

April 1989

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### Recommended Citation

Daniel A. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 Chi.-Kent L. Rev. 161 (1989).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol65/iss1/9>

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## DEMOCRACY AND DISGUST: REFLECTIONS ON PUBLIC CHOICE

DANIEL A. FARBER\*

Opinion polls reveal an increasingly cynical public attitude toward American government.<sup>1</sup> Some recent judicial opinions also reflect a jaundiced view of politics in general and legislatures in particular.<sup>2</sup> A similar attitude toward legislatures has also emerged in recent legal scholarship.<sup>3</sup> This attitude finds some basis in the body of scholarship known as public choice theory, which seeks to use economic methodology to analyze politics. At least on initial acquaintance with the literature, the reader is likely to come away with a feeling of despair about the political process. Sometimes the legislature is portrayed as the playground of special interests, sometimes as the passive mirror of self-interested voters, sometimes as a slot machine whose outcomes are entirely unpredictable. These images are hardly calculated to evoke respect.<sup>4</sup>

In his astute review of the debate over public choice theory, Professor Jerry Mashaw is skeptical of this bleak vision of politics. Although

\* Henry J. Fletcher Professor of Law, University of Minnesota. Bill Eskridge, Phil Frickey, Jerry Mashaw, and Suzanna Sherry made helpful comments on an earlier draft of this comment.

1. See Mitchell & Scott, *Leadership Failures, the Distrusting Public, and Prospects of the Administrative State*, 47 PUB. ADMIN. REV. 445, 445-46 (1987). See also W. NEUMAN, *THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE* 11-29 (1986).

2. See Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 136-38 (1988) (Professor Mashaw's article appears in this symposium issue). Distrust of the legislative process is particularly clear in some recent judicial discussions of legislative history. See, e.g., *Blanchard v. Bergeron*, 109 S. Ct. 939, 946-47 (1989) (Scalia, J., concurring); *Wallace v. Christensen*, 802 F.2d 1539, 1559-60 (9th Cir. 1986) (Kozinski, J., concurring); *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985) (Scalia, J., concurring).

3. See, e.g., Farber & Frickey, *Integrating Public Choice and Public Law: A Reply to DeBow and Lee*, 66 TEX. L. REV. 1013, 1014-15 (1988); Mashaw, *supra* note 2, at 604 nn.12, 15-16. For a particularly clear expression of this attitude toward politics, see Wagner, *Morals, Interests, and Constitutional Order: A Public Choice Perspective*, 67 OR. L. REV. 73, 76-82 (1988) (discussing government as "an instrument of predation," *id.* at 80).

4. When I say that this image is conveyed by some of the public choice literature, I do not mean that any one writer explicitly endorses all aspects of this view of politics. Any given public choice theorist would undoubtedly introduce qualifications and exceptions to this description of politics. Rather, this view is the common core of much of the writing on public choice as it existed, say, about ten years ago. The scholar who comes closest to adopting this view outright is Judge Frank Easterbrook. He has argued, for example, that because the Supreme Court relies on majority voting, the Court's opinion will necessarily be incoherent, Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 811-32 (1982); that legislative outcomes are likely to be either incoherent or the result of arbitrary agendas, Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) [hereinafter Easterbrook, *Statutes' Domains*]; and that much legislation purporting to reflect the public interest is in fact the product of special interest groups, Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 15-18 (1984) [hereinafter Easterbrook, *Foreword*].

he seems to lean toward rejecting this vision, he concludes that it is too early to be sure about its validity.<sup>5</sup> If this vision does prove to be at least partially valid, he argues persuasively, its implications for the legal system remain unclear.<sup>6</sup>

Even if highly pessimistic findings about the political process do not lead directly to new legal doctrines, however, accepting these findings could not help but affect the judicial function. Knowing that legislative actions are generally either self-serving or random might not convey a new intellectual direction to public law, but this knowledge would be bound to have a profoundly dispiriting effect. How could a judge be expected to take seriously the job of interpreting legislation while believing that the legislature is morally bankrupt? If we come to accept this nihilistic vision of politics, judges might still go through the motions of deference to legislatures, but only in a demoralized way. The threat, then, is not so much that judges will change existing legal doctrines but that they may lose heart, leaving American public law an empty shell.

Public choice theory is far from mature. The application of economic methods to political questions already has proved fruitful. We can expect further insights from this approach, but it is too early to say much about the final form that public choice theory is likely to take. It is probably even more premature to attempt to draw firm conclusions about how public law should respond to the findings of public choice theory. But it is not too early, in my view, to reject the profoundly pessimistic implications of the early public choice theories.

I will begin by considering the role of self-interest (particularly special interest groups) in the political process. I find little to quarrel with in Professor Mashaw's perceptive review of the relevant scholarly literature. I am also grateful to him for clearing up some ambiguities in my own earlier writings with Phil Frickey on the subject.<sup>7</sup> To the extent we disagree at all, it is only about matters of emphasis: I am somewhat more confident than Professor Mashaw appears to be that ideology as well as self-interest plays a role in politics.

