertainty results not from vague legal standards applied by relatively uninformed generalist judges, but from the risks inherent in interbranch competition for control over policy" (p. 181). Both executive and legislative oversight are subject to failures in controlling agency decisionmaking. Executive oversight, such as the Office of Information and Regulatory Affairs (OIRA) technocratic cost-benefit analysis requirements, has been described as overtly political. Congressional action has been more successful in forcing regulation than in reacting to agency policymaking. Mashaw paints a bleak picture:

> Political life resembles a theater of the absurd where general public demand is satisfied by programs designed to fail and thus to protect the "special interests" who trade politicians money for votes. Access, participation, fair procedures and rational analytic routines are all smoke and mirrors disguising the sordid business of politics as usual. What's more, the public often seems to believe the "blame the bureaucrats, not us" version of legislative responsibility that sound-bite journalism promotes. Nimbleness at credit claiming and blame avoidance, not the construction of sound policy processes, becomes the skill that ensures incumbency. [p. 185]

Mashaw's oversight game assumes that political institutions, like courts, are passive until called on to respond to some other person, firm, or interest group. So, as with courts, Mashaw's game considers the benefits, costs, and probability of success to institutions engaging in political oversight.[87]

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85. Mark Seidenfeld, *Playing Games with the Timing of Judicial Review: An Evaluation of Proposals to Restrict Pre-enforcement Review of Agency Rules,* 58 OHIO ST. L.J. 85, 97-98 (1997) (citations omitted).

86. *Id.* at 121. Thus, selective abolition of preenforcement review, according to Seidenfeld, should be made by Congress. *See id.* at 124.

87. Mashaw urges that calls for transparency should be considered carefully: "[t]ransparency lowers the 'agency costs' to organized interests," p. 191, i.e., those who already *have* access to the political process. Yet Mashaw is not, like McNollgast, embracing procedural reform as "another way of 'stacking the deck' for favored interests." P. 191. Instead, "[e]ncouraging procedural transparency may be the best we can do to limit political

Mashaw proceeds to model a separation of powers game in three dimensions, representing the President, Senate, and House of Representatives. From a normative perspective, Mashaw argues, the external environment of agency rulemaking should be structured to encourage agency policy choices that are welfare-enhancing for the institutions in the legislative-executive separation of power game (p. 193). But if an agency should choose a policy that lies closer to the President's preferences than to the House's or the Senate's, Congress could quash this choice if it had the authority to veto administrative rules. Without the legislative veto, Congress is forced to resort to other mechanisms or to rely on the judiciary to enforce the original bargain.

Of course, in the absence of effective judicial review or some other mechanism to deter agencies from choosing a policy that lies closer to the President's preference, the House and Senate can legislate to revoke the agency's policy choice. The agency's assertion of a choice closer to the President's preferences, however, redefines the status quo and the bargaining space.[88] As a result, "[t]he stakes involved in the constitutionality of the legislative veto may thus have been somewhat higher than they appeared at first blush" (p. 193). Mashaw concludes:

> Because policy choice in a bargaining situation is a function of both the preferences of the actors and the status quo point, in the face of presidential opposition Congress literally cannot get back to the policy space that it thought it and the president had defined in the preexisting statute. [p. 194]

Coming full circle, Mashaw posits that the legislative-executive separation of powers game may have given rise to the judicial review game and, ultimately, ossification of rulemaking. According to Mashaw, "[l]egal control is being employed to leverage political-institutional warfare about administrative policy in ways that disempower the policy process."[89]

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importuning and shore up administrative legitimacy, if not efficacy." P. 191. Transparency is at best a strategic design tool, p. 191, but one that can have unintended perverse consequences, *see* Rossi, *supra* note 34.

88. The Environmental Protection Agency's 1997 clean air rules, establishing stringent new standards for ozone and fine particulates, are a good illustration. *See* John H. Cushman, Jr., *Clinton Sharply Tightens Air Pollution Regulations Despite Concern over Costs,* N.Y. TIMES, June 26, 1997, at A1. Although the EPA and the Clinton administration adopted fairly stringent standards, critics set their sights on the Republican Congress. *See* Andrea Marks, *Losers in Smog Battle Try End-Run Attack,* CHRISTIAN SCI. MONITOR, Aug. 14, 1997, at 3. Yet despite public opposition, the introduction of bills, and the potential existence of a majority against the new rules in Congress, Congress has not garnered the support to reverse the EPA and the administration to date.

89. P. 196. By contrast, parliamentary systems "tie the fate of elected politicians to the efficacy of administrations," p. 198, effectively redefining the game.

III. Usable Knowledge and the Value of a Unifying Theory of the Administrative State

Although *Greed, Chaos & Governance* spends a significant amount of time exploring how public choice tools might provide insights to specific public law reforms, the book is as much an illustration of the power and limits of public choice ideas as it is a series of arguments for particular reforms.

Mashaw intends his applications of public choice to yield usable knowledge for institutional reformers, in contrast to both the idealism of those who embrace the elusive public interest and the pessimistic, potentially destructive recommendations often associated with public choice ideas. In this sense, Mashaw has much in common with Farber and Frickey, who eschew grand theory and stake out a middle ground in practical reason as a way of integrating public choice and public law. Yet, unlike Farber and Frickey, who provisionally adopt a neorepublican perspective, Mashaw is reluctant to embrace any single unifying perspective of governance outside of the public choice framework. Mashaw's cynicism about neorepublican ideas may be truer to public choice theory, but his realism — evidenced by a reluctance to adopt a unifying perspective outside of public choice — may come at a cost, albeit a cost that public choice method may require on its own terms.

For Mashaw, usable knowledge is a middle ground. The orthodox greed and chaos research agendas have successfully presented a unifying theme, but it is a dismal theme suggesting destruction or dismantling of the administrative state. By contrast, usable knowledge recognizes that public choice ideas can provide some assistance to institutional designers without supplying a grand vision of jaundiced optimism or rampant pessimism. Although public choice theory cannot provide truths, it can provide arguments and advice, so long as we do not demand unrealistically that it provide definite answers and are not misled naively by those who claim stubbornly that it does (p. 38). Public choice is a Comptean positive theory, specializing in description and prediction, much like physics. The fact that there is no unified public choice theory of phenomena such as voting and institutional behavior, much like there is no unifying theory in physics of how matter and energy behave, should not stand as an impediment to learning from public choice's insights (p. 44).

