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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.

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 co-opted 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 veto¹⁴ 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 decision-making 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).

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 — *à 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.

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 law³⁰ 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.

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. xx-iii). 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* doctrine⁷⁴ 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 Arrowian 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.