RESTORING POSITIVE LAW AND ECONOMICS:
INTRODUCTION TO PUBLIC CHOICE THEME ISSUE

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INTRODUCTION

It is a great privilege to write the introduction to the George Mason Law Review’s Public Choice Theme Issue. In no less than two respects, this theme issue represents an intellectual celebration. First, the issue combines the talents of a well respected group of scholars, applying the disciplines of law and economics to the subject matter of political science. In so doing, the contributors to this theme issue provide valuable insights into the nature of our governmental institutions and legal rules. Second, the theme issue is published on the eve of the arrival of a new building, which will become the home of both the George Mason University School of Law (“GMUSL”) and the James M. Buchanan Center for Political Economy (“JBC”). When that move is complete, several renowned public choice scholars, including Professor Robert D. Tollison, who contributed to this symposium, will find their new homes alongside the law faculty of GMUSL.

To those new to the discipline and literature of public choice, the benefits of this physical and intellectual merger might not appear obvious. One objective of this Introduction, and indeed of this symposium, is to reveal the profound synergies that this merger will likely produce.¹ But I also hope to do more: My larger objective is to show the vital role that public choice (by which I intend to include both interest group theory and social choice theory)² has played—and continues to play—in furthering the central mission of law and economics in the positive analysis of legal institutions and rules.

Public choice applies the tools of economics to the subject matter of political science. The methodology and the various camps of public choice have been aptly described in a variety of settings.³ I have recently surveyed much of the public choice literature analyzing legal institutions and rules in my course book on the subject.⁴ I will not provide an overview of

¹ Professor Saul Levmore recently recognized just this intellectual synergy, when he stated: “The most exciting intellectual development in law schools in the last decade is surely the arrival and growth of public choice theory.” Saul Levmore, Foreword to Maxwell L. Stearns, Public Choice and Public Law xi (1997).

² While game theory is generally not considered part of public choice, the combined tools of game theory, public choice, and social choice are sometimes placed under the larger umbrella of “positive political theory.” In fact, many of the tools of game theory are parallel to those of social choice theory.


⁴ See Stearns, supra note 1. Other valuable introductions to, and discussions of, public choice include Daniel A. Farber & Philip P. Frickey, Law and Public Choice (1991); Jerry L. Mashaw, Greed, Chaos, and Governance (1997); Dennis Mueller, Public Choice II (1989);
that rich literature here. Instead, I will use this Introduction to achieve two narrower objectives. First, this Introduction, and the valuable collection of articles that follows, provide an opportunity to comment upon the evolving role of public choice in the larger body of law and economics literature. Specifically, I will argue that public choice, and especially the so-called second wave of public choice,\(^5\) has played, and continues to play, a vital role in restoring law and economics to its central role in providing a robust positive analysis of institutions and rules. Second, I hope to provide a broader context within which to evaluate the individual contributions that follow in this symposium. While my immediate objective is to inspire readers to continue on, and to read the provocative collection of articles that follows, my longer term objective is to convince readers of the value of public choice as an increasingly independent discipline worthy of scholarly and curricular attention across the nation’s law schools.

I. LAW AND PUBLIC CHOICE IN HISTORICAL PERSPECTIVE

As is generally the case within legal scholarship, the benefits of deliberately defying traditional disciplinary boundaries are often realized at a slow pace. While the University of Chicago School of Law was discovering the value of applying the tools of economic analysis to the study of law, giving rise to the ever influential body of scholarship in law and economics, economists themselves were rediscovering political science as fertile ground for the application of economic principles. Both interdisciplin ary schools emerged in the 1950s, but public choice did not find its way into the legal literature until the early to mid-1980s. As a result, Chicago School Law and Economics is historically—and, as I will show, conceptually—antecedent to law and public choice.

It is neither possible nor appropriate here to provide a survey of the vast and diverse body of literature in law and economics.\(^6\) Instead, I hope to provide a bit of historical context about law and economics, as a

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\(6\) For an overview, see Richard A. Posner & Francesco Parisi, Law and Economics: An Introduction, in I LAW AND ECONOMICS ix-li (Richard A. Posner & Francesco Parisi eds., 1997). It is also worth noting that law and economics was once the province of a limited number of specialty journals, including, most notably, the Journal of Legal Studies and the Journal of Law and Economics, both housed at the University of Chicago School of Law. Two other journals dedicated to law and economics, the Journal of Law, Economics, and Organization, published by the Yale University Press, began in the early 1980s, and the Supreme Court Economic Review, after a lapse of several years, began publishing at the GMUSL in 1993. But today, law and economics is a mainstream staple of virtually all top law reviews.
valuable backdrop for thinking about the growing body of law and public choice literature.

A. Law and Economics: From Positive to Normative

For no less than three reasons, law and economics traces its most direct historical roots to the University of Chicago School of Law.\(^7\) Under the early guidance of Professor Aaron Director, who taught at the law school from 1948 to 1972, a prominent group of legal scholars began a research project, which, at once, grew out of, and radically parted from, the then-dominant school of legal realism. Like the legal realists, Director and others sought to pierce formalist legal doctrines, articulated in countless common law judicial opinions, and, instead, to identify the critical underlying case facts and holdings, which over a large number of opinions form the common law. But unlike the realists, Director employed the unifying methodology of economics as the vehicle for evaluating the various common law opinions and rules. While Director apparently wrote very little,\(^8\) in a truly Socratic manner,\(^9\) Director contributed to the intellectual climate at Chicago by asking fundamentally different questions about the nature and evolution of common law rules, and by encouraging others to do the same. An economist with no formal legal training, Director avidly read common law case reports. In doing so, he eschewed judicially crafted common law doctrines in favor of his own careful and reasoned application of basic economic principles, which, he observed, provided the critical glue in linking the precise case facts to the ultimate holdings. Piecing together groups of cases, and focusing on the differences in the underlying case facts, Director, for the first time, recast once archaic and formalistic common law doctrines as a set of rules that furthered the reasonable \textit{ex ante} expectations of the parties, and which therefore appeared consistent with economic efficiency analysis.

