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Public Choice and the Future of Public-Choice-Influenced Legal Scholarship

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BOOK REVIEW

Public Choice and the Future of Public-Choice-Influenced Legal Scholarship

PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY. By Maxwell L. Stearns.* Anderson Publishing, 1997. Pp. xxxvii, 967, table of cases, table of authorities, index. \$54.00.

Reviewed by *David A. Skeel, Jr.***

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I. INTRODUCTION

By many yardsticks, public choice is the single most successful transplant from the world of economics to legal scholarship.¹ As with other law-and-economics scholarship, critics have attacked its assumptions, its methodology, and its conclusions. But nearly everyone concedes the power of at least some of the insights of public choice, and many of its terms, including "public choice" itself, have become common coinage in the legal literature, even among those who would never overtly rely on law-and-economics perspectives in their work.

Although both Maxwell Stearns's collection of readings and commentary, *Public Choice and Public Law*,² and much of this Review focus principally on public choice in the legal literature, it is useful to begin with a brief description of the emergence of public choice outside of law. The antecedents of public choice date back over two centuries,³ but the modern public choice literature is usually traced to pathbreaking work by Duncan Black in 1948 and Kenneth Arrow in 1951.⁴ Black's work, together with that of several other theorists,⁵ suggested that interest groups will exercise disproportionate influence over the political process. Arrow's work on collective decisionmaking underscored the difficulty of ensuring both fairness and rationality in legislative decisionmaking.⁶

1. As will become clear in my more detailed description of public choice in Part II, public choice actually came from the political science literature as well as from economics. Most public choice scholarship uses economic perspectives to explore the traditional concerns of political science.

2. Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* (Anderson, 1997) ("PCPL").

3. As Professor Stearns notes in his preface, interest group theory can be traced back to David Hume's theory of factions, and the French mathematician The Marquis de Condorcet wrestled in the late eighteenth century with some of the problems of collective decisionmaking described below. *Id.* at xxi.

4. Duncan Black, *On the Rationale of Group Decision-Making*, 56 *J. Pol. Econ.* 23 (1948) (explaining how groups make decisions when members are not in complete accord); Kenneth J. Arrow, *Social Choice and Individual Values* (John Wiley & Sons, 1951). See notes 20-23 and accompanying text for a discussion of Arrow's Theorem.

5. Other foundational contributions include Anthony Downs, *An Economic Theory of Democracy* (Harper & Row, 1957) (arguing that rational voters have little incentive to inform themselves); James M. Buchanan and Gordon Tullock, *The Calculus of Consent* (U. of Michigan, 1962) (exploring the rules governing legislative decisionmaking based on the assumption that decisionmakers act in their own self interest); Mancur Olson, *The Logic of Collective Action* (Harvard U., 1971) (exploring the dynamics of collective action and concluding that small groups are more likely to be effective than large ones).

6. The two aspects of public choice scholarship that I have just described correspond to the two principal branches of public choice, interest group theory and social choice, each of which will be discussed in some detail in Part II. Although I have emphasized the influence of Black's article on the development of interest group theory in the text, it also influenced Arrow's work and is seen as seminal both to interest group theory and to social choice. Black also dealt

Public choice emerged at a time when, although recognizing the influence of interest groups, many leading political theorists assumed that pluralism—often defined as vigorous competition among a variety of interests—would lead to legislation that generally furthered the public good.⁷ If nothing else, public choice cast cold water on this perspective and offered a much more sober view of the political process.

Legal scholars first began to explore these insights in earnest in the mid-1970s. Much of the early legal literature debated the implications of public choice for judicial review. Could, or should, courts attempt to correct for the dysfunctions of the legislative process, and if so, how?⁸ Subsequent commentators pointed out that judicial decisionmaking and market processes may also be subject to interest group pressures and the concerns raised by social choice. These scholars argued that a more complete analysis must realistically consider the nature of each of the relevant institutions.

Public Choice and Public Law is the fourth book, all of which have appeared in the last six years, to explore the implications of public choice for legal issues at a general level.⁹ The first, *Law and Public Choice* by Daniel Farber and Philip Frickey,¹⁰ can be seen as both a general introduction to public choice and an argument that its insights support traditional theories of statutory interpretation. William Eskridge's *Dynamic Statutory Interpretation*¹¹ also focuses on

more directly with social choice concerns in subsequent work. See generally Duncan Black, *The Theory of Committees and Elections* (Cambridge U., 1958). For useful overviews and histories of public choice and its two branches, see Gordon Tullock, *Public Choice*, in John Eatwell, Murray Millgate, and Peter Newman, eds., 3 *The New Palgrave: A Dictionary of Economics* 1040 (Stockton Press, 1987) (discussing interest group theory and social choice, with emphasis on interest group theory); Charles K. Rowley, *Introduction*, in Charles K. Rowley, ed., 1 *Public Choice Theory: Homo Economicus in the Political Market Place* ix (Edward Elgar, 1993) (focusing on interest group theory); Charles K. Rowley, *Introduction*, in Charles K. Rowley, ed., 1 *Social Choice Theory: The Aggregation of Preferences* xi-xvi (Ashgate, 1993) (discussing social choice).

7. Earl Latham, *The Group Basis of Politics* (Cornell U., 1952); David B. Truman, *The Governmental Process* (Knopf, 2d. ed. 1971).

8. I discuss these developments in detail in Part III.

9. Other books that are motivated in significant part by the insights of public choice, but which focus on particular areas of the law include, Mark J. Roe, *Strong Managers, Weak Owners* (Princeton U., 1994) (developing a political theory of separation of ownership and control in corporate governance); William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (Harvard U., 1995) (presenting an interest group analysis of takings).

10. Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (U. of Chicago, 1991).

11. William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (Harvard U., 1994).

statutory interpretation, and uses public choice to argue that judges should be solicitous of underrepresented groups.

While the first two books reflect what might be described as the first wave of public-choice-influenced legal scholarship, the third, *Imperfect Alternatives* by Neil Komesar, can be seen as inaugurating a new trend.¹² Komesar emphasizes the importance of comparative institutional analysis, and criticizes the "single institutional" focus of most existing law-and-economics analysis.

Professor Stearns's *Public Choice and Public Law* differs most obviously from the three books I have just mentioned in that it is a collection of readings, rather than a through-written book. Yet it would be misleading to characterize Stearns's effort as simply a survey of the first two decades of public-choice-influenced legal scholarship. It is that, to be sure, but *Public Choice and Public Law* also offers extensive commentary that both reflects and extends the distinctive, and important, perspective that Stearns has brought to his own work in this area.¹³

I describe *Public Choice and Public Law* in some detail in Part IV of this Review. I begin, however, with the basic (and for many, quite perplexing) question: What exactly is "public choice?"¹⁴ After describing the interest group and social choice branches of the public choice literature, and explaining the relevance of collective action theory, game theory, and positive political theory, I focus in Part III on public-choice-influenced legal scholarship. In addition to elaborating on the brief account given above, Part III considers how legal scholars can, and in my view should, make use of public choice insights in their current and future work. I emphasize two approaches that strike me as particularly promising, which I refer to as "institution reinforcing" scholarship and "framing" strategies. In Part IV, I return to Stearns's book and show how it both provides a valuable resource for existing public choice scholarship and advances the next wave of public-choice-influenced legal analysis.

12. Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (U. of Chicago, 1994).

13. A caveat at the outset. I have known Max Stearns for some time, and have read much of his work (including parts of *Public Choice and Public Law*) in draft, so in some respects I am not an entirely objective reviewer. I have no doubt that I would be equally enthusiastic about his work if I did not know him, however, and I do not hesitate to point out my occasional quibbles with *Public Choice and Public Law* in the analysis that follows.

14. Stearns gives a useful overview of the development of public choice and introduces some of the terminology I discuss in Part II. *PCPL* at xvii-xxvi (cited in note 2). My aim in Part II is to provide a more detailed exposition of the terms and the relationships among them.

II. WHAT IS PUBLIC CHOICE?

A. *The Two Branches of Public Choice*

When a new perspective comes into vogue, it is perhaps inevitable that commentators will employ it in confusingly different, and even inconsistent, ways. This certainly has been true of public choice. The term "public choice" is bandied about so loosely that it can seem extraordinarily unclear just what this analysis is. Is public choice the same thing as "social choice," for instance, or are they somehow different? How does game theory relate to this analysis, and how do concerns about "collective choice" or "positive political theory" fit in?

The discussion that follows offers brief answers to some of these questions. Most importantly, I will define what most commentators mean by "public choice." I then will consider the relationship between public choice and other perspectives that often appear in public-choice-influenced scholarship.