I will then turn to the other major branch of public choice theory, which Mashaw treats only in passing. This branch, which grows out of Kenneth Arrow's pioneering work, is often thought to have dire implica-

5. See Mashaw, *supra* note 2, at 125, 150.

6. *Id.* at 127. I agree with his view, *see id.* at 160, that practical reason will be an important part of the answer to the problem of applying public choice theory to legal problems.

7. *Id.* at 142, 143, 147-48.

tions for democratic legitimacy.<sup>8</sup> I will suggest, however, that recent work in the field is not only compatible with respect for democratic institutions, but may also give us better insights into the normative basis of democracy.

The "folk" political science of our time might be called vulgar pluralism. Vulgar pluralism views the political process as an arena of pure greed, in which self-interested voters, self-aggrandizing politicians, and self-seeking interest groups meet to do business. Much of the early public choice literature embraced this viewpoint. Recent scholarship, however, gives us good grounds for rejecting vulgar pluralism. To view politics as wholly deliberative would be quixotic, but there is — perhaps surprisingly — solid evidence that voters and politicians are actually motivated in part by factors other than greed. There is also some reason to believe that pluralism underestimates the active role played by legislatures in reworking preferences into political outcomes.

To the extent that recent advocates of republicanism have rejected vulgar pluralism, the public choice literature supports them. Like Professor Mashaw,<sup>9</sup> I am skeptical of the more utopian strands in neo-republican thought. A careful reading of the public choice literature, however, does support a more modest, perhaps Madisonian,<sup>10</sup> version of republicanism, in which concern about the public interest and legislative deliberation play a role in politics.

### I. DOES IDEOLOGY MATTER?

Whatever else may determine the behavior of legislators, a desire to be reelected must surely be one factor. If we are to understand legislators, then, we must understand the electoral process, and in particular, the behavior of voters. Public choice theory seems to have little to tell us about popular voting. Since any individual's vote is virtually certain to have no impact on election results, and since voting imposes some costs in terms of time and effort, a rational, self-interested person would not vote at all.<sup>11</sup> If such a person did find herself in the voting booth, she

8. For an introductory discussion, see Farber & Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 425-37 (1988).

9. Mashaw, *supra* note 2, at 129-31, 139-41.

10. See Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-48 (1985) (sketching a synthesis of pluralism and republicanism, which the author calls "deliberative democracy" and attributes to Madison).

11. Voter turnout can affect election results. See, e.g., Tucker & Vedlitz, *Does Heavy Turnout Help Democrats in Presidential Elections?*, 80 AM. POL. SCI. REV. 1291 (1986). Hence, a theory which seeks to explain legislators' behavior must also account for the decision to vote.

would have no reason to vote in any particular way.<sup>12</sup> If the policy espoused by one of the candidates would be in her self-interest, she might vote for that person, but she would have little reason to do so, since for all practical purposes there is no causal link between her individual vote and that candidate's election. On the other hand, since something other than self-interest evidently motivated her to drive to the polls, that same motivation might quite plausibly continue to influence her in her choice of candidate.

As Professor Mashaw explains, some empirical studies in the 1970s suggested that voters are influenced by the general health of the economy but not by their individual economic interests.<sup>13</sup> As he notes, however, these studies were subjected to devastating methodological criticism in an article by Gerry Kramer.<sup>14</sup> Besides discrediting these earlier studies, Kramer's article has also stimulated further research. A recent study by Gregory Markus, designed specifically to avoid Kramer's methodological criticisms, concluded that voters are motivated both by their own individual economic circumstances and by the overall health of the economy. Elections, however, are much more strongly affected by the second factor. The explanation is as follows. Suppose that individual voters are equally influenced by the general unemployment rate and by whether they themselves are unemployed. If the unemployment rate rises by five percent, all voters will be less likely to vote for the incumbent. On the other hand, only the additional five percent of the unemployed will be influenced by the change in their individual circumstances. Given two factors, one of which affects the average voter and one that affects only a small minority, the first factor will have the larger effect on outcomes (all other things being equal).<sup>15</sup> Consequently, Markus found, voters' perceptions of their own economic welfare had much less effect on election outcomes than changes in the nation's economic prosperity. Each one percent change in the nation's per capita disposable income translated into a 2.3 percent change in the vote for the incumbent.<sup>16</sup> Although

12. See Farber & Frickey, *supra* note 3, at 1016-18; Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 893-94 (1987) [hereinafter Farber & Frickey, *Jurisprudence*].

13. Mashaw, *supra* note 2, at 150.

14. Kramer, *The Ecological Fallacy Revisited: Aggregate versus Individual-level Findings on Economics and Elections. and Sociotropic Voting*, 77 AM. POL. SCI. REV. 92 (1983).