Professor Ronald Coase’s seminal article, \textit{The Problem of Social

\(^7\) The remaining discussion in this paragraph is based upon a lecture Henry Manne has given on numerous occasions on the history of law and economics, in addition to his written summary. \textit{See Henry G. Manne, George Mason University School of Law, An Intellectual History of the School of Law George Mason University} 5-8 (1993).


\(^9\) Socrates, who earned his rightful place in the history of Western philosophy by asking a lot of (apparently annoying, at least if his ultimate fate is any indication) questions, is perhaps the only great Western philosopher who, as far as we know, never wrote a word.
Cost,\textsuperscript{10} which in significant part was responsible for his receiving the Nobel Prize in Economics in 1991, further bolstered the University of Chicago’s central historical role in the intellectual history of law and economics. In that article, Coase articulated the now-famous Coase Theorem, which posits that in a world with zero transaction costs and perfect information, resources will flow to their most highly valued uses without regard to existing liability rules. As often occurs when scholars plant insights drawn from one discipline into the soil of another, both legal scholars and economists generally failed to understand what Coase regarded as the theorem’s fundamental point.\textsuperscript{11} Coase did not intend to suggest that because transaction costs were low, liability rules, or legal rules generally, were of little or no consequence. Indeed, Coase’s critical intuition was essentially the opposite: Precisely because transacting is costly, and sometimes prohibitively so, lawmaking institutions, including most notably courts and legislatures, do well only to the extent that they devise rules which accord with the \textit{ex ante} expectations of the affected parties. Otherwise, by crafting rules that thwart the parties’ \textit{ex ante} expectations, such institutions might perpetuate inefficient outcomes, which, as a result of positive transactions costs, parties might find themselves unable to avoid through contracting.\textsuperscript{12}

While the Coase Theorem has provided a strong normative basis for analyzing potentially inefficient legal rules, especially those that thwart the \textit{ex ante} expectations of contracting parties, it has also proved a vital contribution to the positive analysis of economic structures. Indeed, Ronald


\textsuperscript{11} As others have pointed out, the Coase Theorem is a misnomer. Because only a single datum inconsistent with a theorem disproves the theorem, Coase’s critical insight cannot be viewed as a theorem in the formal mathematical sense. In the context of empty core bargaining, for example, it has been demonstrated that the theorem does not apply. See Varouj A. Aivazian & Jeffrey L. Callen, \textit{The Coase Theorem and the Empty Core}, 24 J.L. & ECON. 175 (1981). Whatever practical significance the empty core problem might have for Coasian bargaining, one can only restore stable and predictable outcomes by imposing a liability rule in the form of expectancy damages, which in turn produces positive transactions costs that exceed the gains from forming new, and otherwise superior, coalitions. See Ronald H. Coase, \textit{The Coase Theorem and the Empty Core: A Comment}, 24 J.L. & ECON. 183 (1981); see also Maxwell L. Stearns, \textit{The Misguided Renaissance of Social Choice}, 103 YALE L.J. 1219, 1234-40 (1994) [hereinafter Stearns, \textit{Misguided Renaissance}] (explaining relationship between Coase Theorem and empty core bargaining). In turn, the presence or absence of a liability rule in the context of empty core bargaining is potentially dispositive of resource allocation, which is directly contrary to the Coase Theorem. In addition, in a jointly authored article, Avinash Dixit and Mancur Olson recently demonstrated that the theorem also breaks down when the problem of collective action is introduced, although this might be viewed as a specific case of empty core bargaining. See Avinash Dixit & Mancur Olson, \textit{Does Voluntary Participation Undermine the Coase Theorem?} (Aug. 6, 1997) (unpublished manuscript on file with the \textit{George Mason Law Review}). It is worth noting that while he has since used the term, as the title to the above article suggests, Professor Ronald Coase did not label his initial insight the Coase Theorem.

\textsuperscript{12} See Stearns, \textit{Misguided Renaissance}, supra note 11, at 1244.
Coase initially set out to have law professors and economists study real world private market arrangements, which have the effect of reducing transaction costs contractually. Coase's well known theory of the firm is in this tradition.\textsuperscript{13} The theory takes as its starting point the intuition that certain private market structures have evolved in a manner that reduces transactions costs. Specifically, by vertically integrating a vast network of separate economic components, and disciplining the firm with a pyramidically structured management, driven by the profit motive, the firm is able to avoid the countless bilateral monopoly negotiations that would otherwise plague the same components had they instead tried to achieve the same results through countless individual contracts.

It is probably no coincidence that two of the earliest and most prominent contributions by the University of Chicago to law and economics, those of Director and Coase, emerged in a transformative period in American law. In the late nineteenth and early twentieth century, a generally conservative federal judiciary continued to limit the expansion of federal regulatory powers and, at the same time, to further the basic tenets of state common law rules. And prior to \textit{Erie R.R. v. Tompkins},\textsuperscript{14} to the extent that states had liberalized their own common law rules, Article III courts sitting in diversity jurisdiction stood as a ready counterweight, with the power and inclination to provide a competing, and more conservative, federal common law. In constitutional adjudication, the federal courts furthered the same objectives by striking down substantial state and federal regulatory departures from common law principles as inconsistent with fundamental economic liberties. The period of due process jurisprudence associated with \textit{Lochner v. New York}\textsuperscript{15} was consistent with the simple—and stringent—common law rules of the period; indeed, the effect of that ruling was to discipline perceived renegade state legislatures, which threatened to undermine the power of private persons to contract freely in various employment contexts. While the erosion of these simple rules began in the New Deal, the regulatory state underwent an even more profound expansion in the 1960s with the Great Society.\textsuperscript{16} By the mid-1960s, Congress and state legislatures had combined substantially to alter the legal landscape as it existed under the force of traditional common law rules. Restrictions on permissible contracting, for example, in the form of minimum wage and maximum hour laws, had become commonplace. The traditional and limited list of justifications for terminating contractual obligations—incompetence, duress, or fraud—was expanded to include the

\textsuperscript{14} 304 U.S. 64 (1938).
\textsuperscript{15} 198 U.S. 45 (1905).
more malleable doctrine of unequal bargaining power. The conditions under which owners of businesses deemed places of public accommodation could determine whom they chose to serve were limited to exclude considerations of race. And, through a bootstrapping mechanism, the Supreme Court eroded the state action doctrine to prevent homeowners from using the courts to enforce race-based restrictive covenants. In the same period, state legislatures began to experiment with affirmative action programs, which altered the traditional, and generally stringent, merit-based university admissions formulas to include express consideration of race.