At a general level, the distinctive characteristic of public choice is its "use of economic tools to deal with the traditional problems of political science."¹⁵ Perhaps the most basic of these tools is the assumption of individual rationality. In contrast to much traditional political analysis, public choice assumes that all of the relevant players tend to act in their own self-interest, and explores the implications of self-interest for the legislative and other institutional decisionmaking processes.

The public choice literature thus can, and in my view should, be seen as including any analysis that incorporates or explicitly challenges the self-interestedness premise in addressing institutional decisionmaking processes. The literature that fits within this definition consists of two principal branches. The first can be described as interest group analysis, and the second is social choice.

The central insight of interest group analysis is that concentrated interest groups often benefit at the expense of more widely scattered groups, even if the diffuse group has much more at stake overall.¹⁶ Although this insight is now so familiar that it seems obvi-

15. Tullock, *Public Choice*, in Eatwell, Millgate, and Newman, eds., 3 *The New Palgrave* at 1040 (cited in note 6).

16. For cites to foundational works in interest group theory, see notes 4-5. Subsequent explorations of the relative effectiveness of concentrated groups, as compared to more diffuse ones, include George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.*

ous to many, it was far from obvious when it emerged in the public choice literature. Whereas many theorists assumed that interest group competition tends to produce public-regarding legislation, public choice suggested that self-interested behavior by each of the relevant actors could lead to strikingly different outcomes.

The reasoning is as follows. For a self-interested voter, taking the time to inform herself and to vote intelligently is an unattractive proposition, since the likelihood that her vote will affect the outcome of an election is minuscule. Although voters as a group would benefit if each took the time to vote intelligently, ordinary voters simply do not have an incentive to do so. By contrast, because the members of a concentrated interest group have more at stake with respect to the issues that concern them, they tend both to inform themselves and to participate actively in the political process.¹⁷

The interest group branch of public choice suggests that the distinction between ordinary voters and concentrated interest groups is not lost on legislators. Self-interested legislators are likely to focus principally on getting reelected, since legislators who fail to do so quickly become ex-legislators. Because interest groups are better informed than ordinary voters, and serve as an important source of political funding, legislators have a tremendous incentive to be responsive to interest group perspectives.¹⁸

3 (1971); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J. L. & Econ. 211 (1976); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. Econ. 371 (1983) (arguing that competition between interest groups increases spending on the public good). James Q. Wilson and Michael Hayes developed systematic accounts of Congress based on these distinctions. James Q. Wilson, *Political Organizations* (Basic Books, 1973); Michael T. Hayes, *Lobbyists and Legislatures: A Theory of Political Markets* (Rutgers U., 1981).

17. Those familiar with the literature will recognize this aspect of interest group analysis as based on collective action theory. I describe collective action theory and its relationship with public choice below with a particular emphasis on the contributions of Mancur Olson. See notes 33-36. Although I treat collective action theory separately for expositional clarity, I should note that it is very much a part of the interest group literature.

One of the enduring puzzles of the literature is why, given the lack of incentive to vote, a relatively large number of citizens do in fact vote. Commentators critical of public choice point to this puzzle as evidence of the limitations of its rationality and self-interestedness assumptions. Compare generally Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873 (1987) (describing the literature on voting patterns and criticizing public choice theorists' explanations), with Michael E. DeBow and Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 Tex. L. Rev. 993 (1988) (defending public choice analysis).

18. See, for example, R. Douglas Arnold, *The Logic of Congressional Action* (Yale U., 1990). For a critique of this reasoning, arguing that legislators are motivated by factors such as ideology and advancement within Congress, rather than reelection alone, see Kay Lehman Schlozman and John T. Tierney, *Organized Interests and American Democracy* (Harper & Row, 1986).

Like the interest group literature itself, I have focused principally on the advantages interest groups have in the legislative process. But this analysis, and in particular its self-interest assumption, also has generated important insights into related areas such as the incentives of agency bureaucrats and, as we shall see in Part III, the nature of the judicial process.¹⁹

The second branch of public choice is social choice. At the heart of much of the recent social choice literature is Kenneth Arrow's famous impossibility theorem. Arrow's Theorem demonstrates that it is impossible to design a system that will always both aggregate the preferences of a group of decisionmakers in a rational fashion, and satisfy a short list of fairness requirements.²⁰ If there is a particular kind of inconsistency, referred to as multi peakedness, across the preferences of a group of decisionmakers (each of whose individual preferences is wholly consistent), the voting procedure will cycle endlessly among the possible outcomes unless one or more of the fairness requirements is relaxed.²¹

To see this, assume that Voter 1 prefers outcome A to B, and B to C; Voter 2's preferences are B, C, A; and Voter 3's ranking is C, A,

19. On agency bureaucrats, see William A. Niskanen, Jr., *Bureaucracy and Representative Government* 36-42 (Aldine-Atberton, 1971) (arguing that bureaucrats seek to maximize their agency's budget). On judges, see Richard A. Posner, *What do Judges Maximize? (The Same Thing Everybody Else Does)*, 3 S. Ct. Econ. Rev. 1, 28-30 (1993) (analogizing judicial decisionmaking to adhering to the rules of a game). Public choice theorists have had far more difficulty modeling bureaucrats' and judges' behavior, as compared to legislators and private economic actors, due to the absence of a compelling theory as to what bureaucrats and judges maximize. Public choice insights have also been applied to the market process. See, for example, Komesar, *Imperfect Alternatives* at 98-122 (cited in note 12).

20. See generally Arrow, *Social Choice and Individual Values* (cited in note 4). For important explorations of Arrow's Theorem and of the overall insights of social choice, see William Vickrey, *Utility, Strategy, and Social Decision Rules*, 74 Q. J. Econ. 507, 508-12 (1960) (developing list of fairness requirements from Arrow's analysis); William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (W.H. Freeman, 1982) (social choice analysis of the effects of voting rules and difficulties in aggregating preferences); Dennis C. Mueller, *Public Choice II* (Cambridge U., 1989) (leading text and survey of interest group theory and social choice).

21. Briefly, the fairness terms are "unlimited range," which requires that no individual preference ordering be held off-limits; "independence of irrelevant alternatives," which requires that each decisionmaker adhere to her actual ordinal ranking of the alternatives (rather than voting strategically); "nondictatorship," which precludes any one individual's preferences from trumping those of others; "universality," which requires that no possible preference ordering be precluded; and "unanimity," or the "Pareto postulate," which requires that the process honor any preference held by all of the decisionmakers. See David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 Va. L. Rev. (forthcoming February 1997) (manuscript at 22 n.45, on file with the Author) (citing Vickrey, 74 Q. J. Econ. at 507 (cited in note 20)). See also Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L. J. 1219, 1247-52 (1994) (describing the criteria of Arrow's Theorem in detail).

B. In a pairwise vote between A and B, outcome A would prevail (with Voter 1 and Voter 3 voting for A). Outcome C would prevail over A in a similar vote (on the strength of votes from Voter 2 and Voter 3). But, in a third vote between C and B, B would prevail, despite the fact that it loses to outcome A, which C defeats. On closer consideration, it quickly becomes clear that none of the three options can defeat the other two in pairwise voting, and that any voting outcome is thus unstable. This cycling occurs because the preferences are "multi-peaked." Preferences are multi-peaked only if the decisionmakers not only disagree about which choice is best (or second best or worst), but also disagree about the relationship among the choices. If their preferences were arrayed from smallest to largest, or conservative to liberal, the problem would disappear. Cycling would not occur even if the decisionmakers each chose a different first choice.²²

Much of the recent literature has focused on the trade-off posed by the possibility of multi-peaked preferences. A voting institution that adheres to Arrow's fairness criteria will cycle endlessly in these circumstances, but relaxing one or more of the requirements introduces the possibility of path dependence and path manipulation. To give a familiar example, Congress's prohibition against reconsidering an outcome that has been defeated in an earlier vote counteracts the risk of cycling. In the illustration above, for instance, outcome C would prevail under this rule, since outcome B could not be reintroduced after it lost to outcome A. Yet the cost of eliminating cycling is that the order of voting determines the outcome—the result is path dependent. The rule, therefore, vests significant power in anyone who has the ability to manipulate the order of the voting.²³

The discussion thus far suggests a rough rule of thumb for distinguishing between the interest group and social choice branches of public choice. Many of the important contributions of interest group theory stem from the insight that not all voters are equal due to

22. To see this, assume in the illustration above that A is a conservative position, B is moderate, and C liberal. If this were true, voters 1 and 2, as a conservative and a moderate, might keep the preference orderings described earlier (Voter 1 = A, B, C; Voter 2 = B, C, A). Voter 3, as a liberal, would probably change her ordering to C, B, A, since her second choice, after the liberal outcome, would no doubt be the moderate one. If we make this single shift in the voters' preferences, the cycling problem disappears. Option B now defeats both A and C in pairwise votes (voters 2 and 3 prefer B over A, and voters 1 and 2 prefer B over C).