15. Markus, *The Impact of Personal and National Economic Conditions on the Presidential Vote: A Pooled Cross-Sectional Analysis*, 32 AM. J. POL. SCI. 137 (1988). Among other methodological responses to Kramer's criticism, Markus used cross-sectional "microdata" based on surveys rather than relying on aggregate voting data, pooled data from different time periods, and revalidated the items used to measure changes in individual financial circumstances.

16. *Id.* at 151. Markus found that this model predicted almost precisely the 1984 vote for Reagan. *Id.* at 152.

Markus's study is undoubtedly not the final word on the subject, his findings seem plausible.

With regard to legislators themselves, the best of the recent empirical literature also concludes that personal ideology influences roll call votes. As Mashaw points out, these studies — like any other social science research — are neither methodologically perfect nor wholly conclusive.<sup>17</sup> These studies are, however, the best information we have, and should not be lightly dismissed.

Moreover, the results of these studies are confirmed by two other important kinds of evidence. First, the political science literature on legislative behavior supports the conclusion that legislators are partly influenced by a desire to promote the public interest.<sup>18</sup> While economists sometimes seem to trust only the results of econometric studies, as legal scholars we need not be so parochial in our methodological assessments. Indeed, the fact that traditional political scientists have reached the same conclusions as the best econometric research is a particularly valuable confirmation precisely because the research methodologies are so different.

Second, detailed investigations of the adoption of particular statutes tend not to support explanations based solely on special interest influence. For example, it has been suggested that environmental statutes are designed to favor large firms over small ones.<sup>19</sup> In reality, the major influence on the legislation seems to have been a desire to appeal to environmentalist voters.<sup>20</sup> Similarly, the Glass-Steagall Act has been described by a prominent public choice analyst as the result of lobbying by New York investment bankers.<sup>21</sup> A recent study, however, demonstrates that the statute is precisely what it appeared to be all along: the product of misguided populist impulses.<sup>22</sup>

Thus, we have three bodies of evidence that seem to point to the same conclusion: the most careful econometric work, the findings of traditional social scientists, and historical investigations of the public

17. Mashaw, *supra* note 2, at 145-48.

18. For a summary of the political science literature, see Farber & Frickey, *Jurisprudence*, *supra* note 12, at 886-90.

19. Easterbrook, *Foreword*, *supra* note 4, at 16 n.16; Pashigan, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 J.L. & ECON. 1 (1984).

20. Elliott, Ackerman & Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985). Notably, the authors of this study concluded that these voters were not represented by organized interest groups at the time. *Id.* at 317.

21. Macey, *Special Interest Groups' Legislation and the Judicial Function: The Dilemma of Glass-Steagall*, 33 EMORY L.J. 1, 20 (1984).

22. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Banking Regulation*, 85 MICH. L. REV. 672, 694-98 (1987).

choice accounts of particular legislation. There is no such thing as conclusive evidence in the social sciences, but we can feel some degree of confidence in rejecting the vulgar pluralist varieties of public choice. Only a fool would deny the importance of self-interest in the political process, but we can also be reasonably sure that self-interest is not the whole story.

## II. ARE LEGISLATURES CHAOTIC?

If interest group theory suggests the possibility that legislation is likely to be malign, another branch of public choice theory suggests the equally unpleasant possibility that legislation is random and arbitrary. Building on Kenneth Arrow's pioneering work, theorists have shown that voting cycles are likely in majority voting schemes and may often be universal. That is, given any two proposals *A* and *B*, there is some sequence of votes which would lead the majority to reject *A* in favor of other proposals, and then reject those other proposals in favor of *B*, even if in a direct contest *A* would beat *B*.<sup>23</sup> Professor Mashaw aptly summarizes the implications of this phenomenon:

The most basic finding of the Arrovian branch of public choice theory might be characterized as indicating that collective action must be either objectionable or uninterpretable. A stable relationship between the preferences of individuals and the outcomes of collective choice processes can be obtained only by restrictions on decision processes that most people would find objectionable. At its most extreme, Arrovian public choice predicts that literally anything can happen when votes are taken. At its most cynical, it reveals that, through agenda manipulation and strategic voting, majoritarian processes can be transformed into the equivalent of dictatorship. In a more agnostic mode, it merely suggests that the outcomes of collective decisions are probably meaningless because it is impossible to be certain that they are not simply an artifact of the decision process that has been used.<sup>24</sup>

Professor Mashaw is not alone in seeing these negative implications of social choice theory. Because voting is so susceptible to cycling and strategic behavior, Professor William Riker argues, "the meaning of social choices is quite obscure;" they may reflect the voters' true values, successful strategic behavior, or the "accidental amalgam of what the manipulators (perhaps unintentionally) happened to produce."<sup>25</sup> Profes-

23. The proof is sketched in P. ORDESHOOK, *GAME THEORY AND POLITICAL THEORY* 71-82 (1986). For an explanation of Arrow's Theorem and its implications, see *id.* at 57-65.