Mashaw's notion of usable knowledge serves a function similar to practical reason in Farber and Frickey's discussion of public choice. Farber and Frickey believe that grand theory is of limited value to law, a discipline that seeks primarily to resolve practical disputes or to make practical recommendations about institutions. Legal decisionmakers thus rely on practical reasoning, which "in-

volves an analogical and inductive method, resolving new problems by reasoning from well-established paradigmatic cases." [90] Although deductive reasoning, the primary method of public choice theory, will often yield plausible answers, "[m]ore often such . . . answer[s] will ascend from a combination of arguments, none of which standing alone would constitute a sufficient justification. Such 'supporting arguments' are 'rather like the legs of a chair and unlike the links of a chain.'"[91] Farber and Frickey believe that practical reason will permit the integration of public choice and public law, allowing constructive use of public choice insights.[92] Their approach, however, is not without its methodological problems. As Ed Rubin has suggested, the practical reasoning approach may be flawed when applied to foundational methods such as public choice, as it seemingly prejudges its subject matter by "rejecting its methodology as a premise of the analysis before that rejection is advanced or justified."[93]

In advancing their practical reason approach, Farber and Frickey adopt as a provisional unifying perspective the neo-Madisonian view of the political system often associated with modern intellectual republicanism.[94] According to Farber and Frickey, "[l]ike Madison, we believe that no theory of government can ignore the powerful forces of individual self-interest and the critical role of institutional design. It is equally one-sided, however, to lose sight of the role of civic virtue."[95] Farber and Frickey present several illustrations of how neorepublican theories of democratic governance can accommodate public choice arguments.[96]

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90. FARBER & FRICKEY, *supra* note 2, at 116.

91. Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment,* 34 UCLA L. REV. 1615, 1645 (1987) (quoting ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 156 (1982)); *see also* William N. Eskridge, Jr. & Philip N. Frickey, *Statutory Interpretation as Practical Reasoning,* 42 STAN. L. REV. 321 (1990); Daniel A. Farber, *Legal Pragmatism and the Constitution,* 72 MINN. L. REV. 1331 (1988).

92. For a defense of practical reason as a way of learning from the insights of law and economics generally, see Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement,* 84 GEO. L.J. 2071 (1996).

93. Edward L. Rubin, *Public Choice in Practice and Theory,* 81 CAL. L. REV. 1657, 1665 (1993) (reviewing FARBER & FRICKEY, *supra* note 2); *see also* Rubin, *supra* note 4, at 501 ("[U]nless public choice analysis is allowed to proceed from its basic premise — what a literary critic would call its *donné* — the strength of that analysis cannot be adequately assessed.").

94. *See* Seidenfeld, *supra* note 74; Cass R. Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV 29 (1985).

95. FARBER & FRICKEY, *supra* note 2, at 11.

96. Although Farber and Frickey see neorepublicanism as accommodating and organizing some public choice ideas, they reject the strong version of republicanism that would suggest that voters and legislators are always motivated by public spirit rather than self-interest. *See id.* at 45-46. Their vantage point, neorepublicanism, probably entails practical reasoning to the extent that modern republicanism requires consideration of various incommensurable concepts such as the individual and the collective selves. *See* Cass R. Sunstein, *Beyond The Republican Revival,* 97 YALE L.J. 1539, 1564-65 (1988).

Mashaw also seeks to domesticate public choice theory, but rather than look outside public choice, as do Farber and Frickey, he urges public choice "lite." Despite any surface similarity between usable knowledge and practical reason, the methods are distinct. Mashaw does not reject the compatibility of neorepublican political theory and some public choice ideas. He sees no necessary connection, however, between neorepublicanism and public choice. In his applications, he distances himself from those who would embrace neorepublicanism as the vantage point for evaluating public choice ideas.[97] Apart from the deductive method of public choice theory, defined broadly to include positive political theory, Mashaw does not explicitly embrace any singular intellectual perspective of administrative governance as a vantage point for evaluation, whether republicanism, pluralism, or any other theory. Thus, although Mashaw's previous case studies of the Social Security Administration and NHTSA are beautiful illustrations of a practical reasoning approach, *Greed, Chaos and Governance* deploys a method distinct from that of Farber and Frickey. Mashaw, wishing to give public choice arguments the most sympathetic assessment possible, embraces public choice tools as a common language and eschews any extra-public choice unifying perspective, carefully and realistically describing the different stories public choice has to tell about administrative governance. In this sense, Mashaw attempts to use public choice theory on its own terms, albeit with a healthy degree of academic cynicism or realism.

Nevertheless, Mashaw acknowledges that most public choice methodology, including his own realism, has normative consequences. As Mashaw suggests, writers such as Steven Kelman,[98] a neorepublican critic of public choice, and Geoffrey Brennan and James Buchanan,[99] venerable public choice advocates, have acknowledged that positive models can (and do) have normative implications. Although Buchanan and Brennan may disagree on substance with Kelman, all three agree that preferences are not wholly exogenous to politics; rather, they are in part a function of how people go about governing themselves. Public choice theory and its application to institutional design can and do influence the preferences of actors.[100]

97. For Mashaw, neorepublicanism is too idealistic to reconcile with most public choice arguments. Pp. 108, 111-18; *see also* Mashaw, *As If Republican*, *supra* note 16 (presenting a stronger case against republicanism).

98. *See* Steven Kelman, *"Public Choice" and Public Spirit*, PUB. INTEREST, Spring 1987, at 80, 93-94.

99. *See* Geoffrey Brennan & James M. Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 187 (1988).

100. "[A]t the birth of political societies, it is the leaders of the republic who shape the institutions but . . . afterwards it is the institutions which shape the leaders of the republic."

Indeed, this is where public choice theory, as a method, raises the most serious difficulties for legal scholarship generally and public law in particular. Mashaw argues that Kelman's neorepublican critique of public choice theory — which alleges that public choice's "[c]ynical descriptive conclusions about behavior in government threaten to undermine the norm prescribing public spirit"[101] — is inadequate. Kelman suggests that if we design public institutions as if people were public-spirited rather than self-interested, then those citizens would emerge (p. 27). Yet Mashaw believes that the endogeneity of preferences adopted by neorepublicans, such as Kelman, simply substitutes one implausible and idealistic view of human nature with another (p. 27). Instead of adopting this outright rejection of public choice's first-order assumption, Mashaw borrows from Buchanan and Brennan's response, urging that "we design institutions to protect us from self-interested political action, while recognizing that such activity may shape our attitudes towards governance" (p. 26).