23. For an excellent discussion of path dependence and agenda control, and the effect that factors such as congressional committee structures have, see Riker, *Liberalism Against Populism* at 137-95 (cited in note 20).

the organizational advantages enjoyed by members of a concentrated group. Social choice, on the other hand, explores the dynamics of voting under conditions where voters *are* at least initially assumed to have an equal voice. In fact, the literature on cycling shows that voting pathologies can emerge even if each voter participates fully.²⁴

Despite this distinction, it is important to emphasize that the line between interest group theory and social choice is a rough one, and it quickly blurs in both directions.²⁵ The two branches of public choice analysis share a common history, and commentators often employ both in their efforts to understand a particular voting institution. Consider the extensive literature on logrolling. From a social choice perspective, logrolling may act as a solution to cycling concerns, since legislators avoid cycling by trading votes on matters they are relatively indifferent about for votes on matters about which they care deeply. Interest group theory raises questions as to whether the "solution" is an attractive one, however, given that logrolling could enhance interest groups' ability to obtain private benefits from the legislative process.²⁶

An additional source of confusion is that the term public choice is used in two ways. I have characterized public choice as a general term comprising both interest group theory and social choice, and many commentators do likewise.²⁷ But other commentators use public choice more narrowly, as a synonym for interest group analysis.²⁸ When a commentator indicates that she will tell a "public

24. In addition to cycling, arguably the most prominent other social choice insight is the Median Voter Theorem. The Median Voter Theorem suggests that the candidates in two party (or two issue) voting contests will edge toward the middle in an effort to capture a majority of votes. In consequence, the position of the median voter will prove pivotal. This is precisely the effect that our changes to the cycling illustration produced in note 22. The theorem has given rise to a vast literature exploring the insight and the conditions under which it does or does not hold. For an overview, see Mueller, *Public Choice II* at 65-74, 180-82 (cited in note 20).

25. Other commentators have suggested that interest group theory is descriptive rather than normative in nature, whereas social choice is inherently normative—focusing on how voting procedures *should* function. See, for example, Rowley, *Introduction*, in Rowley, 1 *Public Choice Theory* at ix (cited in note 6). Although there is an initial plausibility to this distinction, it quickly breaks down. Interest group theory is increasingly normative in nature, as Buchanan and Tullock's work on constitutions demonstrates. For an early example, see Buchanan and Tullock, *The Calculus of Consent* (cited in note 5). Further, much social choice work is descriptive. See, for example, Stearns, 103 *Yale L. J.* at 1219 (cited in note 21).

26. For a useful discussion of logrolling, and its potential for either perverse or benign effects, see Mueller, *Public Choice II* at 82-94 (cited in note 20).

27. Mueller's excellent book on public choice theory is an example. *Id.* at 1-6 (describing the coverage of the book, which includes both social choice and interest group theory).

28. Although Professor Stearns appears to define public choice in the preface as comprising both social choice and interest group theory, see, for example, *PCPL* at xix (cited in

choice story" about a given issue, it is often this narrower definition that she has in mind.

B. Related Concepts

Having explored in some detail what we mean when we talk about public choice, we still must consider how several related modes of analysis interact with public choice. Two of the most important are game theory and collective action theory. I will focus on these, then conclude with a brief description of the emerging literature employing "positive political theory."

Game theory refers to the economic analysis of strategic interaction—the choices that individuals make when they recognize the outcome depends in part on the decisions made by others.²⁹ The "game" in game theory, then, is the interaction between two or more independent decisionmakers, each of whom attempts to account for the actions of the others. Game theoretic analysis formalizes this interaction by precisely specifying the players involved, the information available to each at any given point, and the different outcomes that would result from each set of "moves" the players might make.³⁰

The most familiar game theory insight is the prisoners' dilemma. In the prisoners' dilemma, two prisoners who have committed a crime and cannot communicate with one another must each decide whether to confess. Although the prisoners would be better off if neither confessed than if both confessed, the best outcome results from confessing when the other prisoner refuses to do so. As a result, both have an incentive to confess and the game often results in the least desirable outcome—two confessions.³¹

note 2), he treats public choice and social choice as distinct perspectives—thus equating public choice with interest group theory—elsewhere in the book. See, for example, *id.* at 556 (distinguishing "teachings of public choice" and "teachings of social choice").

29. Stephen W. Salant and Theodore S. Sims, *Game Theory and the Law: Ready for Prime Time?*, 94 *Mich. L. Rev.* 1839, 1846-47 (1996).

30. For those interested in exploring game theory further, two excellent book reviews and the books they discuss are a good starting point. See *id.* (reviewing Douglas G. Baird, Rebert H. Gertner, and Randal C. Picker, *Game Theory and the Law* (Harvard U., 1994)); Ian Ayres, *Playing Games with the Law*, 42 *Stan. L. Rev.* 1291 (1990) (reviewing first edition of Eric Rasmusen, *Games and Information* (Basil Blackwell, 1989)). See also Robert J. Aumann, *Game Theory*, in John Eatwell, Murray Millgate, and Peter Newman, eds., 2 *The New Palgrave: A Dictionary of Economics* 460 (Stockton Press, 1987) (providing a history of game theory). Another useful introduction is David M. Kreps, *Game Theory and Economic Modeling* (Clarendon Press, 1990).

31. The literature on the prisoners' dilemma is legion. For an overview, see Anatol Rapaport, *Prisoner's Dilemma*, in John Eatwell, Murray Millgate, and Peter Newman, eds., 3 *The New Palgrave: A Dictionary of Economics* 973 (Stockton Press, 1987). Professor Stearns also provides a useful discussion in *PCPL* at 119 (cited in note 2).

The irony of the prisoners' dilemma—that the actions of individuals behaving in their own best interests can produce outcomes that are undesirable for all of them—has led to valuable insights in a wide range of areas. One of the most important is in public choice. Recall the interest group insight that diffuse groups tend to fare poorly in the legislative process. The principal reason for this is that, while the members of a diffuse group might be better off if each participated in an informed fashion, each member has little incentive to do so. In other words, diffuse groups tend to face a debilitating prisoners' dilemma problem. Interest group analysis thus depends in important respects on a concept taken straight from game theory.

In contrast, the central insight in social choice theory, Arrow's Theorem, does not involve game theory in its initial formulation. The principled voting requirement precludes voters from considering the preferences and likely actions of other voters, thus ruling game theoretic interactions out of bounds.³² Yet once we move beyond the initial formulation—as we must, given that *no* institution can both satisfy the fairness requirements and guarantee rational outcomes—strategic interaction quickly reenters the picture. The agenda control and strategic voting concerns that have animated much of the social choice literature are classic examples of strategic interaction, and are particularly amenable to game theoretic analysis.

As should be clear by now, game theory is a useful tool in any context where we wish to consider the nature of strategic interaction between two or more decisionmakers. Because strategic interaction is integral to much of public choice, it is not surprising that we find so much game theoretic analysis in the public choice literature. The second term we need to fit into our picture is collective action—not to be confused with the misleadingly similar term “collective choice.”³³ As with game theory, we can see the relevance of collective action theory most easily by focusing on the interest group branch of public choice. Recall that the prisoners' dilemma from game theory is a

32. This criterion, which is usually characterized as the “independence of irrelevant alternatives,” requires that the voters consider only their preferences with respect to a given vote, without taking other possible votes into account. See note 21 for a list of other relevant criteria.

33. “Collective choice” is a term some commentators use to characterize the literature I refer to as social choice. See, for example, Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. Rev. 1, 6-9 (1991) (providing that collective choice theory assumes that each individual has an equal vote). Collective choice can thus be seen as a synonym for social choice. I have used social choice because most commentators do likewise, and because it seems at least marginally less confusing.

useful tool for explaining the barriers that often prevent large groups from acting in concert.³⁴ The collective action literature starts from precisely the same insight, that free riding prevents many groups from acting collectively.³⁵

Collective action theorists take the obstacles to collective action as their starting point, and ask how it is that some groups do succeed in acting collectively. These theorists have identified two factors that seem particularly important to successful group action. First, smaller groups have a significant advantage as compared to large ones, both because members may have a larger individual stake in successful action and because members can more easily police one another against free riding. Second, groups that have access to "selective incentives"—that is, mechanisms for rewarding or punishing members for contributing or failing to contribute to the collective action—are more likely to prove effective.³⁶

A moment's reflection will make clear that collective action analysis is central to the distinction between concentrated and diffuse groups in interest group analysis, and to any effort to predict which groups will prove successful in legislative and other decisionmaking processes. The collective action literature is less immediately relevant to social choice, since social choice tends to focus on the voting decisions made by isolated individuals within a decisionmaking process. Yet as soon as we move beyond stylized assumptions about the voting process, and integrate interest group questions such as why some voters vote and others don't into our social choice analysis, collective action concerns come back into play.