24. Mashaw, *supra* note 2, at 126-27.

25. W. RIKER, *LIBERALISM AGAINST POPULISM: A CONFRONTATION BETWEEN THE THEORY OF DEMOCRACY AND THE THEORY OF SOCIAL CHOICE* 167 (1982). For a critique of Riker, see J. COLEMAN, *MARKETS, MORALS AND THE LAW* 290-310 (1988). Recently, Riker has argued that these pervasive defects in majority rule justify a decrease in judicial deference to legislative

sor Riker's view of the meaninglessness of legislative outcomes has been echoed by Judge Frank Easterbrook. On the basis of public choice theory, he concludes:

Because legislatures comprise many members, they do not have "intentions" or "designs," hidden yet discoverable. Each member may or may not have a design. The body as a whole, however, has only outcomes. It is . . . impossible to reason from one or more sections of a statute to a problem not resolved.<sup>26</sup>

Whether legislatures are chaotic or driven by internal structures like agenda rules, the normative implications are troubling. Majoritarianism rests on the assumption that legislation is linked to majority views, but public choice theory seems to deny any such causal connection: outcomes are either random or driven by legislative features such as agenda rules, but in any event majority preferences do not translate into a meaningful collective choice.

One way of escaping this dilemma is to postulate that preferences are created by political decisions, rather than vice versa, so that individuals ultimately come to hold identical preferences as members of the same political community. I agree with Professor Mashaw that this version of the republican vision is unrealistic if not unpalatable.<sup>27</sup> We must take as given, then, that society is composed of individuals with diverse preferences, and from that perspective inquire into the possibilities of democratic choice.

One interpretation of these public choice results is that legislatures are much like slot machines: since majority rule produces complete cycling, the legislative outcomes are unpredictable if not wholly fortuitous. These predictions of legislative chaos do not, fortunately, have much empirical support. As one scholar observed, "the theoretical results achieved by the formal analysis of legislative choice are markedly inconsistent with our empirical knowledge of legislatures such as the U.S. Congress."<sup>28</sup> How can we explain this gap between theory and fact?

decisions. See Riker & Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373 (1988).

26. Easterbrook, *Statutes' Domains*, *supra* note 4, at 547-48.

27. Mashaw, *supra* note 2, at 140.

28. Panning, *Formal Models of Legislative Processes*, in HANDBOOK OF LEGISLATIVE RESEARCH 669 (G. Loewenberg, S. Patterson & M. Jewell eds. 1985). He explains:

As formal theorists themselves have increasingly recognized, social choice theory as it pertains to legislative voting is unsatisfactory in ways that are not easily dismissed. The immediate focus of dissatisfaction is the radical inconsistency between what the theory implies and what is in fact observed. Extant theory implies that stable outcomes typically do not exist, that the outcomes which do occur are inherently unpredictable, and that consistent policy choices by legislatures are not to be expected due to the prevalence of cyclical majorities. Schofield (1980), for example, concludes from his survey of social choice theory that political processes are fundamentally chaotic and unpredictable, that

To begin with, majority voting is not always prone to incoherence,<sup>29</sup> most notably so when the members of the group have "uni-peaked preferences." This might occur if each legislator ranked outcomes on a liberal-to-conservative scale, and differed only in her preferred location on the scale.<sup>30</sup> The likelihood that a group has sufficiently well-behaved preferences to guarantee coherent results is greater in a small group such as a legislative committee. Nevertheless, a representative's position on a unidimensional, ideological spectrum may also be a determining factor in some floor votes, thereby preventing any possible voting cycle.

Another method of preventing cycling is to impose structural restrictions such as agenda rules. One important focus of public choice theory concerns agenda setting and decisional structures such as committees.<sup>31</sup> Legislatures apparently use these devices to ameliorate the problem of cycling majorities.<sup>32</sup> As a result, even when majority rule itself does not suffice to produce coherence, legislatures may possess "structure-induced equilibrium."<sup>33</sup>

almost anything can happen. But these theoretical expectations are clearly at odds with what we know empirically about most legislatures (Tullock, 1981). Unless the observed stability of legislative processes is simply dismissed as illusory, this inconsistency between theory and observation poses awkward problems for formal theorists. How this inconsistency can be remedied is consequently a principal question on the research agenda now emerging in formal theory.

*Id.* at 680-81. See also Shepsle, *Prospects for Formal Models of Legislatures*, 10 LEGIS. STUD. Q. 5, 10-11 (1985) ("neither interpretation" of the chaos theorem—that either there must be a dictatorial agenda setter or legislative outcomes must "wander anywhere"—"rings true in any real-world legislative context").

29. For summaries of the various methods of evading Arrow's result, see Farber, *From Plastic Trees to Arrow's Theorem*, 1986 U. ILL. L. REV. 337; Sen, *Social Choice and Justice: A Review Article*, 23 J. ECON. LITERATURE 1764, 1770-74 (1985).