By eschewing any extra-public-choice-unifying perspective, Mashaw may be truer to public choice methodology than Farber and Frickey. His reluctance to embrace a unifying intellectual perspective of governance, however, broadens the range of knowledge that public choice will yield, while also limiting the ability to deem the knowledge usable. This, for example, probably precludes Mashaw from developing a more complete explanation for when delegation to administrative agencies is desirable. It also potentially weakens Mashaw's ability to further his main thesis — that public choice ideas can be salvaged from those who wish to dismantle government. Without a referent point, usability is a somewhat shallow normative concept. For example, Mashaw's argument in favor of rationality review must look outside public choice for normative insights as to when statutes are not public-regarding. While Mashaw's illustration of how public choice concepts can apply to institutional design is reasonable, lucid, and often convincing, his method fails to make explicit the criteria for deeming "usable" the knowledge public choice arguments yield. As a result, his various applications of public choice to institutional design, though clear and insightful in isolation, are tentative and seem somewhat fragmented when placed together in a book. All that seems to tie them together is their fidelity to public choice ideas, construed broadly to include the tools of positive political theory, a common theme of criticism of the legislature, and Mashaw's cynical realism. No normative framework or perspective organizes the various insights of

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JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 84 (M. Cranston trans., Penguin Books 1968) (1762) (citing the eighteenth-century French philosopher and jurist Montesquieu).

101. Kelman, *supra* note 98, at 93-94.

the book; in the parlance of some legal pragmatists, the beliefs Mashaw's book supports are not woven into a coherent web.[102]

For legal scholars, the application of public choice assumptions, method, and tools raises a special challenge, especially if the scholar is to understand these ideas and take them seriously. For those who wish to use public choice ideas to understand public law, adoption of a unifying intellectual perspective such as neorepublicanism makes it simpler and more practical to glean usable knowledge from these tools. The adoption of a unifying perspective also makes explicit the assumptions of the evaluator's method. A unifying perspective may certainly limit an evaluator's thesis to those who are convinced by the perspective, but it also can assist in articulating explicit criteria for rendering knowledge usable, as well as for deriving a normative baseline for evaluation of the political process.[103] So understood, a unifying perspective is not a synonym or furtive excuse for engaging in grand theory, but instead can bolster a pragmatic approach, such as Mashaw's, by allowing the integration of otherwise disparate interdisciplinary ideas — and the beliefs they support — into a coherent web.

Of course, Mashaw's realist reluctance to adopt an extra-public-choice-unifying perspective may be warranted. Understood on its own terms, public choice theory purports to be nothing more than a Comptean positive science, deploying assumptions about human behavior and an economic methodology to generate descriptive and predictive hypotheses, which can be tested empirically. Perhaps Mashaw, like many economists and political scientists who utilize public choice theory, is simply being true to the positivist method. Mashaw's bête noire, the dismal orthodoxy attributed to public choice, provides a clarion normative theme: government, particularly bureaucracy, is bad. Mashaw's realism, coupled with his fidelity to public choice method, challenges this theme but yields little more than fragmented lessons about public law. Perhaps this is all we can expect from public choice method, applied on its own terms: rampant pessimism or fragmented lessons. Mashaw's realism would leave us content taking the latter from public choice ideas.

Conclusion

For some, public choice theory has come to be associated with antigovernment ideology, wholesale critiques of judicial involvement in governance, cramped textualist interpretation of statutes,

102. *See* Farber, *supra* note 91, at 1336 ("[A]n interlocking web of belief, in which each belief is supported by many others rather than by a single foundational 'brick,' is inherently far sturdier than a tower.").

103. *See* Elhauge, *supra* note 45.

and anti-administrative agency positions. Mashaw's book teaches us that public choice theory has no necessary alliance with such positions. The book is notable for its careful, studied applications of public choice, especially its innovative criticisms of the legislature and its constructive approach towards understanding delegation to bureaucracy. An appreciation of bureaucracy as an institution in our system of democratic governance, as Mashaw urges, is necessary before we can "pursue the public interest by attempting to learn from those who sometimes seem to suggest that it could not possibly exist" (p. 209). *Greed, Chaos, & Governance* challenges us to bring public choice theory to bear on dialogue about public-spirited institutional reform. Hopefully, legal scholars will rise to this challenge, engaging public choice arguments, including Mashaw's, in constructive ways to help us understand the complexities of public law and to weave a coherent web of knowledge about the administrative state.

THE APPEARANCE OF IMPROPRIETY: HOW THE ETHICS WARS HAVE UNDERMINED AMERICAN GOVERNMENT, BUSINESS, AND SOCIETY. By *Peter W. Morgan* and *Glenn H. Reynolds.* New York: The Free Press. 1997. Pp. xiii, 272. $25.

Rameshwar Sharma needed cash to continue his research on two proteins, $alpha_{2A}$ and $alpha_{2GC}$, so he turned to the federal government.[1] At the time he submitted his grant application, Sharma had completed a good deal of work on $alpha_{2A}$ but very little on $alpha_{2GC}$. At some point while typing his forty-six page grant application, Sharma realized that repeatedly typing $alpha_{2A}$ and $alpha_{2GC}$ was annoying. To ease his pain, he created macro keys that he could hit whenever he wished to type either protein. Big mistake. On page twenty-one he hit the wrong key, inserting $alpha_{2GC}$ where $alpha_{2A}$ should have been.

No one on the National Institute of Health (NIH) review panel was fooled — they all knew that if Sharma really had done the work on $alpha_{2GC}$ that his typo seemed to indicate, he would have trumpeted his progress. In addition, the surrounding discussion concerned $alpha_{2A}$.

Quite apart from the typo, the NIH panel denied Sharma's grant application. Had this been all that had happened to Sharma, he would have considered himself lucky. Instead, an anonymous accuser forwarded his application to the Office of Science Integrity (later the Office of Research Integrity (ORI)). After investigation, the ORI determined that his typo constituted scientific misconduct. The gist of the ORI's position was that Sharma was attempting to fatten his chances by fabricating his work product.

Three years later an appeals panel vindicated Sharma, concluding that his typo "was the result of a careless error" (p. 130). In the interim, the federal investigation closed his lab, forcing him to take an unsalaried position at an optometry college in Pennsylvania. He lived in a dorm. He made so little money that he had to pull his two children out of college and he was unable to attend his father's funeral in India. As Sharma himself put it, the entire ordeal had a "devastating effect" on his reputation and his career (p. 129).

Some Orwellian nightmare? Orwellian maybe, nightmare no. In the *Appearance of Impropriety,* Peter W. Morgan[2] and Glenn H. Reynolds[3] present Rameshwar Sharma's splintered reputation and career as what remain after one passes through the enormous buzz

1. This entire story appears in Morgan and Reynolds's book. *See* pp. 128-30.

2. Member, Dickstein, Shapiro, Morin, & Oshinsky LLP.

3. Professor of Law, University of Tennessee College of Law.

saw created by the conjunction of the Ethics Establishment — the bureaucracies that police behavior in several of the largest segments of American society[4] — and the appearance of impropriety standard — the ethical standard those bureaucracies apply to individual behavior. Morgan and Reynolds argue that each component alone has its problems, but that together they are devastating. The potent combination has affected areas other than science, including government, business, and academia. Although the authors are not the first to decry the appearance of impropriety standard,[5] they are the first to analyze it in relation to the institutional context in which it operates, noting how that context magnifies its imperfections.