In attempting to relate game theory and collective action to public choice, it is tempting to suggest that the former apply broadly to aspects of legislative, market, and judicial behavior, whereas public

34. See note 31 and accompanying text.

35. Collective action theory thus depends in its very conception on a game theoretic insight.

36. See Mancur Olson, *Collective Action*, in John Eatwell, Murray Millgate, and Peter Newman, eds., 1 *The New Palgrave: A Dictionary of Economics*, 474, 474-75 (Stockton Press, 1987). Olson's book *The Logic of Collective Action* (cited in note 5), was the pioneering work, and Olson has been the guiding light of the discipline. The other most prominent theorist is Russell Hardin. See Russell Hardin, *Collective Action* (Johns Hopkins U., 1982). Hardin emphasizes that it is the concentration of members in a group, rather than their number that determines the group's ability to organize. *Id.* at 40-41. He also contends that successful collective action often results from political entrepreneurship, or as a by-product of other activity by a group. *Id.* at 35-37 (discussing political entrepreneurship); *id.* at 31-35 (discussing by-product).

choice is uniquely concerned with the legislative process.³⁷ Yet this would be a mistake. Although public choice has focused primarily on legislative behavior, it increasingly has been employed to explore courts and markets as well, as I will consider in much more detail in Part III.

Before we turn to the applications of public choice, however, we should briefly consider one final term: positive political theory. Positive political theory uses game theory to explore relationships among decisionmaking institutions such as Congress, administrative agencies, and the courts. It differs from public choice in that it focuses on the strategic interactions among political decisionmaking institutions, and on institutional structures, rather than on the individuals who comprise the institutions. Positive political theory does take account of the problems of multi-individual decisionmaking that preoccupy collective action theory and the two branches of public choice. But it does so indirectly. Positive political theory incorporates these considerations into its characterization of an institution. It then takes intra-institution concerns as a given, in a sense, in order to emphasize strategic interactions between and among institutions.

In short, this new perspective makes direct use of game theoretic analysis; though it has a different focus than either branch of public choice, it is closely connected to both.³⁸

III. PUBLIC CHOICE AND THE LEGAL LITERATURE

As is usually the case when legal academics draw on nonlegal insights, public choice did not enter legal discourse until well after it had captured the attention of economists and political scientists. It was not until the mid-1970s that legal scholars first explored the implications of public choice, even though many of the seminal insights of both interest group theory and social choice had been in place for over a decade. Since then, public choice has taken the legal

37. Notice that this distinction is to a certain extent implied by the frequent description of public choice—the description with which I began the analysis of this Part—as the use of economic approaches to explore the concerns of political science.

38. Important contributions to this emerging literature include William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L. J.* 331 (1991) (describing interaction between Congress, courts, and the President); John A. Ferejohn and Barry R. Weingast, *A Positive Theory of Statutory Interpretation*, 12 *Int'l Rev. L. & Econ.* 263 (1992) (analyzing interaction between the Supreme Court, the Congress enacting legislation, and the current Congress in the context of Court decisions based on statutes).

literature by storm. In this Part, I will briefly describe the diffusion of public choice into the legal literature. I then will speculate as to the future of public-choice-influenced legal scholarship.

A. *Law and Public Choice: The First Wave*

The first wave of public choice inquiry in the legal literature can be seen as a classic illustration of legal academics sticking to their area of comparative advantage. Whereas much of the extant economic and political science public choice literature focused on the legislative process, legal academics asked what the implications of public choice are for the legal system.

The first wave took as its starting point the social choice and interest group insights that the legislative process cannot guaranty outcomes that are both fair and rational, and that concentrated interest groups will exert disproportionate influence over the process. The obvious issue raised by the prospect of legislative dysfunction was the proper role for judges to play. How should public choice affect our view of the nature of statutory interpretation and, more generally, of judicial review?

Three commentators prompted a vigorous debate on this question by offering distinct visions of statutory interpretation in a post-public choice world. The starkest proposal was that of Judge Frank Easterbrook. Judge Easterbrook suggested that courts not only should recognize the role of interest groups in the political process, but that they also should enforce any interest group bargains reflected in the legislative product.³⁹ Rather than trying to "correct" the process in some way, judges should interpret statutes in accordance with the realities of how they were enacted. Judge Richard Posner initially staked out a position similar to Judge Easterbrook's,⁴⁰ though he subsequently shifted his focus to a perspective less obviously tied to the insights of public choice.⁴¹

39. Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 14-18 (1984). See also Frank H. Easterbrook, *Statutes' Domains*, 50 U. Chi. L. Rev. 533, 552 (1983) (arguing that courts should refuse to apply statutes to issues not addressed by the terms of the statute).

40. See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. Chi. L. Rev. 263, 284-85 (1982) (arguing that courts should defer to interest group influence rather than find a constitutional right where constitutionality is unclear). See also Rubin, 66 N.Y.U. L. Rev. at 52, 62 n.218 (cited in note 33) (contrasting Posner's current, "imaginative reconstruction" approach with his earlier public-choice-influenced work).

41. Judge Posner's later view suggests that judges should view their role as extrapolating from legislators' incomplete communications. Posner's current position is thus a variation of traditional theories of statutory interpretation that call for judges to fill in statutory gaps.

Professor Jonathan Macey responded to Judge Easterbrook and to Judge Posner's initial position by proposing a more independent, and more aggressive, role for courts. While agreeing that courts should enforce clear interest group bargains, Professor Macey contended that courts should refuse to enforce "implicit" bargains—that is, interest group deals that legislators disguise by defending the provision in question in public-regarding terms. Professor Macey contended that by refusing to enforce implicit bargains, courts could raise the costs to interest groups of obtaining private interest legislation, and in doing so moderate the influence of interest groups.⁴²

In addition to their political conservatism, each of the commentators shared a view that the pessimistic insights of public choice do, in fact, accurately describe the legislative process. Not surprisingly, this perspective prompted a backlash of sorts. Most prominently, Daniel Farber and Philip Frickey acknowledged that the public choice account of legislation is accurate in important respects, but contended that many of the dire conclusions of public choice are overstated.⁴³ In their view, judges should simply police the political process for obvious defects, and should otherwise let the political process run its course.

Although generally sympathetic to public choice, William Eskridge shared some of Professors Farber and Frickey's concerns as to its limitations. Professor Eskridge's model of statutory interpretation called for judges to show solicitude for underrepresented minorities when they exercise judicial review.⁴⁴ Cass Sunstein has used public choice insights in somewhat similar

Richard A. Posner, *The Federal Courts* 286-93 (Harvard U., 1985); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 817 (1983) (arguing that imaginative reconstruction based on incomplete legislative intent is the proper judicial methodology rather than application of traditional canons); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179, 189-90 (1986-87) (arguing that proper judicial interpretation involves judicial action rather than inaction when judges are faced with an incomplete or ambiguous statute).

As noted in the text, Judge Posner's current view is only loosely tied to public choice. I include it both because Judge Posner describes it as a continuation of his interest group analysis, see Posner, 50 U. Chi. L. Rev. at 800 (cited in this note), and because Posner has played a prominent role throughout the debate.

42. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 Colum. L. Rev. 223, 250-56 (1986).

43. Farber and Frickey, *Law and Public Choice* at 61-62, 153 (cited in note 10).

44. Eskridge, *Dynamic Statutory Interpretation* at 294 (cited in note 11).

fashion, and has argued that courts should interpret statutes and the Constitution so as to curb interest group excesses.⁴⁵

Despite the sophistication of the debate, nearly all of the proposals suffered from a single, obvious weakness: in striking contrast to their sober portrayal of legislators, the proposals tended to assume that judges are somehow above the fray and can be wholly objective in interpreting the statutes that come before them. Yet there is no reason to believe that the judicial process is immune from interest group activity and the other kinds of distortions that characterize legislation. Once we subject judges to the same public choice scrutiny previously reserved for legislators, it becomes much more difficult to blithely assume that statutory interpretation can counteract the problems of legislative decisionmaking.⁴⁶

Interestingly, the literature on the evolution of the common law has proceeded on a somewhat analogous track, with overly optimistic early accounts giving way to more realistic assessments of the judicial process. Starting in the early 1970s, Judge Posner contended that common law rules tend to become efficient over time, due in large part to judges' unarticulated preference for efficient, rather than inefficient, rules.⁴⁷ Other commentators argued for the efficiency of the common law on other grounds.⁴⁸ Yet the differential interests of

45. See, for example, Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 478-79 (1989) (suggesting courts should and sometimes do aggressively construe statutes where concentrated interest groups might otherwise undermine their implementation); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1689-93 (1984).