This seeming wholesale change in the legal climate, which began in the New Deal and which continued in earnest into the late-1970s, substantially transformed the Chicago-inspired law and economics movement. While early Chicago School scholars employed economic analysis to explain then-existing institutions and rules, a new generation of law and economics scholars employed the same tools to challenge the alleged inefficiencies of the expanding regulatory state.

Before concluding this historical discussion of—and tribute to—the Chicago School, it is important to consider one additional contributing force, which forever cemented that institution’s place in this illustrious intellectual history of law and economics. Then-Professor, now Seventh Circuit Judge, Richard Posner, published the first edition of his seminal work, The Economic Analysis of Law (now in its fifth edition), in 1973. Perhaps more than any other single force, that book provided legal scholars unfamiliar with the discipline of economics and its wide-ranging applications to legal problems, with the basis for an informed overview and analysis. It is no exaggeration to say that Posner’s book has almost single-handedly made the once arcane tools of economics accessible to

20 Of course, as proponents of affirmative action rightly observe, under so-called merit-based admissions, universities freely considered such nonmerit factors as geographical diversity, legacy status, financial contributions by family members to the institution, and nonrace-based diversity, in the form of athletic and musical talent. And, indeed, historical religion-based quotas as applied, for example, to Jews, and racial exclusions, as applied to African-Americans, were also inconsistent with a merit-based approach to college and university admissions.
22 Another major contributing force was the summer programs created by the former Dean of GMUSL, Henry G. Manne, through the Law and Economics Center, which he created at the University of Miami School of Law, then moved to Emory Law School, and brought with him to GMUSL in 1986. In addition to his Economics Institute for Law Professors, this Center is widely known for its Economics Institute for Federal Judges.
legal scholars trained in altogether different disciplines. In turn, his book, in each of its improved editions, probably remains among the most important contributions to the dissemination of law and economics within the legal academy. Indeed, it is fair to suggest that many leading experts in law and economics today were weaned on one of the earlier versions of Posner’s text.23

In establishing a historical foundation for this symposium, and for public choice generally, it is worth considering two types of criticisms that have been leveled against the approach to law and economics set out in Posner’s various works, including most notably, his book. One group of scholars has questioned Posner’s positive assertions concerning the forces which drive common law rules, as opposed to statutes, toward efficiency. A second group of scholars, including Professor Charles Rowley writing in this symposium,24 has questioned on normative grounds whether the benchmark of efficiency, as Posner has defined it, can or should serve as the motivating factor in judicial decision making. Briefly reviewing these two criticisms will allow us to consider the complementary role that public choice has played, and continues to play, in the positive economic analysis of institutions and rules.

Professors Paul Rubin and George Priest have written an influential tandem of articles,25 in which they questioned Posner’s seemingly tautological assertion that judges—in contrast with legislators—can and do promote efficient outcomes because they have a taste for doing so.26

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24 Rowley, Wealth Maximization, supra note 23.

25 See Priest, supra note 23; Rubin, supra note 23. For presentations and analyses of this literature from law and economics and public choice perspectives, see KENNETH G. DAU-SCHMIDT & THOMAS S. ULEN, LAW AND ECONOMICS ANTHOLOGY ch.7 (1998); STEARNS, supra note 1, at 779-83.

26 For a parallel debate, which, it has been argued, lies at the core of public choice, consider the literature on why individuals vote. Some scholars, most notably Professors Daniel A. Farber and Philip P. Frickey, have argued that because economics has offered no utilitarian justification for the costly, but ultimately noninstrumental, act of voting, public choice is founded upon an inevitable tension. Either people vote for noninstrumental reasons, thus calling into question the rationality postulate, or they vote because they have a taste for doing so, thus resting public choice upon a tautology. See Daniel A. Farber & Philip P. Frickey, The Jurisprudence of Public Choice, 65 TEX. L. REV. 873, 893-94 & n.129 (1987). In contrast, Professors Michael DeBow and Dwight Lee have rejoined that persons vote because they derive a consumption benefit from doing so, thus “rescuing” public choice from the claimed tautology, but with little ability to predict the next noninstrumental activity for which persons will have a taste. See Michael E. DeBow & Dwight R. Lee, Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey, 66 TEX. L. REV. 993, 997-98 (1988). For a more detailed discussion and analysis, see STEARNS, supra note 1, at 64-69.
Instead, while disagreeing on the details, these scholars posit that the driving force promoting common law efficiency is exogenous of—or lies outside—judicial predilections. If we assume that inefficient rules, when supplanted with efficient rules, produce larger gains than the reverse, then, holding all else constant, we would expect a higher percentage of cases challenging inefficient rules. In turn, even if we assume that judges decide cases on a random basis with respect to efficiency, the higher percentage of challenges to inefficient, as opposed to efficient, rules, will result in a general evolution toward efficiency.  