30. See K. ARROW, COLLECTED PAPERS OF KENNETH J. ARROW: SOCIAL CHOICE AND JUSTICE 78-87 (1983); A. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 166-72 (1970).

31. For an overview of the literature, see Panning, *supra* note 28, at 676-78, 681-82. Agenda control and legislative decisional structure can also influence outcomes even when cycling majorities are not present, for example, by keeping popular alternatives entirely off the voting agenda. See generally Levine & Plott, *Agenda Influence and Its Implications*, 63 VA. L. REV. 561, 564 (1977) ("[A]genda or groupings in which alternatives are considered for adoption or elimination can be a major parameter in determining what a group will ultimately choose."). For some experimental confirmation of this hypothesis, see Wilson, *Forward and Backward Agenda Procedures: Committee Experiments on Structurally Induced Equilibrium*, 48 J. POL. 390 (1986).

32. These devices and norms have other consequences as well, such as their tendency to increase legislative bias in favor of the status quo. For a discussion of how the Article I structure of decisionmaking prevents cycling and favors the status quo, see Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 954-58.

33. See Shepsle & Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503-19 (1981); see also Shepsle & Weingast, *Uncovered Sets and Sophisticated Voting Outcomes with Implications for Agenda Institutions*, 28 AM. J. POL. SCI. 49, 69 (1984) [hereinafter Shepsle & Weingast, *Uncovered Sets*] (concluding that "only in the simplest of institutions . . . does the cyclicity of the majority-rule preference relation directly characterize outcomes."); Shepsle & Weingast, *When Do Rules of Procedure Matter?*, 46 J. POL. 206, 208 (1984) (considering the effect of institutional practices on majority coalitions).

These institutional features of legislatures promote stability and coherence, but other mechanisms also seem to restrain instability. Voting experiments have shown that voting outcomes can be fairly predictable and clustered even when the voters' preferences contain massive cycles. Theoretically, the results of majority voting should wander over all possible outcomes, but voting actually has a strong tendency to favor balanced compromise outcomes.<sup>34</sup>

These empirical results are paralleled by more sophisticated formal models, in which voting outcomes remain stable and predictable even when the group's preferences are saturated with cycles.<sup>35</sup> These models involve a wide range of assumptions and use a variety of mathematical tools to describe the focal area of legislative outcomes.<sup>36</sup> The models also limit voting outcomes to relatively small subsets of all those possible. Even in the presence of massive cycling possibilities, they predict stability of a kind missing from earlier models.<sup>37</sup>

One source of stability consists of behavioral norms such as fairness.<sup>38</sup> Consider a very simple voting situation<sup>39</sup> in which three people

34. See Ferejohn, Fiorina & Weisberg, *Toward a Theory of Legislative Decision*, in *GAME THEORY AND POLITICAL SCIENCE* 165, 170-73 (P. Ordeshook ed. 1978); Fiorina & Plott, *Committee Decisions Under Majority Rule: An Experimental Study*, 72 *AM. POL. SCI. REV.* 575, 590 (1978). On the other hand, even where there is a single alternative that dominates all others, it is not always chosen. See Hoffman & Packel, *A Stochastic Model of Committee Voting with Exogenous Costs: Theory and Experiments*, 27 *BEHAV. SCI.* 43, 44-45 (1982) (note, by the way, how some of the participants cleverly evaded the experimental design to gather information and find a "mutually acceptable" solution, *id.* at 52-53).

35. See Ferejohn, McKelvey & Packel, *Limiting Distributions for Continuous State Markov Voting Models*, 1 *SOC. CHOICE* 45 (1984); Grofman, Owen, Noviello & Glazer, *Stability and Centrality of Legislative Choice in the Spatial Context*, 81 *AM. POL. SCI. REV.* 539 (1987) [hereinafter Grofman]; Miller, *A New Solution Set for Tournaments and Majority Voting: Further Graph-Theoretical Approaches to the Theory of Voting*, 24 *AM. J. POL. SCI.* 68 (1980).

36. See Ferejohn, McKelvey & Packel, *supra* note 35, at 59; McKelvey, *Covering, Dominance, and Institution-Free Properties of Social Choice*, 30 *AM. J. POL. SCI.* 283, 297 (1986); Shepsle & Weingast, *Uncovered Sets*, *supra* note 33, at 69-71 (exploring the effects of different agenda formation rules).

37. For a general description of these results, see Panning, *supra* note 28, at 681.

38. Indeed, one common problem in designing voting experiments is the risk that participants will vote for "fair" rather than individually rational outcomes. See Fiorina & Plott, *supra* note 34, at 583 (describing pilot experiments); Wilson, *Results on the Condorcet Winner: A Committee Experiment on Time Constraints*, 17 *SIMULATION & GAMES* 217, 222-25 (1986). Interestingly enough, economics graduate students are the one group of experimental subjects who appear immune to fairness claims. See Donohue, *Law and Economics: The Road Not Taken*, 22 *LAW & SOC. REV.* 903, 912 n.19 (1988).