Despite the book's ambitious sweep, perhaps it is not ambitious enough. For example, Morgan and Reynolds fail to provide any foundation for their discussion by defining what they mean by ethical behavior.[6] More specifically, Morgan and Reynolds fail to supply any one ethical yardstick against which society should measure its members' behavior. The authors flirt with several ethical constructs — the Golden Rule (pp. 37, 109), what amounts to an agency-cost definition (pp. 46, 74), and finally a motivational model or a model that examines the actor's motives (p. 36) — but they stop short of choosing one.[7] To be fair, the authors did not set out to answer the age-old conundrum of what constitutes ethical behavior. But because they fail to ground their discussion in some ex-

4. Morgan and Reynolds identify Ethics Establishments in several areas of contemporary society. For example, in government, there is the independent counsel (pp. 75-80); in business, there is the enormous business ethics industry (p. 100); and in the natural sciences, there is the Office of Research Integrity (p. 127).

5. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 7.1.4 (1986); Cynthia M. Jacob, *A Polemic Against R.P.C. 1.7(C)(2): The "Appearance of Impropriety" Rule,* N.J. LAW., June 1996, at 23; Alex Kozinski, *Teetering on the High Wire,* 68 U. COLO. L. REV. 1217, 1226-27 (1997). *But see* Ann McBride, *Ethics in Congress: Agenda and Action,* 58 GEO. WASH. L. REV. 451, 466-67 (1990) (arguing in favor of the appearance of impropriety standard).

6. For an example of an author struggling with this task in the appearance of impropriety context, see Robert F. Bauer, *Law and Ethics in Political Life: Considering the Cranston Case,* 9 J.L. & POL. 461 (1993) (dissecting the concept of self interest — essentially Morgan and Reynolds's agency-cost model below — in political ethics).

7. It may initially seem possible to shoehorn these three methods into one theory, and, in fact, many philosophers have attempted to do so. *See generally* JOHN HARSANYI, *Can the Maximin Principle Serve as a Basis for Morality?,* A CRITIQUE OF JOHN RAWL'S THEORY *in* ESSAYS ON ETHICS, SOCIAL BEHAVIOR, AND SCIENTIFIC EXPLANATION 37 (Gerald Eberlein & Werner Leinfellner eds., 1976) (seeking to combine Rawls's "original position" with utilitarianism); HENRY SIDGWICK, METHODS OF ETHICS (photo. reprint 1980) (1874) (attempting to synthesize utilitarianism with other ethical methods). Most ethical philosophers, however, now believe that the methods, when developed in detail, lead to very different theories that can diverge sharply in some cases. *See, e.g.,* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 97-100 (1973) (giving examples of the clash between utilitarianism and Golden Rule–type ethics).

plicit definition of ethical behavior, their analysis at times feels superficial.[8]

In the end, the book's analysis inheres largely in its application of the adage "You get what you pay for" to present-day ethical discourse, in effect restating it to read "Ask for appearances, and appearances are what you will receive." It adorns that analysis with anecdotes ranging from the humorous to the outright scary.[9] The book's general argument can be somewhat facile at times[10] and might occasionally leave those desirous of more searching inquiry

8. For example, occasionally the authors seem to argue for an agency-cost model, *see infra* note 14 and accompanying text, by suggesting that inducing ethical behavior is merely a matter of aligning incentives. At one point they suggest that our legislators' incentives deviate from the collective good as a result of special-interest influence. P. 35. They further suggest that we should "engage in a meaningful debate as to which sorts of private influences are acceptable and which are not." *Id.* But even assuming that an agency-cost model is the correct basis for divining an ethical construct, it does not follow that "a meaningful debate" on special-interest influence is desirable or even possible. For in order to distinguish the good special-interest influence from the bad, one needs to define the "public good" — a very difficult task. What is the public good if not what emerges from a fight between special interests? One might argue that even if in general a fight between special interests defines the public good, the process is distorted by the money they infuse into the system. But is this necessarily correct? If the special-interest groups raise their funds from individuals, maybe the dollars they dump into the system are representative of public support. Then again, maybe not. It is certainly possible that the current system is skewed toward the rich. Whatever is in fact the case, the point here is that the authors fail to discuss any of this.

9. The story with which I began this Notice, for example, certainly qualifies as scary. On the lighter side, Morgan and Reynolds recount William Safire's reaction to Senator Biden's "borrowing" some language from British Labour Party Leader Neil Kinnock in one of his speeches during the 1988 presidential race. Biden eventually had to withdraw from the race as a result. That's not the amusing part. What was funny was Safire's account of political plagiarism in general and his own small part in it. Speaking of Biden's speech, he said:

> Maybe my familiarity with rhetorical borrowing has left me insensitive to the shock of recognition. I remember listening to John F. Kennedy's inaugural, with its stirring line "In your hands, my fellow citizens, more than mine, will rest the final success or failure of our course." I had to admire the way Ted Sorensen evoked the rhythm of the line in the Lincoln first inaugural: "In your hands, my dissatisfied fellow-countrymen, and not in mine, is the momentous issue of civil war." (Kennedy subtly corrected Lincoln's redundancy of fellow-countrymen; that was especially astute.) What's wrong with such evocation? Winston Churchill, writing his ringing 1940 speech about defending his island by fighting on the beaches, in the streets, etc., recalled Georges Clemenceau's defiance in 1918: "I shall fight in front of Paris, within Paris, behind Paris." (Clemenceau, in turn, was paraphrasing marshal Ferdinand Foch on Amiens.) That sort of boosting — a less pejorative term than lifting and certainly far from plagiarizing, rooted in the Latin for "kidnaping" — is done all the time.

Pp. 145-46 (internal quotation marks omitted) (quoting William Safire, *No Heavy Lifting*, N.Y. TIMES, Sept. 27, 1987, § 6 (Magazine), at 12). Safire then told on himself. Evidently, when working as a speech writer for Richard Nixon, Safire "boosted" a phrase from Kennedy that he had taken from Adlai Stevenson that Stevenson had in turn lifted from Franklin D. Roosevelt. Safire started to feel a little guilty about it, so he called the author of FDR's speech to apologize. Instead of castigating Safire, the author confessed that he had in turn "boosted" it from a speech by Robert Ingersoll, nominating James Blaine for President in 1876. So much for originality in politics.