In this symposium, Professor Rowley, relying in part on an Austrian-school critique of efficiency analysis, takes a substantially different tack. In the late nineteenth and early twentieth century, Rowley observes, private markets and the common law combined, through a decentralized and spontaneous ordering, to produce what appears to be our best proxy for efficient outcomes. Relying upon the works of Friedrich A. Hayek and others, Rowley observes that in the absence of this kind of spontaneous ordering, Posner's efficiency analysis calls upon judges to engage in the judicial equivalent of central planning, which is no more likely to provide uniformly satisfactory results than the now-widely discredited notion of legislative central planning, for example in the former Soviet Union and Eastern European nations. Without knowing the utility functions of private market participants, which can only be expressed through the revealed preferences in a set of countless decentralized processes, and without a mechanism for comparing these preferences, which virtually all economists admit is impossible, courts are left with

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27 Professor Rubin, in contrast with Priest, has posited that this tendency will be more pronounced when repeat litigants, e.g., defendants in products liability actions, anticipate that they will "capture" the benefits of displacing inefficient with efficient rules in future cases. See Rubin, supra note 23, at 55-56. Since writing this article, Rubin has retreated from his efficiency analysis, arguing that plaintiffs' tort lawyers, with the organizational assistance of the American Trial Lawyers Association, have the incentive and means to drive the common law of tort away from efficiency and the ability to capture gains from doing so in future cases. See generally Paul H. Rubin & Martin J. Bailey, The Role of Lawyers in Changing the Law, 23 J. LEGAL STUD. 807 (1994). In contrast, Priest posits that litigant capture is unnecessary to drive the common law toward efficiency, provided the gains from displacing inefficient rules with efficient rules exceed those of displacing efficient rules with inefficient rules. See Priest, supra note 23, at 72-75.


29 Unlike Rizzo, Rowley also criticizes Posner's efficiency analysis on social choice grounds, arguing that, in effect, the common law efficiency analysis which Posner espouses is a form of social welfare function, which cannot simultaneously satisfy both rationality and fairness criteria. For a more detailed discussion, see infra at Part I.B. (discussing Arrow's Theorem).

30 See Rowley, Wealth Maximization, supra note 23, at 982 n.76; see also ARMEN A. ALCHIAN
the inevitable task of guessing what constitutes a set of efficiency enhancing outcomes. In doing so, judges will base their decisions upon their own intuitions, with few, if any, meaningful guideposts, as to which outcomes actually are efficient. But Rowley's critical insight asks as many questions as it answers. And the questions that it asks lie at the heart of the so-called second wave of public-choice-inspired legal scholarship. Before introducing this new literature, a final comment on the Chicago School will be helpful.

If we embrace the methodology of Aaron Director, Ronald Coase, Richard Posner, and other well noted Chicago School law and economics scholars, including Gary Becker, Frank Easterbrook, and Richard Epstein, we are left relying upon a methodology the initial justification for which was its superior power to explain existing legal institutions and rules, instead, to bring those institutions and rules under attack. To be clear, I am not accusing the Chicago School of disingenuousness or internal inconsistency. Nor am I attacking (here) the normative precepts upon which its adherents base their analyses. Instead, I am simply describing an important, and rarely discussed, evolutionary trend in Chicago School law and economics scholarship. The overriding justification for Chicago School law and economics has been the power of that school to provide superior positive explanations for wide ranging rules, which formalistic doctrines proved ill suited to justify on their own terms. As any first year law student at a school inspired in part by law and economics now knows, such rules as expectancy damages in breach of contract actions, the Learned Hand negligence formula, and the rule of capture, to choose three rules almost at random, are all intuitively regarded as efficient, even though expectancy damages invites breach, Learned Hand fails to impose liability for at least some potential injury-reducing precautions, and the alternative chase rule might encourage some beneficial investigative activity. But this is stuff of the past. Today, the action within law and economics is to explain such matters as why, from an ex ante perspective, Ms. Walker is better off risking having the furniture store remove all of her furniture under a dragnet security clause in spite of her seemingly unequal bargaining power; why, under at least certain conditions, prohibitions on race or sex discrimination and rules creating affirmative action programs may ultimately harm their intended beneficiaries; and why


32 See generally GARY S. BECKER, THE ECONOMICS OF DISCRIMINATION (1957); RICHARD A.
governmental regulations traditionally handled under minimum level rational basis scrutiny should instead be regarded as takings subject to strict scrutiny. In short, the new Chicago School literature is a very different law and economics, one which, I will argue, has a strong and growing countervailing force within the more recent law and public choice literature.

B. Law and Public Choice: From Normative to Positive

In his recent review of my course book on public choice, Professor David Skeel divided the legal literature employing public choice into two "waves." The first wave was principally motivated by an application of the theory of group behavior to political activity and organization. Employing rational choice models, economists and political scientists had devised rather sophisticated models, which, to a considerable extent, challenged the more commonplace models of the legislative process employed within law schools. Most notably, perhaps, Mancur Olson had devised a comprehensive theory of group behavior, which revealed counter intuitively that the likelihood of group success, a proxy for group power, was often inversely correlated with group size. Olson posited that, holding all else constant, groups that were better able to organize, and to exclude others from the benefits of their political activities, were more likely to succeed in exerting sufficient political pressure to achieve their legislative objectives. In effect, the economic theory of group behavior put the traditional justification for governmental decision making on its head. Rather than operating to iron out the details of general interest legislation, with proponents and opponents exerting roughly symmetrical influence, majoritarian interests on either side of a wide-ranging legislative initiative

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34 See Skeel, supra note 5.

35 While Skeel attributes the first wave to a combination of interest group theory and social choice theory, see id. at 660-63, the latter did not enter into mainstream legal literature until the early 1980s and did not gain significant influence until almost a decade later.

36 For public choice models of the legislative process, see, for example, Michael T. Hayes, Lobbyists and Legislators 98-126 (1981) (offering public choice model of the legislative process); William H. Riker & Peter C. Ordeshook, An Introduction to Positive Political Theory 272-305 (1973) (same); James Q. Wilson, Political Organizations 327-46 (1973) (same). For the classic legislative model employed in law school instruction, see Henry M. Hart & Albert M. Sacks, The Legal Process 1415 (10th ed. 1958) ("assume, unless the contrary unmistakably appears, that the legislature is made up of reasonable persons pursuing reasonable purposes reasonably").