For other prominent articles critical of the assumptions and use of public choice, see Richard H. Pildes and Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121 (1990) (criticizing the use of social choice); Rubin, 66 N.Y.U. L. Rev. at 1 (cited in note 33) (criticizing public choice's rationality assumption as too narrow an account of legislators' behavior and arguing for a "comprehensive rationality" approach).

46. For one of the best, and most sustained, arguments along these lines, see generally, Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 Yale L. J. 31 (1991).

47. Richard A. Posner, *Economic Analysis of Law* 320-28 (Little, Brown, 1973). Posner has restated this claim in subsequent editions of his treatise. See, for example, Richard A. Posner, *Economic Analysis of Law* 520-21 (Little, Brown, 4th ed. 1992) (stating that judges' "aloof disinterest" in the outcome of cases replicates the invisible hand of the market). See also William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Harvard U., 1987) (attempting to show efficiency of tort law empirically).

48. See Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. Legal Stud. 51, 53-57 (1977) (arguing that litigation by groups with a long-term interest in precedent can lead to efficiency); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. Legal Stud. 65, 66-75 (1977) (arguing that more frequent litigation of inefficient rules prods common law toward efficiency). For an excellent review of the literature, see Rebert D. Cooter and Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. Econ. Lit. 1067, 1091-97 (1989). In contrast to Posner's view, which focuses on judges, much of the

different kinds of litigants, and other biases in the cases that go to trial, suggest that any tendency toward common law efficiency is likely to be, at most, a weak one.⁴⁹

The first wave of public choice scholarship has thus complicated, rather than simply clarified, our understanding of the roles of legislators and judges. The extent to which interest group influence and the distortions identified by social choice undermine the legislative process remains unclear. In addition, the ability of the judiciary to counteract these influences on legislative decisions is open to question. The obvious next step is to engage in a more nuanced comparison of decisionmaking institutions. As we shall see, this raises intriguing questions as to the future of public-choice-influenced legal scholarship.

B. *Catching the Next Wave*

It seems safe to say, as I have just noted, that the next wave of public choice scholarship will reflect an increasing interest in comparative institutional analysis. Rather than simply identifying the flaws of a particular institution, public-choice-influenced legal scholars will consider the comparative attributes of each of the relevant institutions.⁵⁰

Evidence of just such a trend already exists. A recent book by Neil Komesar contends that there is an urgent need for comparative

other literature, including Rubin and Priest, has argued that the litigation process tends toward efficiency even if judges are not themselves efficiency minded. For a critique, see Gillian K. Hadfield, *Bias in the Evolution of Legal Rules*, 80 *Geo. L. J.* 583, 584-85, 594-98 (1992) (distinguishing between "invisible hand" approaches and those based on judges' motivations, and attempting to refute the latter).

49. See, for example, Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 *U. Pa. L. Rev.* 1643, 1693-94 (1996) (arguing that litigants typically have little regard for the social costs imposed by inefficient rules).

This is not to say that public choice influences affect courts to precisely the same extent as they do legislatures. Federal judges do not face the same reelection pressures as legislators, for instance, and thus may be somewhat less susceptible to interest group pressure. But they are not immune. See, for example, Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 *U. Pa. L. Rev.* 1111, 1147-53 (1991) (stating that specialized courts are more susceptible to capture than generalized courts).

50. For an interesting article detecting an increasing interest in institutional analysis in areas ranging from critical theory to law and economics, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 *Harv. L. Rev.* 1393, 1403-11 (1996). Although I share Rubin's view as to the importance of nuanced institutional analysis, I am less optimistic that this trend will unify legal discourse to any meaningful extent.

institutional analysis in order to counteract the distortions of single institution analysis in law-and-economics scholarship.⁵¹ Professor Komesar's transaction costs model emphasizes the interests that affected individuals or groups have, their costs of participation, and how these factors change as we shift our focus among markets, the legislative process, and the judicial system.⁵²

With the enhanced sensitivity to comparative institutional analysis, we can expect to see increasingly sophisticated applications of public choice insights in the legal literature. Ironically, however, existing comparative analysis has tended to fall into precisely the same trap that its advocates criticize: the assumption that there exists an objective, unbiased context where institutional distortions can be corrected. Thus, comparative analysis often begins with a nuanced assessment of the respective institutions, then shifts to a prescriptive mode whose proposals depend on implementation by an unbiased decisionmaker. Most frequently, the analysis awards this status to courts, whose limitations are ignored when it comes time to act on the insights of the comparative analysis.⁵³

It is easy enough to see the reason for this oversight. Because legal scholarship is at its heart prescriptive, comparative analysts feel a natural urge to progress from descriptive analysis to proposals for change.⁵⁴ In doing so, however, they face a strong temptation to forget the real world limitations of the institutions with which they are concerned.

The obvious antidote to this problem is to pursue the analysis all the way down—that is, to resist the temptation to address correctives to a hypothetically unbiased decisionmaker. Yet this poses an intriguing dilemma for future public choice scholarship. Given the

51. Komesar, *Imperfect Alternatives* (cited in note 12).

52. One of Komesar's principal illustrations is tort reform. Whereas corporate tortfeasors are well represented both in the judicial and legislative contexts, tort victims have effective representation only in the courts. This is because the possible returns to *potential* tort victims are too low, and their costs too high, to justify organizing to lobby legislatures. *Id.* at 171-77. Only after a tort victim is injured, and considers filing suit, are her stakes high enough to justify action. *Id.* In view of these facts, Komesar suggests (although only tentatively) that the decision whether to limit tort damages may be more appropriately made by courts than legislatures. *Id.* at 194-95.

53. Thomas Merrill has criticized Komesar's analysis in these terms. Thomas W. Merrill, *Institutional Choice and Political Faith*, J. L. & Soc. (forthcoming 1997) (manuscript at 61-65, on file with the Author) (reviewing Komesar, *Imperfect Alternatives* (cited in note 12)).

Although courts, like legislatures, are imperfect, they face different pressures and may have a comparative advantage in some respects. Merrill suggests that there are limits to how much advantage an interest group may obtain by outspending its opponent in litigation. *Id.* at 29-30.

54. See Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 Mich. L. Rev. 1835, 1847-53 (1988).

typically prescriptive nature of legal scholarship, what role can the next wave of public choice literature, with its enhanced sensitivity to institutional limitations, play? What can so relentlessly descriptive an analysis aspire to?

In the following sections, I will suggest two ways in which the next wave of public choice scholarship can perform an important prescriptive function.

1. The Institution-Reinforcing Role of Public Choice

The first role that institutionally nuanced public choice scholarship can play might be described as "institution reinforcing." What I mean by this is that descriptive public choice analysis may offer a novel explanation of an existing institution, an explanation that reinforces rather than undermines the normative validity of the institution.⁵⁵

One of the best recent examples comes from Professor Maxwell Stearns's own work on standing doctrine. Constitutional law scholars have for years criticized standing doctrine as, among other things, a mechanism the Supreme Court uses to avoid deciding difficult issues on the merits. As the Court's invocation of standing has increased, so have the complaints that its use disguises the real reasons for the Court's decisions.⁵⁶

Drawing on the insights of the social choice branch of public choice, Professor Stearns has suggested a different explanation of standing. Professor Stearns's account begins with the observation that the Court faces the same problems, such as the risk of cycling or of path dependence, as other collegial decisionmaking bodies.⁵⁷ Moreover, because the Court must resolve the cases it hears, it does

55. Notice that successful institution-reinforcing scholarship may therefore succeed in generating novel, non-intuitive insights about the effects of a given regime. For a discussion of this in other law-and-economics contexts, see Jason Scott Johnsten, *Law, Economics, and Post-realist Explanation*, 24 L. & Soc. Rev. 1217, 1227 (1990) (reviewing book by Steven Shavell and noting this quality in the book).

56. See, for example, Louise Harmon, *Fragments on the Deathwatch*, 77 Minn. L. Rev. 1, 61 n.120 (1992) (discussing the Court's avoidance of constitutional questions).

57. Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309, 1335-50 (1995). See generally Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. Pa. L. Rev. 309 (1995) (providing empirical support for Stearns's social choice theory applied to Supreme Court decisions). Judge Easterbrook was the first legal commentator to view the decisionmaking of collegial courts through the lens of social choice. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 813-32 (1982).

not have the option of evading these perversities by simply doing nothing, as legislators can in the event their preferences cycle. Professor Stearns argues that for much of the Court's history, this has not been a problem, since the justices have tended to hold single-peaked preferences—usually, preferences arrayed along a single spectrum from left to right. But the Court's membership and the issues coming before it have increased in heterogeneity, which has magnified the likelihood that they will have multi-peaked preferences.⁵⁸

The emergence of multi-peaked preferences dramatically increases the risk of path manipulation by ideological litigants. To the extent judges (or circuits) are more likely than in the past to have irreconcilable views on a given issue, strategic factors such as choice of forum play an unusually, and inappropriately, important role both in initial outcomes and in the development of precedent.⁵⁹ In Professor Stearns's view, the Supreme Court's increasing use of standing to dismiss cases is best seen not as an unprincipled refusal to grapple with the merits, but as a means of counteracting this sort of path manipulation.⁶⁰ By limiting standing to litigants who are most directly affected by the harm in question, the Court reduces the likelihood that cases will be brought solely to influence the decision path.⁶¹ Social choice thus may provide an important justification of an otherwise puzzling trend in Supreme Court decisionmaking.

In illustrating how public choice can be used to explain an existing institution, I have not yet suggested the *prescriptive* role that such a project can serve. Yet it is easy to see how the act of description is itself prescriptive. By proposing a new way of conceptualizing an existing institution, public choice scholars are attempting both to

58. See Stearns, 144 U. Pa. L. Rev. at 349-85 (cited in note 57) (finding the Warren court to have single-peaked preferences, even on divisive issues such as whether to incorporate the Bill of Rights into the Fourteenth Amendment, whereas the Burger and Rehnquist Courts have multi-peaked preferences). The persuasiveness of Professor Stearns's analysis obviously depends in important part on his contention that the Justices' preferences increasingly have become multi-peaked.

59. See notes 20-23 and accompanying text (describing cycling, path dependence, and path manipulation)

60. Stearns, 83 Cal. L. Rev. at 1318 (cited in note 57); Stearns, 144 U. Pa. L. Rev. at 347-48 (cited in note 57).

61. This is not to suggest that standing can eliminate path dependence in judicial decisionmaking. The argument, instead, is that it reduces litigants' ability to manipulate the path, thus enhancing the perceived fairness of the litigation process.

Notice, too, that the analysis requires that the Supreme Court justices hold similar views about the role of standing—or at least act as if they did. If the justices' views on standing were as divergent as their views on an underlying issue, standing would prove less effective in counteracting path manipulation.

describe, and, in some respects, to transform the institution in question. Thus, if one or more justices agreed with Professor Stearns's suggestion that standing is crucially concerned with minimizing path manipulation, they might begin to speak explicitly in these terms in their standing cases. To the extent this occurred, the social choice explanation would both reinforce and alter existing standing doctrine.

There is, of course, a long tradition of law-and-economics scholarship that aspires to just this role.⁶² Because institution-reinforcing scholarship seeks to explain what already is, it often does not produce readily testable hypotheses. Yet the approach need not preclude empirical examination, as some of the best law-and-economics efforts to date have shown.⁶³ One suspects that important work in public choice scholarship will continue in this tradition.

2. Using Public Choice to Frame Reform

The illustration we have just considered suggests that public choice can be used to explain, and thus to reinforce, an existing institution. Public choice analysis also could play an important role in overtly seeking change. In particular, the analysis gives scholars a tool not simply for describing an institution, but also for more effectively framing a proposal for reform.⁶⁴

As with the previous illustration, recent scholarship demonstrates how public choice insights can be used to frame reform. In their article on double taxation of corporate income, Jennifer Arlen and Deborah Weiss offer an interest group explanation for the persis-

62. See Johnston, 24 L. & Soc. Rev. at 1224-27 (cited in note 55) (characterizing Landes and Posner's arguments as to the efficiency of tort law as transformative in intent). My own view is that most law-and-economics scholars divide into two categories: those who tend to assume the existing regime is roughly appropriate, and who are thus likely to engage in institution-reinforcing scholarship; and those who are suspicious of existing law and are inclined to call for sweeping change.

63. Landes and Posner's work is seen by some as an example, but it has been sharply criticized by others. For another example, see Rebert E. Scott, *A Relational Theory of Secured Financing*, 86 Colum. L. Rev. 901 (1986) (developing relational theory to explain existing secured transactions rules, and comparing it to existing evidence on lending patterns).

64. Existing work is much more likely to take the opposite approach, and to employ public choice (usually interest group theory) analysis to explain why a proposal the author views as optimal has *not* be adopted. Although this approach can yield valuable insights, it often has a post hoc quality that suggests the work was primarily intended to preempt criticism that the proposal in question is implausible or ill-founded.

tence of a double tax despite a near consensus in favor of reform.⁶⁵ Professors Arlen and Weiss contend that, although corporate managers would seem to be natural allies of tax reform, two factors suggest that managers actually are the most obvious obstacles. First, managers may be lukewarm about reform because they would rather lobby for tax benefits, such as investment tax credits, that benefit them more directly.⁶⁶ Second, some managers may actively oppose reform, since the "earnings trap" created by double taxation gives them greater discretion to invest a firm's earnings than they would otherwise have.⁶⁷

Even more than their explanation of double taxation, what is noteworthy about the analysis of Professors Arlen and Weiss for our purposes is that they conclude by using their interest group insights to suggest directions for effective reform. Given the implausibility of reforming double taxation in the face of resistance by corporate managers, Professors Arlen and Weiss argue that proponents should propose a phased-in plan, rather than one-shot reform, in order to maximize the benefit to the kinds of new investment that managers tend to prefer.⁶⁸ In addition, proponents should consider neutralizing managers' resistance by focusing on proposals that preserve at least some of the retained earnings trap—thus, adopting a second best approach that could succeed rather than a purer reform that would almost certainly fail.⁶⁹

This use of public choice as a means of framing a reform proposal addresses an important criticism of the use of public choice insights in the legal literature. In response to the first wave of public choice scholarship, one prominent commentator argued that scholars' descriptive analyses of existing institutions invariably are colored by their own normative perspective on the issue and institution in ques-

65. See Jennifer Arlen and Deborah M. Weiss, *A Political Theory of Corporate Taxation*, 105 *Yale L. J.* 325, 363-65 (1995) (concluding that double taxation results from the resistance to change by a small group of managers).

66. *Id.* at 340-42. The difference is that elimination of the double tax would principally benefit existing capital rather than the kinds of future investment with which management is most concerned.

67. *Id.* at 348-49 (noting also that some managers prefer the earnings trap, though the number is likely to be small).

68. Professors Arlen and Weiss also note that proposals enhancing shareholder voice could further reform efforts. *Id.* at 363-65.

69. *Id.* at 365-66. As a final consideration, Arlen and Weiss warn against proposals that would permit specified kinds of firms to avoid double taxation, since such proposals would undermine the benefited firms' incentive to press for more widespread reform. *Id.* at 367. Thus, the recent success in obtaining pass-through tax treatment for new entity forms such as limited liability companies could undermine efforts to reform the double tax.

tion.⁷⁰ In view of this, he argued that scholars should drop the public choice analysis and simply debate their normative position directly, rather than doing so indirectly and covertly through an ostensibly neutral application of public choice.⁷¹

A scholar who uses public choice for framing purposes can, if she wishes, clearly distinguish her normative inclinations from her descriptive institutional analysis. The scholar could begin by stating and defending her normative view and then turn to the insights of public choice in order to frame a proposal that seems most likely to succeed, given the realities of the institution in question. Such a strategy has the important virtue of making the commentator's normative commitment explicit, without requiring her to sacrifice the insights offered by a nuanced public choice analysis.

The framing strategy has a second valuable attribute. Public choice is often criticized as excessively malleable—that is, as lending itself to any conclusion a commentator wishes to reach. An important virtue of the framing strategy is that it can be used to develop testable hypotheses about the nature of a decisionmaking institution.⁷² To return to the corporate double taxation example,⁷³ the analysis of Professors Arlen and Weiss suggests that proposals providing for phased-in implementation, and those that preserve some of the retained earnings trap, will prove more successful than proposals that do not do either of these things. Their prediction, like the predictions of other scholars who propose a framing strategy, can be tested by tracking the historical and/or the subsequent pattern of actual legislative, judicial, or market activity.