10. For example, the authors suggest that one way to foster personal and governmental responsibility is to shrink the federal government's responsibilities, both practically and constitutionally. P. 194. While this may be true, given current debates, it does not appear to be a solution easy, or arguably even possible, to implement.

dissatisfied. Nevertheless, what the book lacks in academic rigor, it makes up for in readability and intrinsic interest, and it leaves the reader with a graphic understanding of the dangers of the combination of the Ethics Establishment and the appearance of impropriety standard.

Part I of this Notice discusses Morgan and Reynolds's views on the appearance of impropriety standard. Part II engages in a similar examination with respect to the Ethics Establishment. Part III outlines the problems the authors identify as springing from the combination of the two. Finally, Part IV discusses some of the solutions that Morgan and Reynolds propose.

I. The Appearance of Impropriety Standard

A. *Subverting the Standard*

The appearance of impropriety standard is just what it sounds like — an ethical standard that focuses on whether behavior *appears* improper, not on whether it is. At the heart of Morgan and Reynolds's arguments rests the plausible proposition that "a preoccupation with mere appearances inevitably leads to the concealment of substantive abuses" (p. 15). The problem springs not from an appearance standard per se but from the misuse that it invites (p. 8). In particular, the authors argue that an appearance standard is vulnerable to two perversions — *Petty Blifil* (pronounced Bliff-full) and *Grand Blifil*[11] — both of which distract us from the underlying substantive behavior.

Morgan and Reynolds use Petty Blifil to "describe the ease with which unscrupulous individuals use our ethical standards to attack relatively innocent individuals with accusations of 'impropriety'" (p. 21). According to the authors, one of the most noteworthy examples of Petty Blifil occurred during the Savings and Loan (S&L) scandal. Federal Home Loan Bank Board Chairman Edwin J. Gray opposed bank deregulation in direct contravention to the wishes of several S&L operators, including Charles Keating. In an attempt to drive Gray out, Keating systematically funneled information on Gray's expense practices to the *Wall Street Journal* and the *Washington Post*. Despite the fact that Gray was following past Bank Board practices, the press accused Gray of "being too close to the savings and loans he was supposed to be regulating" (p. 22). Sure enough, Gray left office, dragging his tattered reputation behind him. Keating, on the other hand, gave large gifts to Mother

11. Morgan and Reynolds borrow the term "Blifil" from a novel by Henry Fielding. *See* Henry Fielding, The History of Tom Jones, A Foundling 615 (Martin C. Battestin & Fredson Bowers eds., Oxford Univ. Press 1975) (1749). Fielding wrote the book as an attack on appearance ethics in England during his own time, the Augustan Age (1660-1750). Blifil, who was adept at manipulating ethical appearances for his own benefit, was Fielding's villain.

Teresa and waged an antipornography war, all of which won him high acclaim. After the S&L edifice collapsed and the dust cleared, however, Keating found himself in jail and the "questions about the appearance of Gray's expenses [were] supplanted by questions about exactly how many hundreds of billions of dollars the American taxpayer lost in what has been called the 'worst public scandal in American history.'"[12]

Because the appearance of impropriety standard opens the door to this type of duplicity, the standard is counterproductive. Rather than encouraging ethical behavior, it can drive those who are truly interested in the public welfare — the Grays of the world — from the process only to make room for those "who are *so* determined to acquire power, or adoration, or whatever, that they will endure just about anything to get it" (p. 24).

Grand Blifil represents the corruption of the appearance standard on a grand scale. Grand Blifil consists of the manipulation of appearances to create the illusion of *institutional* propriety (p. 27). It results in two phenomena. First, requiring proper appearances encourages proper appearances rather than proper substance (p. 28). Second, in an effort to supply the proper appearance, even the best-intentioned may succumb to hiding unsightly facts (p. 29).

As to the first type of Grand Blifil, the authors point to campaign finance reform as one of the better examples (p. 30). In particular, they recount the Illinois state legislature's attempts to control its members' receipt of campaign funding. In response to an episode in which riverboat-gambling lobbyists pulled state representatives off the House floor to give them campaign contributions, the legislature passed a law making it illegal to give contributions on state property. The reason? It looked bad. The result? Lobbyists could continue to contribute as before, just not on state property. The authors argue that this case illustrates Grand Blifil's tendency to "treat[ ] symptoms instead of causes" (p. 35) and to leave the underlying problems unchanged.

As an example of the second type, Morgan and Reynolds offer seasoned government bureaucrats' desire to operate government orally rather than in writing (p. 29). Why do they refuse to write things down? It allows them to protect appearances by ensuring that no "less-than-rosy assessments of how things are going" show up later to splinter the illusion (p. 29). The problem with this practice "is that we cannot fix what we cannot see" (p. 29).

In short, the authors argue, albeit indirectly, that the appearance standard serves society poorly. Rather than triggering more searching inquiry, the authors contend that the appearance standard shifts

12. P. 23 (quoting MARTIN MAYER, THE GREATEST-EVER BANK ROBBERY: THE COLLAPSE OF THE SAVINGS AND LOAN INDUSTRY 1 (1990)).

our focus away from our underlying substantive problems as we each expend our time and energy trying to appear ethical and attempting to show that others do not. Consequently, it leaves those underlying problems unsolved. Finally, as in the case of Edwin Gray, it has a tendency to drive the truly ethical from the process because it can provide such a powerful tool to the unscrupulous.

B. *So Why Do We Have It?*

If the appearance standard is so counterproductive, why do we use it? Morgan and Reynolds provide several explanations for our love of form over substance (pp. 41-46). First, looking at form is easier than looking at substance.[13] Deciding whether some behavior truly comports with our ethical standards is very difficult. One must know or learn about the intricacies of the arena in which the behavior occurred — say, business — to analyze whether what happened was in fact unethical. It is much easier to say: "Hmmm . . . that looks bad" and be done with it.

Second, it is safer (p. 43). As argued above, determining whether behavior is ethical is often complicated. One must analyze the behavior for its substance rather than its appearance. That substance provides others with a foundation from which to attack one's determination. Appearances are like beauty, however — they are in the eye of the beholder. I can say that behavior *appears* improper without fear of someone else substantively proving me wrong. After all, my determination is nothing more than a statement of how the behavior appears to *me.*

Third, the relative nature of the standard rests well within the comfort zone of many Americans (p. 43). Since World War II, America's professional and managerial classes have expanded. Much of the work these individuals do revolves around intangibles — legal concepts, public relations campaigns, and the like. This work makes them comfortable with the ephemeral appearance standard. In addition, even those who are not professionals live in today's entertainment-oriented world — one that focuses heavily on appearance rather than substance. "It is hardly surprising that appearance ethics thrives amid such a culture" (p. 44).