37 See generally Mancur Olson, The Logic of Collective Action (1971). To be precise, there is an optimal size function, suggesting that groups can either be too small or too large to operate effectively within political markets. The critical point for present purposes is that the size principle operates over a significant range to the disadvantage of over-weighted groups.
often found their will subordinated to special interests with a size and organizational comparative advantage.

Building upon the theory of group behavior, the earliest and perhaps most notable Chicago School contribution to public choice was to recast business regulation from an "imposed upon" to an "acquired" model. Not only did interest groups exert seemingly disproportionate influence on legislative behavior, in the form of rent seeking, but also, and more importantly, the very effort to regulate industry was ultimately itself a manifestation of industry rent seeking.\(^{38}\) The economic theory of regulation posits that much regulation operates as a vehicle through which special interests erect and maintain barriers to entry, thus enhancing the organizational ability of the regulated industry and allowing a smaller group of beneficiaries to capture the gains. The first wave of scholarship to which Professor Skeel refers was largely focused upon the normative question of whether, and how, to limit the apparently disproportionate influence that interest groups exert on political processes.\(^{39}\) Those who focus on this question have, not surprisingly, been inspired by the efficiency analysis associated with the Chicago School. To the extent that democratic processes reflect interest group maneuvering, rather than good faith deliberation about the provision of genuine public goods, the results are likely to be inefficient and thus undesirable.

Among the early and seminal insights which grew out of the economic theory of regulation was the theory of the independent judiciary offered by William Landes and Richard Posner. Landes and Posner presented the independent judiciary as a bonding mechanism, which operated to extend the life of interest group bargains beyond the immediate session of Congress.\(^{40}\) If judges were elected rather than appointed, and if their terms were fixed rather than for life, their interests in promoting special interest bargains would end with the political pressures that produced those bargains. In contrast, judicial independence operates as a bonding mechanism through which courts signal to interest groups that their congressionally ratified bargains will be enforced well into the future. One question this raises, which has led to considerable disagreement about the theory's normative implications, is why we would seek to extend the shelf life of


\(^{39}\) Cf. Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review?, 101 YALE L.J. 31, 48-49 (1991) (positing that literature relying upon interest group theory to advocate heightened judicial review necessarily rests upon a most often unstated normative baseline concerning the appropriate extent of interest group involvement in the political process).

interest group bargains. The differing intuitions on this question have greatly affected the first wave of law and public choice literature.

Then-Professor, now Seventh Circuit Judge, Frank Easterbrook advanced the thesis that federal courts can and should identify interest group bargains underlying even general interest legislation and enforce them on their own terms. 41 Professor Jonathan Macey, in contrast, responded that since most legislation, even if ultimately the product of interest group bargaining, is worded in public-regarding terms, federal courts should interpret such statutes in a manner consistent with their stated public-regarding purpose. 42 Macey does not advocate preventing interest groups altogether from reaping the benefits of their legislative bargains, but rather seeks to raise the cost. If interest group bargains must be open and explicit, rather than hidden and implicit, the cost to interest groups of achieving payoffs enforceable in federal courts from the political process will be substantially raised.

Resolving this disagreement between scholars requires that we first answer the question why we have an independent judiciary whose effect is to prolong interest group bargains. I would suggest that the most compelling normative explanation is not because interest group bargains are desirable in their own right, but rather because the framers of the Constitution recognized that interest group bargains provide the glue that holds together sufficiently large coalitions to pass desired general interest legislation. In effect, the bonding mechanism is a vehicle which raises the incentives to interest groups today to work the legislative process to their advantage, knowing that a by-product of their efforts will be to encourage an increased supply of general interest legislation, relative to a world in which the federal judiciary did not stand ready to preserve those bargains tomorrow. So viewed, the theory of the independent judiciary exposes the tradeoffs associated with extending the life of interest group bargains, but it does not tell us anything about how those tradeoffs should be resolved.

In any event, responding to the somber assessment of the legislative process articulated by Easterbrook and Macey, Professors Farber and Frickey wrote a group of articles, culminating in their widely read book, *Law and Public Choice*, 43 in which they challenged the underlying assumptions on which public choice theory is based, and proposed that better developed models employing positive political theory accord with a more benign vision of the political process, 44 one in which ideology and public

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43 FARBER & FRICKEY, supra note 4.

44 For my analysis of the reliance by Professors Farber and Frickey upon these models, see
spiritedness play a positive role. While the Farber and Frickey analysis is largely critical of public choice, or at least the Chicago School variety, Professor William N. Eskridge heartily embraced public choice to advance an equally ambitious normative agenda for the role of courts in the interpretation of statutes, albeit one that produces far more liberal results. Relying upon the earlier works of James Q. Wilson and Michael T. Hayes, Eskridge proposed gauging the response of courts in the construction of statutes based upon the extent to which the supply or demand configurations for the given legislation was broad, and thus the product of benign political processes, or narrow, and thus the product of interest group manipulation.

My purpose here is not to evaluate each of these provocative positions on the role of public choice in the judicial interpretation of statutes. The more important point for present purposes is that each of the above theses advocates a change in the judicial approach to the construction of statutes based upon the authors' impressions about the acceptable extent of interest group involvement in the political process. In addition, it is noteworthy that while each of the above authors expresses skepticism about legislative processes, they are all willing to assume that the federal judiciary will be neutral in its application of their normative proscriptions in the construction of statutes. In turn, this rich body of literature invites a comparative assessment of the relative competence of the relevant institutions affected by these proposals in the creation of law and public policy.

The emerging second wave of public choice scholarship directly confronts the question of comparative institutional competence as a response to the various normative proposals that have emerged from, or in response to, the Chicago School. The starting point for analysis in the second wave is the nirvana analysis, initially described by Professors Ronald Coase and Harold Demsetz. The nirvana fallacy is the tendency of scholars to identify defects in a given institution or rule and then to propose change without fully considering the defects associated with the proposed alternative regime. Scholars undertaking a real world, rather than nirvana, analysis of institutions and rules begin not by identifying defects

Stearns, supra note 1, at 717-22.