3. Conclusion

In describing ways that scholars can make use of the increasing sensitivity to comparative institutional analysis, I do not mean to suggest that all public-choice-influenced legal scholarship will adopt these kinds of approaches. Public choice will no doubt continue to be

70. Elhauge, 101 *Yale L. J.* at 49-59 (cited in note 46). See also David A. Skeel, Jr., *Review of William A. Fischel, Regulatory Takings: Law, Economics, and Politics*, 88 *Pub. Choice* 433, 434-35 (1996) (suggesting similar reservations about Fischel's unstated assumptions in Fischel's fascinating interest group assessment of takings law).

71. Elhauge, 101 *Yale L. J.* at 62-63 (cited in note 46).

72. For a similar observation about transaction cost economics, see Johnston, 24 *L. & Soc. Rev.* at 1243 (cited in note 55) (stating that transaction cost economics has the virtue of generating testable mathematical hypotheses).

73. See notes 65-69 and accompanying text.

used as a source of occasional insights into analyses whose focus is elsewhere, much as it is now.

Nevertheless, to the extent public choice scholarship does progress in a discernable direction beyond the first wave, there almost certainly will be an increasing recognition of the importance of comparative institutional analysis. Both institution-reinforcing analysis and framing strategies are ways for scholars to employ a nuanced institutional analysis while at the same time engaging in legal academics' traditional task of prescribing solutions to perceived problems in the law.

IV. REVIEWING *PUBLIC CHOICE AND PUBLIC LAW*

Having discussed the terminology and the significance of public choice for the legal literature, we now have a useful context for considering *Public Choice and Public Law: Readings and Commentary* more explicitly.

Writing a reader is, in many respects, a low ceiling project.⁷⁴ In assembling and editing a group of law review articles and related materials, the editor/author's principal contribution often is simply to save other teachers and scholars the time and expense of performing this function themselves. A reader that does this successfully may prove financially rewarding to the editor/author, but it does not provide any particular contribution to the literature.

Even from the subtitle, it quickly becomes apparent that *Public Choice and Public Law: Readings and Commentary* has appreciably larger ambitions. As "Readings and Commentary" suggests, the book consists of extended discussions of the articles included and many of the issues the articles raise. This ongoing commentary is as central to the book as the articles themselves, and gives *Public Choice and Public Law* a distinctive, "through-written" feel that is quite remarkable for a book of this kind. To show this, let me begin by briefly describing the book itself, and by focusing on several choices Professor Stearns has made in deciding which articles to include. I will then conclude by discussing how the commentary ties the articles together in such a way as to make *Public Choice and*

74. Fortunately for those who prepare them, they also can be a low cost project. At its simplest, a reader may be little more than a by-product of a scholar's own class preparation. Once the scholar has selected and edited the materials, preparing the reader for publication may entail little extra effort.

Public Law an important new contribution to the public choice literature in its own right.

The book is divided into three long chapters. The first chapter begins with a subchapter devoted to the debate about public choice's assumptions that decisionmakers are rational and act in their own self-interest. The chapter then concludes with a subchapter labelled "Economic Reasoning: An Introduction to Modelling." Although Professor Stearns's commentary does discuss modelling in some detail, the more obvious theme of the articles is that each focuses on or critiques the interest group branch of public choice theory. Thus, the subchapter includes articles taking differing views of the implications of interest group theory for the line item veto⁷⁵ and legislative delegation,⁷⁶ together with Professor Elhauge's critique of the literature using interest group theory to justify particular perspectives on judicial review.⁷⁷

Professor Stearns devotes the second chapter to the social choice branch of public choice. The chapter uses articles by Professors Stearns and Saul Levmore to introduce central social choice concerns, such as cycling.⁷⁸ The remaining articles in the chapter consider bicameralism, legislative intent, and judicial decisionmaking from a social choice perspective. The first two chapters thus give a complete introduction to public-choice-influenced legal literature, including public choice's rationality assumptions and its two major branches. Together, these chapters cover roughly one-half of the book.

The remainder of the book consists of a single chapter labelled "Applications of Covered Concepts." In this final chapter, Professor Stearns shifts from a focus on the basic contours of public choice theory, to articles that have used some aspect of public choice analysis to shed light on a particular issue. In brief, the chapter includes articles using interest group theory, social choice theory, or both, to

75. Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 Wash. & Lee L. Rev. 385 (1992), in Stearns, *PCPL* at 77 (cited in note 2); Glen O. Robinson, *Public Choice Speculations on the Item Veto*, 74 Va. L. Rev. 403 (1988), in Stearns, *PCPL* at 101 (cited in note 2).

76. Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1 (1982), in Stearns, *PCPL* at 134 (cited in note 2); Jerry Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. L. Econ. & Org. 81 (1985), in Stearns, *PCPL* at 180 (cited in note 2).

77. Elhauge, 101 Yale L. J. at 31 (cited in note 46), in Stearns, *PCPL* at 204 (cited in note 2).

78. Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971 (1989), in Stearns, *PCPL* at 258 (cited in note 2); Stearns, 103 Yale L. J. at 1219 (cited in note 21), in Stearns, *PCPL* at 295 (cited in note 2).

explore stare decisis, statutory interpretation, the efficiency of the common law, and standing. The chapter then concludes with summaries of articles on discrimination.⁷⁹

It quickly becomes apparent that Professor Stearns has made two very important choices in selecting the materials he includes, both of which affect the tone of the book and the kinds of courses for which it is most useful. First, Professor Stearns has limited his focus to the *legal* literature that employs public choice analysis, omitting almost entirely the contributions to public choice of economists and political scientists.⁸⁰ The problem posed by this choice is that, because all of public choice's foundational works were nonlegal, Professor Stearns must acquaint his readers with this work indirectly, by including law review articles that themselves discuss the seminal nonlegal contributions. Fortunately, the omission of nonlegal works proves to be a strength rather than a weakness of the book. Not only are law review articles likely to be much more effective pedagogically in law school classes, but Professor Stearns also has edited the articles in such a way as to include rich discussions of the important nonlegal public choice literature.⁸¹

In addition to focusing on the legal literature, Professor Stearns also has selected only public law analyses.⁸² Consequently, *Public Choice and Public Law* omits entirely the burgeoning public choice literature on private law concerns such as tax policy and corporate takeover doctrine.⁸³ This is not to say that the book is of interest

79. Lynn Stout, *Strict Scrutiny and Social Choice: An Economic Inquiry into Fundamental Rights and Suspect Classifications*, 80 Geo. L. J. 1787 (1989), in Stearns, *PCPL* at 901 (cited in note 2); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 Harv. L. Rev. 1003 (1995), in Stearns, *PCPL* at 909 (cited in note 2).

80. The articles that come closest to being exceptions appeared in economics-oriented legal journals. See Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Int'l Rev. L. & Econ. 239 (1992), in Stearns, *PCPL* at 393 (cited in note 2) (written by a political scientist); Rubin, 6 J. Legal Stud. at 51 (cited in note 48), in Stearns, *PCPL* at 727 (cited in note 2) (economist).

81. This is particularly apparent in Professor Stearns's decisions as to which footnotes to include and which to omit. Although many footnotes are omitted, Professor Stearns has tended to retain those that reference pivotal non-legal contributions to, or describe, the development of the public choice literature. In the first article, for instance, the footnotes he includes cite to much of the important political science literature. See Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 Tex. L. Rev. 873 (1987), in Stearns, *PCPL* at 11 n.56, 12 nn.59-62, 67, 13 nn.69-70, 73, 75 (cited in note 2). See also Aranson, Gellhorn, and Robinson, 68 Cornell L. Rev. at 1 (cited in note 76), in Stearns, *PCPL* at 144 n.76, 153 n.134, 154 nn.136-39, 141 (cited in note 2) (providing references to foundational non-legal work in social choice).

82. The inclusion of "Public Law" in the title of the book makes this selection clear.

83. Saul Levmore alludes to this approach in his characteristically insightful foreword to the book. Saul Levmore, *Foreward* to Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* xv (Anderson, 1997). As a result, *Public Choice and Public Law* is in

only to public law scholars, however. The entire structure of public choice analysis can be seen as "public" in nature, since much of the literature focuses on the general dynamics of the legislative and judicial processes. It is only at the application stage that the focus of private law scholars diverges from that of their public law colleagues. A private law scholar who wished to teach from *Public Choice and Public Law* might therefore assign all of the first two chapters, while substituting private law applications in the final chapter.⁸⁴

Anyone who is familiar with Professor Stearns's own path-breaking work on social choice and constitutional process will have no difficulty understanding his reasons for structuring the book as he has. In addition to providing a representative selection of articles, the book also can be seen as reflecting the intellectual concerns of its author. Most obviously, we see this in Professor Stearns's inclusion of three of his own articles.⁸⁵

some respects a natural substitute for a legislation course, as Levmore also points out. *Id.* But it can easily be adapted to other courses, as I describe in the text below.