39. This simple model captures the essence of the "chaos" results on majority voting:

One common interpretation of those results is that institutions that use majority rule ought not to work: since choices are cyclical, losers should always be able to find some alternative they like better that could defeat the present status quo, and so on ad infinitum. Thus, all legislatures should be in constant turmoil as losers try to reverse decisions they do not like.

Grofman, *supra* note 35, at 539. The cake game in the text has the same attribute, inasmuch as a loser can always propose a new split that will win a majority over the status quo, whatever the status quo might be.

must vote over how to divide a cake between them.<sup>40</sup> Assuming that they seek to maximize their own gains in this distributive situation, no equilibrium outcome exists. Any proposal can always be upset by another proposal preferred by two of the players, so this process has no ending point.<sup>41</sup> Yet there is a natural way to cut the cake; an equal three-way split (technically, the "value solution" of the game).<sup>42</sup> Besides its equitable appeal, this solution has a sort of stability. It is true that anyone could offer an amendment that would beat this outcome, but this would accomplish nothing except to start another round of endless cycling.<sup>43</sup>

In short, we have strong reasons to believe that legislatures do not suffer from the kind of instability or unpredictability suggested by some aspects of public choice theory.<sup>44</sup> But these findings do not entirely dispel the normative anxiety expressed by Mashaw and others. Perhaps legislatures are not chaotic, but they may still be normatively arbitrary. If structural features such as agenda rules rather than majority preferences determine outcomes, what becomes of the normative case for democracy? Knowing that outcomes are predictable and stable is of little comfort if they are also unconnected with anything that can plausibly be called the popular will or the public interest.

40. For a general discussion of such "fair division" games, see M. SHUBIK, *GAME THEORY IN THE SOCIAL SCIENCES* 306-11 (1982).

41. In technical terms, this game has no "core." See Wiley, *Antitrust and Core Theory*, 54 U. CHI. L. REV. 556, 559-61 (1987).

42. See M. SHUBIK, *supra* note 40, at 183-84; see also *id.* at 179-80, 413 (noting relevance of value solution to fair division games).

43. Such norms should emerge even more strongly in voting situations that already have a certain stability, such as those with institutionally induced equilibria or reasonably small uncovered sets. The incentive to move away from these "natural" equilibria is small, because the ensuing cycling is likely to send the outcome back into the equilibrium area anyway. Rational behavior calls for quickly finding and sticking with the equilibrium area. We can assume that successful institutions will have such norms, thus reinforcing any tendency toward equilibrium that is already present. The norms need not, of course, be explicit, but may well be based on implicit understandings and sanctions, which are especially likely to arise in situations like legislatures, where participants have long-term, on-going interactions. It may also be possible to devise procedural rules that guarantee this result. For instance, in the cake-cutting example, the person cutting the cake can be required to take the last piece. For a recent summary of the relevant literature, see Axelrod & Dion, *The Further Evolution of Cooperation*, 242 SCI. 1385 (1988).

44. Indeed, "natural selection" would eliminate any legislature that failed to develop defenses to cycling and instability. What purpose is served by a legislature whose outcomes are entirely unpredictable and fortuitous? One might as well have legislation chosen at random from lists of proposals. Obviously, a totally unstable legislature cannot further any version of the public good, nor can it reliably advance the welfare of any interest group. Nor can it even further the self-interest of the legislators themselves; because the outcome of the legislative process is fortuitous, no one has any incentive to reward individual legislators.

### III. ARE LEGISLATIVE OUTCOMES ARBITRARY?

At present, our understanding of the stabilizing features of legislatures is still primitive. Any effort to assess the normative implications of those features must be tentative. It is not too early, however, to attempt at least an initial assessment of the normative issues. In the remainder of this paper, I will sketch the possible outlines of a normative appraisal of these stabilizing features.

One of the basic rules of legislative procedure is that any proposal must win a majority vote when paired against the status quo. This helps induce stability by limiting the set of possible outcomes. It also makes good normative sense: clearly, the legislature should not adopt a measure which a majority finds less desirable than the status quo.

Stability can also be increased by restricting votes to a single dimension of dispute. This can be done through a "single subject" rule, by requiring bills to fit within the jurisdiction of specialized committees, or by a germaneness rule for amendments. Essentially, each of these devices seeks to ensure a sort of rationality. A vote on two unrelated issues (say abortion funding and arms control) leads to irrational results because preferences about abortion funding have no relevance to arms control.