45 See DeBow & Lee, supra note 26, at 993-95 (arguing that several of the conclusions Farber and Frickey reach are consistent with insights drawn from a large body of non-Chicago-based public choice scholarship).

46 See Wilson, supra note 36.

47 See Hayes, supra note 36.

48 For my analysis of these competing positions, see Stearns, supra note 1, at 629-39.


50 See Skeel, supra note 5, at 663.

51 See Coase, The Coase Theorem and the Empty Core, supra note 11, at 187.

in a given institution and then proposing change, but rather by recognizing that all institutions are in some material respect imperfect.\textsuperscript{53} One particularly informative method for undertaking a sophisticated real world analysis of institutions and rules—especially those that operate in a manner at odds with the normative efficiency prescriptions of Chicago School adherents—is to expand the range of evaluative criteria growing out of economic analysis. In a group of articles, I have argued that social choice theory, and specifically Arrow’s Theorem, provide just such a set of normative criteria.\textsuperscript{54}

Arrow’s Theorem holds that no collective decision making body simultaneously can satisfy the condition of transitivity (defined in social choice as rationality: A preferred to B preferred to C implies A preferred to C) and four reasonable conditions which Arrow deemed essential to fair collective decision making. The four fairness conditions are: (1) range (the decisional rule must choose its universal outcome consistently with the selection by all members of all conceivable sets of ordinal rankings of three or more available options),\textsuperscript{55} (2) nondictatorship (the decisional rule cannot systematically vindicate the preferences of a single member against the contrary preferences of the group); (3) independence of irrelevant alternatives (in choosing between paired alternatives, members must base their decisions solely on relative merit, disregarding such extraneous matters as the voting path); (4) unanimity (if a move from the status quo to an alternative state will benefit at least one member without harming others, then the institution must so move). I will not summarize here the voluminous literature growing out of Arrow’s insight, except to make one point. This theorem, or more precisely a corollary drawn from it,\textsuperscript{56} expands the positive force of the economic analysis of law by multiplying the relevant normative benchmarks by a factor of five.

To take a single example, consider the contrasting views of \textit{stare decisis} offered by Judge Frank Easterbrook and myself. Judge Easterbrook has observed that \textit{stare decisis} in Supreme Court decision making has the perverse effect of rendering the evolution of doctrine dependent upon the

\textsuperscript{53} See NEIL K. KOMERAR, IMPERFECT ALTERNATIVES 3-13 (1994).


\textsuperscript{55} In prior presentations, I have split this criterion into range and universal domain. See Stearns, Misguided Renaissance, supra note 11, at 1247-48. The above presentation of range combines both of these elements. See generally MUELLER, supra note 4, at 385 (describing range).

\textsuperscript{56} The corollary is that any decision making body that functions must relax either rationality or one of the Arrowian fairness criteria. See Stearns, Historical Evidence, supra note 54, at 330-38 (describing Arrow’s corollary).
arbitrary order in which cases are presented for consideration. In turn, Judge Easterbrook has advocated that the Supreme Court relax *stare decisis* in constitutional cases to avoid path dependency. In contrast, my own analysis of *stare decisis*, which grew out of a larger effort to explain the Supreme Court's standing doctrine, began with the premise that because the Supreme Court is a collective decision making body, it must relax at least one of the five Arrovian criteria. If we assume that the Court has a collective obligation to decide those cases properly before it, then we can demonstrate that the Court must employ a rule that limits the number of binary comparisons relative to the number of available options. In turn, in a regime which adheres to *stare decisis*, the order in which cases are presented will have a significant impact upon the substantive outcomes of cases.

Rather than advocating that the Court relax *stare decisis* to avoid path dependency (given that the result would be to invite doctrinal instability), I considered whether any other rule operates in conjunction with *stare decisis*, to ameliorate that doctrine's most damaging effects. In turn, I was able to explain the Supreme Court's increasingly important standing doctrine, and most obviously the barriers to third party and diffuse harm standing, as vehicles that raise the cost to litigants of trying to manipulate the path of cases in the federal judiciary in general, and in the Supreme Court in particular. Employing the theory of social choice, I was able to demonstrate that a rule criticized under a Chicago approach, which focused on the seeming irrationality of path dependent case law, can be better understood by expanding the relevant range of economic criteria to include a consideration of the fairness with which the path of case decisions is determined.

In Professor Skeel's analysis, the second wave of public choice scholarship largely serves the twin purposes of institution reinforcement and of devising novel methods of framing reform. In fact, these two functions go hand in hand. To see why, we must consider the mission of positive economic analysis generally. The mission of positivism is not to suggest that that which *is* is necessarily desirable. If it were, there would be little point in analyzing institutions and rules. Instead, we would all better devote our time to virtually any other task. The benefit of a positive economic analysis of institutions and rules is that it often meets intuition

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58 See id. at 820.

59 In the terminology of social choice, the Court is required to employ a non-Condorcet decisional rule, thus relaxing the Arrovian range criterion. *Stare decisis* presumptively holds certain rank ordering over presented alternatives—those which would reveal that the court possesses cyclical preferences—off limits in cases subject to precedent.

60 See Skeel, *supra* note 5, at 663-70.
with counter intuition, and in the course of doing so, reveals that identified problems are better solved with narrow—rather than sweeping—solutions. In addition, as the above discussion of *stare decisis* and standing demonstrates, when scholars approach a problem from a positive, rather than normative perspective, they are more likely to try to identify salient features of the underlying institution or a decision making rules that those approaching the same institution or rules, in search of defects, might readily gloss over.