Fourth, it can befriend the truly unethical (p. 44). The appearance standard is double-edged. Not only does it permit an accuser to magnify minor transgressions into major appearance problems,

13. P. 41. In saying that the appearance standard is easier, the authors do not mean to suggest that it is any easier for people to agree on what appears improper. Rather, they mean that it is easier for the critic to form an opinion; in other words, it takes less work and expertise to decide whether behavior looks improper than it does to determine whether behavior *is* improper.

but it also allows the unethical to reduce ethical offenses to mere appearance problems.

Finally, it's comforting (p. 45). Appearance ethics "gives the illusion of control and precision" (p. 45). Substantive analysis is more complex and therefore more uncertain. Whether one has committed a *true* ethical infraction can be difficult to ascertain, leaving the one doing the analyzing uneasy about her decision. The analysis — if one may call it that — of whether something *looks* bad seldom suffers from the same infirmity. In this sense, the fact that the appearance of impropriety standard is easier to administer, as argued above, makes it more comforting to those doing the administering.

C. *Problems with the Analysis*

While Morgan and Reynolds's account is powerful, it has its shortcomings. First, the authors fail to provide a foundational definition of ethical conduct. The absence of such a definition glosses over one of the main reasons why we may have settled for an appearance standard: necessity. We may need a simple, easy-to-understand, but somewhat superficial theory because we cannot agree entirely on what behavior is unethical.

Two examples of the authors' own passing dalliance with various standards illustrate the "necessity" explanation. At one stage in the book, the authors indicate that they define ethical conduct as that which comports with the Golden Rule (p. 109), while in another they define it as that which is consistent with a utilitarian-like[14] agency-cost model[15] (p. 46). The Golden Rule standard is straightforward: "Always treat others as you would like them to treat you."[16] The agency-cost model requires a bit more explanation. It rests on the Millian view that ethical behavior is that which maximizes overall social welfare. Under this view, the individual is entrusted with the task of behaving in ways that maximize societal welfare. In effect, each individual serves as society's agent. Consequently, when an individual behaves in a way designed to increase personal welfare at the expense of societal welfare — creates an agency cost — he acts unethically.

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14. Utilitarianism is "the ethical theory, that the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole." SIDGWICK, *supra* note 7, at 411.

15. Agency costs result from a divergence in incentives between an agent and a principal. In their simplest form, they result when a principal engages an agent to perform some task for him, but the agent acts with his own interests in mind instead. From the principal's perspective, the agent's failure to perform the task exactly as the principal would have wished results in costs to the principal. *See* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 608 (3d ed. 1995) (discussing the "principal-agent problem").

16. *Matthew* 7:12.

These two standards are not necessarily coextensive. Consider wealth redistribution. The Golden Rule perhaps supports redistribution: if I were poor, I would prefer for a wealthy individual to share his wealth with me; therefore, if I am wealthy, I should share my wealth with someone less fortunate. The agency-cost method, on the other hand, may counsel against redistribution. If I value my wealth more than a less fortunate individual, even though he may value wealth as well, redistribution reduces overall social welfare and is unethical.[17]

It is not at all clear that society has chosen one theory of ethical conduct over the other.[18] Without a unitary definition, there is no shared substance on which Morgan and Reynolds can center the reader's attention. Without that substance, we may be relegated to concerning ourselves with whether something looks bad.

Second, Morgan and Reynolds's analysis fails to respond to some of the reasons why society might desire an appearance standard. One may think of the appearance standard as a prophylactic rule.[19] At least in the area of governmental ethics, such a rule might prove useful for several reasons. As an initial matter, unethical conduct is often hidden from view. As the President's Commission on Federal Ethics Law Reform put it with reference to honoraria:

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17. Indeed, matters are still more complex than this discussion would suggest. Some defenders of views similar to the Golden Rule have sharply criticized redistribution. *See* ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974). Meanwhile, some advocates of utilitarianism and its relatives have supported very extensive redistributive measures. *See, e.g.,* PETER UNGER, LIVING HIGH AND LETTING DIE (1996).

18. In fact, there exist several possible candidates; we have been able to settle on none of them as the definitive formulation of ethical conduct. One possibility is Mill's utilitarianism. *See supra* note 14. Another is Kant's theory, which considers motives as they relate to the action an individual takes. His view asks, of that action, whether the rule that the action embodies could be a universal law; if so, the action is morally right. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Beck trans., Robert Paul Wolff ed., Bobbs-Merrill 1969) (1785). Finally, John Rawls's theory of justice as fairness, which employs the maximin criterion, is based on certain aspects of Kant's views. *See* JOHN RAWLS, A THEORY OF JUSTICE (1971); John Rawls, *Kantian Constructivism in Moral Theory, in* MORAL DISCOURSE AND PRACTICE 247 (Stephen Darwall et al. eds., 1997). Indeed, given this uncertainty, there exists great debate in the legal community concerning the relationship of the law and morality. *Compare* Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 9, 14-19 (1969) (arguing for adoption of the Rawlsian approach in the Fourteenth Amendment context) *with* Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution,* 1979 WASH. U. L.Q. 695, 699-700 ("The violent disagreements among the legal philosophers alone demonstrate that there is no single path down which philosophical reasoning must lead. . . . Under these impossible circumstances, courts — perhaps philosophers, also — will reason toward conclusions that appeal to them for reasons other than those expressed. . . . The consequence of this philosophical approach to constitutional law almost certainly would be the destruction of the idea of law.").

19. *See, e.g.,* George D. Brown, *The Constitution as an Obstacle to Government Ethics — Reformist Legislation After* National Treasury Employees Union, 37 WM. & MARY L. REV. 979, 1006 (1996).

> Honoraria paid to officials can be a camouflage for efforts by individuals or entities to gain the officials' favor. The companies that pay honoraria and related travel expenses frequently deem these payments to be normal business expenses and likely believe that these payments enhance their access to the public officials who receive them.[20]

As Morgan and Reynolds themselves argue, the appearance of impropriety is much easier to see than is the impropriety itself.

In addition, a prophylactic rule may dampen the temptation to act unethically.[21] The Supreme Court utilized this rationale in vacating a government contract because of the apparent improprieties of one of the contract's chief negotiators.[22] In discussing whether the negotiator's conduct violated 18 U.S.C. § 434,[23] the Court noted:

> [T]he statute establishes an objective standard of conduct, and that whenever a government agent fails to act in accordance with that standard, he is guilty of violating the statute, regardless of whether there is positive corruption. . . . To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation.[24]

Prophylactic rules recognize that the wrong circumstances can tempt even the most well-intentioned individual to engage in unethical behavior. Such standards respond to this reality by limiting the opportunities for individuals to put themselves in those circumstances.