84. Some of my own picks might include, in the tax area, Arlen and Weiss, 105 *Yale L. J.* 325 (cited in note 65) (discussing interest group theory of double taxation); Richard L. Doernberg and Fred S. McChesney, *On the Accelerating Rate and Decreasing Durability of Tax Reform*, 71 *Minn. L. Rev.* 913 (1987) (interest group theory of tax legislation); Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 *U. Pa. L. Rev.* 1 (1990) (considering interest group, populist, and psychological factors in tax legislation). In corporate law, I would include, among others, Reberta Remano, *The Political Economy of Takeover Statutes*, 73 *Va. L. Rev.* 111 (1987) (antitakeover statutes); Roberta Romano, *The Genius of American Corporate Law* (AEI Press, 1993) (charter competition in corporate law, antitakeover statutes); Roe, *Strong Managers, Weak Owners* (cited in note 9) (political explanation of separation of ownership and control); Jonathan R. Macey and Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 *Tex. L. Rev.* 469 (1987) (charter competition). For bankruptcy, Eric A. Posner, *The Political Economy of the Bankruptcy Reform Act of 1978* (1997) (unpublished manuscript, on file with the Author). See also Alan Schwartz and Robert E. Scott, *The Political Economy of Private Legislatures*, 143 *U. Pa. L. Rev.* 595 (1995) (interest group theory of uniform laws process in commercial law). I am, of course, also partial to my own work in bankruptcy, David A. Skeel, Jr., *Markets, Courts, and the Brave New World of Bankruptcy Theory*, 1993 *Wis. L. Rev.* 465, 495-595 (1993) (applying interest group theory to bankruptcy legislation), and corporate law, Skeel, 83 *Va. L. Rev.* (cited in note 21) (forthcoming February 1997) (considering the effect of the Delaware Supreme Court's norm of unanimous decision making in social choice and interest group terms). See also David A. Skeel Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 *Tex. L. Rev.* 471, 512-45 (1994) (discussing charter competition in corporate law and arguing that a similar process would lead to superior bankruptcy laws if states regulated corporate bankruptcy).

85. Stearns, 49 *Wash. & Lee L. Rev.* at 385 (cited in note 75), in Stearns, *PCPL* at 77 (cited in note 2); Stearns, 103 *Yale L. J.* at 1219 (cited in note 21), in Stearns, *PCPL* at 295 (cited in note 2); Stearns, 83 *Calif. L. Rev.* at 1309 (cited in note 57), in Stearns, *PCPL* at 787 (cited in note 2). One suspects that subsequent editions also will include his recent contribution to a colloquium debating the merits of issue-by-issue and outcome voting by courts. Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor*

More importantly, and more interestingly, the connections between the book and Professor Stearns's own ongoing project are evident throughout the commentary interspersed among the readings. As I have noted, Professor Stearns's commentary is extensive, and often includes lengthy discussions that are as substantive and nuanced as the readings that precede them. Professor Stearns gives a lengthy analysis of voting and the benefits of the simplified models used by economists after the first set of readings,⁸⁶ for instance, and offers an alternative economic explanation of judicial holdings in response to a pair of articles on *stare decisis*.⁸⁷

Given that *Public Choice and Public Law* chronicles the emergence and flowering of public choice in the legal literature, many of the articles come from what I have described as the first wave of public-choice-influenced legal scholarship. But, Professor Stearns's commentary places the book firmly into the second wave. He is keenly aware of the need to perform a comparative institutional analysis, and this recurs throughout the commentary.⁸⁸ The nature of his analysis is almost always institution-reinforcing. One after another, the commentaries suggest public choice explanations as to why our public institutions have developed as they have, and why that development makes sense. The economic explanation of judicial holdings that I just noted has this character, as does his account of the Supreme Court's *Marks* doctrine which I discuss below. One might even say that what *Public Choice and Public Law* is "about" is the versatility of the institution-reinforcing approach to public choice.

The sense one gets in reading the commentaries together with the articles that prompt them, is that one is participating in Professor Stearns's own thinking process. The analogy that comes most immediately to mind is jazz. Traditional readers often either omit commentary entirely, or conclude each section with a series of brief, targeted questions based on the readings in the section. Much like a jazz performance, and in striking contrast, Professor Stearns's commentary picks up on particular themes and explores them at length, taking them in intriguing, and sometimes unexpected, directions. At times these flights seem unnecessarily digressive or fall flat. Professor Stearns's relatively lengthy discussion of the economic concept of an Edgeworth Box may well have been important

John Rogers and Others, 49 Vand. L. Rev. 1045 (1996) (defending outcome voting on social choice grounds).

86. Stearns, *PCPL* at 64-72 (cited in note 2).

87. *Id.* at 546.

88. See, for example, *id.* at 366-68 (comparing legislatures and courts).

to his own early thinking on these issues, for instance, but it seems unnecessary to a full understanding of the public choice literature.⁸⁹

More often, however, the commentary provides surprising, and genuinely new, insights. To give just one example, in his commentary on a pair of articles on legislative delegation, Professor Stearns moves from logrolling to a discussion of the Supreme Court's *Marks*⁹⁰ doctrine. This doctrine holds that plurality decisions should be construed in accordance with the narrowest of the opinions that voted for the controlling outcome. Although the doctrine is surprising in some respects,⁹¹ Professor Stearns speculates that it may accord with the Median Voter Theorem insight that majority voting pulls both extreme positions toward the middle.⁹² He reasons that the Median Voter Theorem suggests that it is much more likely that all of the Justices in a fragmented majority would prefer the narrow opinion over the dissenting view than it is that they all would prefer a more sweeping holding.⁹³ Both the initial question—whether the *Marks* doctrine is the best approach to fractured decisions—and Stearns's use of social choice in an institution-reinforcing fashion to suggest a tentative answer are fascinating contributions.

It is in these thoughtful, occasionally idiosyncratic explorations that *Public Choice and Public Law* makes a genuine contribution to the public choice literature. Professor Stearns suggests new perspectives, and new questions, that will no doubt figure both in his own future work, and in the thinking of other scholars. At the same time, Professor Stearns does not neglect the traditional function of a reader. The articles are intelligently edited, and the selections are admirably representative of the public choice legal literature. On one or two occasions, I might have chosen different examples of an author's

89. *Id.* at 362-66. The Edgeworth Box is a graph that depicts the points which maximize the utilities of two individuals with respect to fixed quantities of two different items. Although it seems unnecessary to Professor Stearns's discussion, which explores Pareto optimality and comparative institutional advantage, the discussion subsequently offers several intriguing speculations about the point of the Pareto criterion.

90. *Marks v. United States*, 430 U.S. 188 (1977).

91. To give the most obvious example, an opinion that received only one vote may control if it is the narrowest of the opinions that voted for the majority outcome.

92. For a description of the Median Voter Theorem, see note 24.

93. Stated differently, the *Marks* doctrine can be seen as assuming that there will be a consensus among the majority justices supporting the narrow view over the dissent. Stearns, *PCPL* at 126-29 (cited in note 2). Notice that this may not be the case if the justices' preferences prove to be multi-peaked, since part of the majority in such a case might prefer the dissent over the narrow opinion.

work.⁹⁴ But I was hard-pressed to think of any crucial articles that Professor Stearns omitted. In addition to including the most important work thus far, the book also provides a bibliography at the end of each subchapter, as well as extended appendices. *Public Choice and Public Law* is thus an extremely valuable reference for the first wave of public-choice-influenced legal scholarship, and a powerful demonstration of what may well be the next wave.

94. Two examples come from a subchapter on legislative intent. First, I might have included Judge Frank Easterbrook's article, *The Supreme Court, 1983 Term—Foreward: The Court and the Economic System*, 98 Harv. L. Rev. 4 (1984), rather than his article *Statutes' Domains*, 50 U. Chi. L. Rev. 533 (1983), in Stearns, *PCPL* at 557 (cited in note 2), as it is arguably more important and more directly concerned with the implications of public choice for statutory interpretation. Second, I might have omitted Richard Posner's article, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 Case W. Res. L. Rev. 179 (1986-87), in Stearns, *PCPL* at 572 (cited in note 2), altogether, as it arguably does not make use of public choice insights at all. Yet in each case, Professor Stearns's choices are defensible. Judge Easterbrook's article contains extensive discussions of cases selected solely because they were decided in the 1983 term, for instance, and Judge Posner's article illustrates, as I discussed earlier, how dramatically his current view of statutory interpretation has changed from his earlier views. See notes 40-42 and accompanying text.