Before commenting upon the articles that follow, I would like to introduce the isolation fallacy, which, like the nirvana fallacy, is critical to the positive analysis of real world institutions and rules. The isolation fallacy is the failure of scholars to consider that identified deficiencies in a given collective decision making body might be substantially ameliorated when that decision making body operates in conjunction with another collective decision making body.\(^6\) As the prior discussion of the legislative process reveals, the first wave of public choice literature was largely motivated by a desire to recommend reforms in the nature of expanded judicial powers to countervail perceived deficiencies in legislative decision making. In fact, judicial decision making, which is also a collective decision making process, is subject to its own Arrovian deficiencies, including, but not limited to, path dependency. And yet, it is quite possible that by operating together, these two lawmaking institutions can improve the overall fairness and rationality of lawmaking. With that background, we are now ready to consider the rich assortment of articles which follow.

II. **THE PUBLIC CHOICE THEME ISSUE**

Many, if not most, of the contributions to this theme issue, surf nicely along the crest of the second wave of the law and public choice literature. Three articles help to provide a deeper and more nuanced understanding of a single institution within our system of governance, sometimes by explaining a previously unexplained feature of a public policy question, and sometimes by encouraging the reader to think about an old problem in a new way. Two of these articles focus on Congress and legislatures generally. Francesco Parisi offers an analysis of the vote trading process and its role in inducing seemingly stable and rational outcomes, with implications for the infamous Line-Item Veto Act\(^6\) and for proposals to amend the Constitution to provide the President with permanent item veto authority. Adrienne Threath analyzes the often overlooked complementarity

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within Congress of a system with unlimited terms and a seniority-based committee structure in promoting both necessary specialization and public spiritedness. The third article in this group, by Warren F. Schwartz and C. Frederick Beckner III, provides a framework for analyzing frivolous suits and for assessing how the incentives to file such suits are affected within a system in which single members of a multi-member trial court decide frivolity, even though the outcomes of isolated decisions might significantly differ from that of the court's median judge.

A second group of articles provides a sophisticated look at the manner in which our collective decision making institutions and rules improve the overall rationality and fairness of outcomes by operating together, rather than in isolation. Bruce Chapman explains how tax incentives operate to encourage the development of charitable institutions, which, because their contributors are more likely to have value-restricted preferences than are members of a legislature, can better organize to facilitate the provision of certain kinds of public goods. Erin O'Hara and William Dougan explain the seeming anomaly that federal courts tend to sustain taxation rules that redistribute wealth from rich to poor, which economists have demonstrated are likely wealth reducing, while they tend to strike down tax transfers between groups of equal wealth and power, which are less likely to be wealth reducing. O'Hara and Dougan explain this counter intuition by analyzing the persistence with which the relevant coalition structures are likely to form, and thus to continue to influence the direction of tax legislation, after the immediate decision. Thomas Ulen offers a carefully reasoned analysis, drawing upon both public choice and more traditional tools of law and economics, to explain how federal and state sovereigns emerge and operate in conjunction to improve the overall quality of lawmaking, the provision of public goods, and the fit between constituent wants and the provision of state largess. Finally, William Shughart and Robert Tollison provide a valuable overview of the rich and growing literature, previewed above, concerning the role of the federal courts in furthering legislative interest group bargains.

The final pair of articles engages us in an important normative debate. Charles Rowley considers the foundational assumptions associated largely with the Chicago School of law and economics that courts can and should seek to promote efficient results. And Mark Stein applies a utilitarian calculus to analyze John Rawls' famous minimax proposal to weigh the costs and benefits of providing to severely disabled persons unlimited resources as the least well off persons.

While I will not attempt to summarize each of these articles—or even their main points—in the discussion that follows, I will explain the important role each contribution plays in the continuing dialogue regarding the role of public choice in furthering our collective understanding of
institutions and rules.

A. Intra-Institutional Analysis: Vote Trading, Term Limits, and Frivolous Suits

1. Applications to Congress

In separate articles, Francesco Parisi and Adrianne Threatt reinforce an important, and often overlooked, insight about legislative decision making in general and congressional decision making in particular. Both articles reveal that policy proposals aimed at raising the cost of procuring special interest legislation, whether in the form of a line-item veto, term limits, or other barriers to the commodification of preferences, can have perverse results if the objective is to encourage general, rather than special, interest legislation. By narrowing the relevant issue space, such proposals counter intuitively have the effect of raising the costs of procuring desired general interest legislation, and thus, are likely to reduce its overall supply. Despite their substantially different analytical techniques, these authors offer a complementary insight: Rules which make the marketplace for special interest legislation more fluid are the grease in the complex machinery that provides desired general-interest legislation.

In The Market for Votes: Coasian Bargaining in an Arrovian Setting, Professor Francesco Parisi offers what is perhaps the most technical presentation in the symposium.63 Employing mathematical, geometric, and descriptive presentations, Parisi combines insights drawn from the Coase Theorem and Arrow’s Theorem to model legislative voting behavior and to explore the tradeoffs associated with various proposals for institutional reform. Parisi states his overall thesis as follows: “[I]f all voters are allowed to enter into Coasian bargaining over the policy outcome to be adopted by the majority coalition, collective preferences in a multi-dimensional policy space will be transitive as long as individual preferences are single peaked.”64 Parisi explains that while most commentators on legislative bargaining assume that all vote trading takes place at the stage of forming majority coalitions, it is possible to model a more stable set of outcomes when vote trading is permitted between the coalition and noncoalition members after the majority coalition is formed. Under this

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64 Parisi, supra note 63, at 747.
analysis, Parisi demonstrates that the two stage vote-trading process further allocates special interest payoffs in a manner that moves the resulting package toward a set of Pareto-optimal outcomes. Whether or not Parisi is correct that the model of vote trading he devises satisfies all of the Arrovian fairness criteria,\textsuperscript{65} his model does suggest that with a fully fluid market for vote trades, both before and after the majority coalition is formed, outcomes can be unique and stable.\textsuperscript{66}