Single-dimensionality operates most strongly as a source of coherence when preferences are uni-peaked — for example, when a legislator's preferences are determined by her location on a liberal-to-conservative ideological scale. The strong republican conception of community requires that everyone share a single set of preferences. Uni-peakedness can be seen as a weaker, but in some ways more realistic, form of community. People may disagree strongly about outcomes, but they share a common cultural perspective which makes their disagreements coherent and understandable to each other. Single-peakedness makes it possible for people to locate their own positions with respect to those of others, to identify the source of disputes, and to reach coherent and consistent decisions.

Another structural stabilizer is the use of committees as gatekeepers. Again, this device has at least some normative appeal. Committees may develop useful specialized knowledge, which may increase the social value of legislation, and they also offer an opportunity for group deliberation that may be unmanageable on the floor of the legislature. Either on the floor or in committee, deliberation may also provide an opportunity for changes in preferences; not, presumably, by revamping basic individ-

ual values, but by providing additional information about how to implement those values most effectively.

Moreover, committees may also give some degree of veto power to the constituencies most vitally affected by certain legislation, giving them a form of insurance against adverse government actions. Suppose that most individuals have a single vital interest that could be impaired by legislation. The committee system has two effects on them. If they control the relevant committee, they can veto legislation that affects this crucial interest. On the other hand, other committees will veto legislation that might benefit that particular group, depriving the group of possible gains. If individuals are risk averse, they may find this an attractive tradeoff.<sup>45</sup>

The norm of fair division, which also supports stability, has obvious ethical underpinnings. In part, it functions to limit the extent to which losses are disproportionately imposed on subgroups. Like the committee system, this has an insurance-like aspect. In some contexts, it may also reflect more fundamental ethical concerns. The concept of fair division has an evident egalitarian tinge. It can also reinforce concepts of community, by functioning as an acknowledgement of mutual concern and respect.

These devices<sup>46</sup> are not, of course, wholly beneficent in effect. Each device has potential side effects. Committees can give special interests the power to manipulate agendas or kill beneficial legislation. Ideology can take the place of thought or turn into fanaticism.<sup>47</sup> Issue-by-issue voting on expenditures can lead to budget deficits, since those favoring individual programs are not forced to set priorities. Compromise based on norms of fair division can erode principled commitments. Nevertheless, despite the possibilities of abuse, these stability enhancing devices have important normative virtues. They are not merely arbitrary meth-

45. The normative benefits and risks of the committee system are explored in Shepsle, *Representation and Governance: The Great Legislative Trade-off*, 103 POL. SCI. Q. 461 (1988).

46. Two other sources of stability should also be mentioned. First, the range of possible outcomes can be sharply limited by strategic voting. See P. ORDESHOOK, *supra* note 23, at 266-81. Strategic voting means that voters look ahead on the agenda, frustrating the efforts of agenda setters to manipulate outcomes. This intelligent action by voters can prevent perverse outcomes in which voters would be led to undesired results. This seems to increase the rationality of the process. Second, Arrow's Theorem requires three or more alternatives, and can be avoided if voters are presented with only two alternatives, as the two party system essentially insures. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 48-60 (2d ed. 1963). Depending on how these alternative packages of policies are assembled, the result again can be an increase in the fairness and rationality of the process.

47. Rose-Ackerman, *Public Policy in the Public Interest* (Book Review), 6 YALE L. & POL. REV. 505, 512 (1988).

ods for avoiding cycling and instability. Rather, they are in themselves potentially desirable decisionmaking procedures.

Public choice theory thus has an ironic connection with republicanism. At first sight, the two seem irreconcilable: one seemingly based on a glumly pessimistic appraisal of politics while the other sometimes seems nearly utopian in its aspiration for the political process. But republicanism at its most basic is a protest against the view that the political process is a purely passive reflection of preexisting preferences.<sup>48</sup> Public choice theory supports republicanism on this point, because arbitrary preferences in themselves are likely to be insufficient to generate coherent social choices.<sup>49</sup> Rather, preferences have to be processed through the legislative machinery, applying norms such as fairness and using committees and other stability-enhancing devices. Choice is considerably expedited if there is sufficient cultural consensus to generate uni-peaked preferences along single dimensions of dispute. By undermining pluralism, social choice provides support for at least a weak form of republicanism in which government is seen as not merely passive but instead as actively processing existing preferences.