Finally, and most important, some have argued that the appearance standard — and prophylactic rules like it — do no less than ensure the sanctity of our democracy.[25] As Professor Dennis Thompson explained:

> [I]n the more impersonal world of politics, reality and appearance blend together so that we cannot often tell the difference. Not only can most citizens judge politicians and political institutions only by what they appear to do, but also for many citizens what they appear to do is what they actually do. . . . Citizens have no way of finding out what the reality is, and therefore every reason to assume the

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20. PRESIDENT'S COMMN. ON FED. ETHICS LAW REFORM, TO SERVE WITH HONOR 35 (1989).

21. *See, e.g.*, Brown, *supra* note 19, at 1006.

22. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520 (1961).

23. 18 U.S.C. § 434 (1948) (repealed 1962).

24. *Mississippi Valley Generating Co.*, 364 U.S. at 549-50.

25. *See Mississippi Valley Generating Co.*, 364 U.S. at 561-62; Brown, *supra* note 19, at 1006.

> worst. . . . There is an ethical obligation to protect the appearance of propriety almost as great as to produce its reality.[26]

The Supreme Court has agreed. The Court cautioned that the appearance of impropriety is "an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern . . . ."[27]

II. THE ETHICS ESTABLISHMENT

In Chapters Four through Nine, Morgan and Reynolds chronicle the explosion of the Ethics Establishment; these bureaucracies operationalize the appearance standard and give it wide application. The authors trace the origins of the Ethics Establishment to August 5, 1974 — the day the Nixon White House released the "smoking gun" audio tape.[28] With the tape's release, Americans' distaste for public institutions reached an all-time high. Within months a concerted effort was underway to cleanse them of all unethical conduct (p. 47).

Given its origins, it is not surprising that the Ethics Establishment has most pervasively invaded our governmental institutions. According to the authors, nowhere is this invasion more apparent than with the Independent Counsel (p. 75). In response to Nixon's "Saturday Night Massacre,"[29] Congress created the Independent Counsel. The Counsel, largely free from political control, and enjoying an almost unlimited budget, is appointed by the U.S. Court of Appeals for the District of Columbia Circuit. This combination of political unaccountability and fiscal freedom creates a prosecutor without an off-switch. The Independent Counsel remains free to dig for the most minor infractions — infractions of which almost anyone would be guilty.

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26. *Congressional Ethics Rules: Hearings Before the House Bipartisan Task Force on Ethics,* 101st Cong. 1 (1989) (statement of Professor Dennis F. Thompson, Harvard Univ.).

27. *Mississippi Valley Generating Co.,* 364 U.S. at 562.

28. P. 47. Morgan and Reynolds track a steadily declining trend in Americans' confidence in their public institutions beginning in 1960. P. 49. They mark as the starting point of this trend the U-2 spy plane incident over the Soviet Union. Eisenhower initially lied, claiming the U-2 was a weather plane — a story he later recanted. Nevertheless, they place the birth of the Ethics Establishment with Nixon's release of the "smoking gun" tape — the tape on which Nixon is heard directing one of his aides to push the CIA to pressure the FBI to curtail its Watergate investigation.

29. The "Saturday Night Massacre" occurred when President Nixon, in an attempt to thwart any investigation of the Watergate break-in, fired Special Prosecutor Archibald Cox and every member of his team. *See* G. Gordon Liddy, *Character, Conscience, and Destiny,* 96 MICH. L. REV. 1975, 1979 (1998) (reviewing KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION (1997)) (discussing the Massacre).

The Ethics Establishment has also created its own "Iron Triangle,"[30] consisting of government officials, interest groups, and the press. As calls for additional ethics regulations mounted, the government enlisted the help of its bureaucrats to create and operate new agencies like the Office of Government Ethics and new positions such as Designated Agency Ethics Officials (p. 81). Similarly, congressional staffers can now support or oppose policies and potential appointees by manipulating alleged ethical violations (p. 96). In addition, a network of interest groups, such as the Center for Public Integrity, Common Cause, and Public Citizen, champion ethics in government (p. 90). Finally, after America lionized Woodward and Bernstein, the press quickly learned that exposing ethical improprieties paved the way to fame and fortune (pp. 92-93). Together, these players constitute a self-perpetuating system:

> The relationship between ethics bureaucrats . . . and the Congress and interest groups is marked by constant interaction and trading of favors. Congressional staffers get "dirt" from interest groups who, for example, oppose the confirmation of a particular judge or the implementation of a particular policy. Then they leak the information to journalists, and hold hearings that generate more news and that allow interest groups an opportunity to testify and otherwise get their message out. Journalists investigating the scandals get still more leaks from government officials close to the scandal, often in exchange for not linking those officials to what went wrong — or even occasionally in exchange for defending those officials in columns or on political talk shows. [p. 96]

The end result is an Ethics Establishment that runs on a renewable resource — political opportunism.

The Ethics Establishment did not limit itself to the governmental arena. Rather, it laid down roots in myriad other sectors of society. Beginning with the insider trading scandals of the 1980s, business spawned its own ethics cottage industry (p. 100). Generally, the ethics-in-business movement manifested itself in company ethics codes (p. 101). Currently, roughly ninety percent of America's largest companies have ethics codes.[31]

Similarly, as Rameshwar Sharma's story suggests, the scientific community has embroiled itself in its own Ethics Establishment (p. 127). The criminal justice system, on the other hand, has less created its own Ethics Establishment than been co-opted by it. As the ethics movement has gained steam, we increasingly have criminal-

30. P. 96. The term "Iron Triangle" was first coined to explain the relationship between the Pentagon, Congress, and defense contractors. *See* GORDON ADAMS, THE IRON TRIANGLE (COUNCIL ON ECONOMIC PRIORITIES) (1981).

31. P. 103 (citing Patrick E. Murphy, *Corporate Ethics Statements: Current Status and Future Prospects,* 14 J. BUS. ETHICS 727 (1995)).

ized ethical infractions.[32] Those who just recently would have been subject only to social opprobrium now face jail time.[33]

III. The Conjunction of the Appearance of Impropriety Standard and the Ethics Establishment

Morgan and Reynolds argue that the combination of the Ethics Establishment and the appearance standard results in predictably problematic outcomes. The Ethics Establishment has injected into large segments of American society the relentless search for ethical misconduct. The appearance standard has focused that search on the ephemeral and insubstantial. This combination has gutted those segments in which it operates, kicking up appearance firestorms while leaving the underlying substantive problems largely untouched. Two examples make the authors' point.