In the work that originally gave rise to modern social choice theory,<sup>50</sup> Arrow's concern was less with the political process than with how to measure social welfare.<sup>51</sup> His finding was that, in general, there is no acceptable method for combining individual preferences into a unified societal preference. Thus, in some sense, the "public interest" cannot be an existing entity which is simply out there to be found, at least to the extent the public interest is taken as the cumulative product of individual preferences. Such a value-neutral, nonpolitical definition of the public interest quite possibly does not exist. The legislature may also lack the ability to identify transcendent values through deliberation of the kind envisioned by some republicans. Nevertheless, legislation may still have a valid claim of representing the public interest when the decisionmaking techniques meet certain standards of fairness and stability. A legislative decision might properly be said to represent the public interest when individual preferences on particular issues themselves generally fall into coherent ideological patterns; when decisions are made using techniques

48. See Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1131-38, 1153-54 (1986).

49. See Frohock, *Rationality, Morality, and Impossibility Theorems*, 74 AM. POL. SCI. REV. 373, 382-83 (1980).

50. K. ARROW, *supra* note 46.

51. For an argument that the Arrow Theorem is only relevant to measurements of social welfare, as opposed to political choice, see Kadish, *Practice and Paradox: A Comment on Social Choice Theory*, 93 ETHICS 680, 691-94 (1983).

that embody society's understandings about relevance; when norms of fair division are respected; and when the end result is preferred by a majority to the status quo.<sup>52</sup> In short, perhaps we should not think of the public interest as something that the political process merely identifies. Rather, it might be useful to consider the public interest as being in some sense created as the political process goes to work on processing existing preferences.

The realities of the political process may sometimes realize the vices of these stability features rather than their virtues. On those occasions, the legislative process has less of a claim to represent the public interest. But where the process operates properly, the resulting outcome has a good claim to represent "society's judgment" — not a mechanical combination of individual preferences of the kind Arrow showed to be a phantom, but rather a judgment created by and through the decisionmaking process. Thus, when we say that legislation is in the "public interest," we appear to be describing an inherent quality of the legislation, but perhaps we are better understood as meaning that the legislation has been or should be adopted in the context of a properly functioning legislative process, given existing preferences as a starting point.

This does not mean, however, that a well-structured process guarantees good legislation. Like Professor Mashaw, I believe that practical reason must play an important role in the judicial process,<sup>53</sup> but its role is no less crucial in the legislative process. Well-designed institutions, like adjudicatory due process, can provide a setting in which intelligent, principled decisions can be made. In part, legislative structures, like trial procedures, make good decisions possible by narrowing the context of the decision. Out of all the possible mixes of social policy, only a few are presented to the legislator for a vote, providing a structure in which political discourse can proceed. But the best conceivable set of legislative procedures could not dictate results any more than the best trial procedures can guarantee justice. The ultimate responsibility for the quality of the decisions belongs to the participants—lawyers and judges in adjudication, legislators and citizens in legislation. Because the legislative structure allows but does not guarantee desirable outcomes, there are no substitutes for good judgment and political leadership.

This perspective cannot obviate Arrow's theorem. The results of the

52. As Michael Fitts points out, attempts by courts to enforce these standards may be ineffective or even counter-productive. See Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Political Process*, 136 U. PA. L. REV. 1567, 1625-42 (1988).

53. See Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615 (1987); Mashaw, *supra* note 2, at 160.

political process cannot satisfy all of his postulates (transitivity, independence of irrelevant alternatives, etc.), simply because no decision method can do so. But if we were to think of politics as an active reworking of the existing situation, these postulates might seem less compelling. Arrow's postulates concern the relationship between the input and output of social decisions. Since we can never fashion a procedure that will fit his postulates, there may be little point in judging decisionmaking processes by this standard: they *all* flunk. Our standards might do better to look within the legislative black-box to inquire into the quality of political procedures.<sup>54</sup>

I do not want to argue, of course, that chaos and arbitrariness never emerge in actual deliberative bodies. No one who has attended law school faculty meetings can doubt the reality of this possibility. I would argue, however, that on the whole legislatures are likely as a result of natural selection to reach coherent outcomes that are related in some reasonable way to legislators' preferences. In areas where the legislature seems to dither or reach random results, there is less incentive to invoke the legislative process. Such issues are more likely to be left to other institutions such as the executive branch, the courts, or the market. In areas where agenda setters use their power to reach results that are systematically opposed to the preferences of the legislators, they are more likely to face challenges to their power. Consequently, there may be some tendency for legislative action to take place in areas where (a) there are coherent preferences, and (b) those preferences strongly influence results. In the law school setting, then, the Dean is likely to take control on those issues where there is no coherent faculty majority, while in those areas where such a majority exists, the Dean will have only a limited (but still real) power to use agenda manipulation to thwart that majority. I leave any empirical judgment about these propositions to the reader.

In closing, I would like to avoid two possible interpretations of my comments. First, because I have been critical of some public choice scholarship, the reader might conclude (as some actually have in the past) that I am an "opponent" of public choice. My own view, however, is that while public choice methodology requires careful handling, it is potentially very useful. Second, although I argue that civic virtue and legislative deliberation do play some role in the political process, I am

54. Nozick has proposed that we should judge the fairness of an existing wealth distribution by the fairness of the process by which it evolved, rather than on its intrinsic ethical appeal. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 153-55 (1974). Perhaps we should at least in part assess the validity of political outcomes on the basis of process rather than substance.

not naively optimistic about the extent of that role. But if we throw up our hands in disgust at the flaws of the political process, we are unlikely to improve matters.