First, as noted above, many of America's largest companies are adopting ethics and corporate culture codes. While installing these codes may lead to more ethical companies, the standard practice of purchasing "off-the-shelf" codes in order to create the appearance of having improved the ethical culture may have the opposite effect as these companies spend more precious time and resources on appearing ethical than on being ethical (p. 104). Texaco, for example, produced a booklet entitled *Texaco's Vision and Values* in which it stated "Our employees are our most important resource" and "Each person deserves to be treated with respect and dignity in appropriate work environments, without regard to race, religion, sex, age, national origin, disability or position in the company" (p. 105). Despite these public declarations, Texaco found itself mired in a discrimination suit for the private statements its executives made concerning African Americans and other minorities (p. 105). As Morgan and Reynolds point out, "[i]t's not the code; it's the culture" (p. 105). In other words, it is not the appearance, but the substance.

Second, the Independent Counsel is particularly troublesome when combined with the appearance standard. Unlike the normal prosecutor who is summoned to prosecute a specific crime and who must exercise prosecutorial discretion as a result of his budgetary and temporal constraints, the Independent Counsel prosecutes an

32. Pp. 159-60 (citing John C. Coffee, Jr., *From Tort to Crime: Some Reflections on the Criminalization of Fiduciary Breaches and the Problematic Line Between Law and Ethics*, 19 Am. Crim. L. Rev. 117, 119-26 (1981)).

33. For a good example of the results of this trend to criminalize ethics, see David Grann, *Prosecutorial Indiscretion: Espy and the Criminalization of Politics*, New Republic, Feb. 2, 1998, at 18 ("Espy could be facing more than 100 years in prison for the appearance of impropriety, for simply taking gifts.... The irony is that, before [the independent prosecutor] stepped in, the democratic system had exacted its own eloquent justice without the blunt instrument of the independent counsel or the new ethics laws.").

individual and has almost unlimited resources in trying to *uncover* criminal conduct that until recently was simply unethical (p. 171). Most important, the increasing criminalization of ethical standards and use of the Independent Counsel appear to have confused the American public, as individuals increasingly run ethical and legal imperatives together (pp. 173-74). Instead of strengthening society's ethics, it has led to the widespread belief that whatever is legal must be ethical (p. 174). As a result, one may successfully defend oneself against allegations of impropriety with the claim that one's behavior was not illegal, and our ethical standards erode as people begin to equate ethical standards with arguably more lenient legal standards (p. 174).

IV. The Solutions

In the last chapter of *The Appearance of Impropriety,* Morgan and Reynolds suggest seven rules for righting America's ethics ship. The authors admit that their suggestions are no quick fix (p. 199); indeed, they deride the quick-fix mentality as what brought us appearance ethics in the first place (p. 199). Nevertheless, their proposals are somewhat simplistic. In the end, they amount to little more than: "Quit using the appearance standard." While correct, the advice fails to provide the reader with much more than broad-brush-stroke guidance.

First, Morgan and Reynolds argue that we should "accentuate the negative" (p. 201). In short, "seek out and encourage the reporting of bad news. Not scandal, or improper appearances, but truly bad news about things that aren't working" (p. 201). This way, those who must make decisions will know whether something needs additional attention. Second, keep things "crunchy" (p. 202). Create systems where substantive performance is easy to monitor. "[O]rganizational structures in which someone has to take responsibility for results, and in which results are obvious, produce better behavior than those in which responsibility is diffused, and results are difficult to measure" (p. 202).

Third, "keep your eye on the ball" (p. 203). Relegate the appearance standard to those areas in which its application is beneficial. For example, apply it to groups consisting of specialized individuals who should make nonpolitical decisions, like judges.[34] Fourth, "responsibility is for everyone" (p. 205). A strong ethical

34. For an opinion that the appearance standard may impose costs in the judicial arena as well, see Kozinski, *supra* note 5, at 1226-27 ("I think there is also a converse danger, and that is having a judiciary too far removed from contemporary life, too shielded from the everyday experiences and problems of the community in which they live. Consistent with current notions that judges should avoid even the appearance of impropriety, many of my judicial colleagues tend to cut themselves off from substantial contact with the world around them once they ascend to the bench. While avoiding conflicts of interest is certainly a good thing, it is

system should demand as much from accusers as it does from the accused. Unlike the current system, which is soft on both sides, the new system should focus a critical eye on the behavior at issue and its motivations as well as the motivations of the accuser. In this way, the authors argue, we may be able to avoid stories like Rameshwar Sharma's.

Fifth, "do [not] call virtuous people chumps" (p. 205). Currently, American society seems to believe that it is better to be tricky than virtuous. We constantly reinforce in one another the idea that the way to get ahead is to focus on appearances. In the end, we are left with only appearances. Instead, we should reinforce the belief that virtuous conduct is our touchstone.

Sixth, "if you focus on appearances, you will fail even at that" (p. 206). As you concentrate on appearances to the detriment of substance, the substance erodes, making it impossible to maintain even the appearance of propriety.[35] Finally, "cultivate virtues, rather than appearances" (p. 207). "Cultivating virtue does not simply mean trying to do the right thing. It means trying to be the kind of person who does the right thing" (p. 207). In effect, Morgan and Reynolds argue that if we are successful in this, the need for having ethical standards at all simply will fade away.

CONCLUSION

If the contemporary world of ethics is as Morgan and Reynolds suggest, we all should be more diligent in watching our backsides lest we run the risk of ending up like Rameshwar Sharma. One typo and one enemy could end a career. But while the authors perform admirably in prompting visceral terror in the reader by recounting disturbing anecdote after disturbing anecdote, they are less successful in satisfying the reader's intellectual demands. The authors need to attempt to build their arguments on a coherent definition of ethical behavior. They need to address frontally some of the more legitimate rationales for an appearance standard. Finally, they should devote more time and effort to their proposed solutions. Altering institutional culture is a daunting task, one which they afford too little attention and respect. In the end, the book's shortcomings lie not in what it does, but in what it does not do. Nevertheless, while Morgan and Reynolds may leave some doubt in

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also important to encourage judges to continue living in the real world, rather than sequestering themselves in their chambers.").

35. For instance, during the Watergate investigations President Nixon spent large portions of his time devising plans to ensure that his administration appeared proper. Nixon advised his chief of staff H.R. Haldeman to "stay close to the p.r." P. 61. Of course, Nixon failed even at that and his reputation was destroyed as a result.

the reader's mind about the dangers of the Ethics Establishment and its sword the appearance standard, they leave no doubt in the reader's heart.

— *Jordan B. Hansell*