One interesting feature of Parisi’s article is that it provides a compelling intuition, grounded in the theory of social choice, for analyzing the likely effects of the item veto. Parisi aptly illustrates that the item veto, either in its present statutory form or through a constitutional amendment, would likely have the perverse effect of reducing the relevant issue space for coalition-forming or coalition-expanding negotiations over public interest bills. It does so by signaling to prospective coalition members that the president has the power to unpack such bargains.\textsuperscript{67} If the purpose of the item veto is to encourage general interest legislation, Parisi’s analysis reveals that the ultimate effect of the proposal is likely to be the opposite. By limiting the relevant issue space for legislative bargains, the item veto will render general interest legislation more difficult to procure.\textsuperscript{68}

In The Impact of Term Limits on the Congressional Committee System, Adrianne G. Threatt provides a related analysis of the increasingly popular, albeit constitutionally suspect,\textsuperscript{69} proposal to limit congressional

\textsuperscript{65} As Parisi appears to concede, the form of vote trading he models sacrifices Arrow’s Independence of Irrelevant Alternatives criterion. See id. at 747 n.16.

\textsuperscript{66} See id. at 752-53 ("Proposition 1: If the conditions for the Coase theorem are present for all voters, the composition of the initial majority coalition is irrelevant for the policy outcome."); see id. at 755 ("Proposition 2: If the Coase theorem holds, and voters’ preferences are strictly concave, and vote-exchange agreements are enforceable, cycling in a multi-dimensional policy space is excluded."); see id. at 762 ("In order for a vote exchange process to work at its best, all dimensions of the policy space should be the potential object of bargaining and trade.") (emphasis in original).

\textsuperscript{67} See id. at 755 (arguing that the item veto works an apparent market failure).

\textsuperscript{68} In my own analysis of the item veto, written well before the Line-Item Veto Act was adopted, I reached a parallel result, employing interest group and coalition theory. See Maxwell L. Stearns, The Public Choice Case Against the Item Veto, 49 WASH. & LEE L. REV. 385 (1992). I explained that by affording the president the authority to unpack legislative bundles in the form of bills, the item veto would have the perverse effect of giving the president relatively greater authority to control the direction of substantive legislative policy than to excise the most egregious pork barrel legislation. This counter intuition follows from the insight that the president has relatively greater power to determine which bills to support than he does to choose with whom he must bargain within Congress to get those bills passed. In both Parisi’s analysis and my own, the effect of the item veto is at best different from, and perhaps even opposite, that which item veto proponents allege. It is, of course, quite possible that both Parisi and I are wrong in our analyses of the item veto, but the fact that we achieved like conclusions based upon two different sets of economic intuitions suggests the power of positive political theory in analyzing the problem, and might even be sufficient to shift the burden of persuasion on this important question of public policy.

terms. By combining deliberative and informational models of the legislative process, Threatt concludes that the ultimate effect of the term limits proposal, if adopted, would likely be to reduce the informational benefits of a seniority-based committee system in facilitating robust vote trading. Specifically, Threatt argues that “[c]ommittees . . . have jurisdictional gate-keeping powers that contribute to [the] enforcement of vote trades in the distributive models.” Gate-keeping power allows committee chairs to prevent reneging on today’s interest group bargains by providing them with the power to refuse amendments to change the status quo. In this analysis, congressional committees serve a function parallel to that of the independent judiciary, albeit in enforcing legislative bargains before bills become law, and thus, before federal courts are in a position to enforce such deals themselves. Both institutions, the independent federal courts and congressional committees, strengthen the incentives among interest groups to engage in bargaining, thus rendering the vote-trading marketplace more fluid. Consistent with the distributive model, Threatt argues, seniority further facilitates vote trading by allowing those with better established reputations associated with the subject matter of a given committee’s jurisdiction, and for honoring negotiated bargains, to control committees which serve as fora for vote trading. Consistent with the informational model, Threatt then argues that the committee structure not only facilitates vote trading, but also that it promotes the necessary consensus and expertise to create sound public policy. In the informational model, it is critical that the parent chamber control the initial committee membership to ensure meaningful representation, thus promoting consensus, and that it employ the seniority system to provide a reward system consistent with the objective of legislative expertise.

After reviewing both models, Threatt argues that term limits would undermine both the distributional and informational benefits of the committee structure as it presently exists and that, in doing so, the proposal would undermine not only the procurement of special interest legislation, which is among the goals of term-limit advocates, but also the necessary

71 Id. at 775.
72 See id. at 775-76 (adding that “committees’ jurisdictional rights and privileges facilitate vote trading as an initial matter because both sides expect from the start that the committee-negotiated trade will be enforced later”).
73 See supra note 40 and accompanying text (discussing Landes and Posner thesis).
74 See Threatt, supra note 70, at 777 (“Therefore, the expectation is that seniority enables more and better logrolling, both at the individual and committee levels.”).
75 See id. at 782-83, 784 (noting that the less-than-absolute commitment to seniority ensures that shirkers or outliers will not undermine the informational benefits of the committee system).
76 Other goals include furthering the small “r” republican notion of producing a legislature closer
expertise for the effectuation of sound public policy. Because all members of Congress serve both their immediate constituents and the nation as a whole, Threatt offers the following insight:

A puzzle remains: congressmen need to pursue both special and aggregate interests at once, yet pursuing both goals simultaneously does not seem possible according to models that recognize only one set of goals in isolation. In an integrated theory, the committee system is the answer to this puzzle. The best way to view the committee system is not to think of it as exclusively serving either distributive or... informational goals, but rather to think of it as the mechanism congressmen use to strike a balance between the two competing goals.\textsuperscript{77}

Threatt concludes that with term limits in place, the incentives of congressmen to secure special interest benefits for their constituents will change only marginally,\textsuperscript{78} but that the incentives to acquire the beneficial expertise for the sound development of public policy would be seriously compromised. The critical point is that the promise of increased power in the form of becoming a committee chair is the carrot under the seniority system, which encourages members of Congress to acquire expertise by taking a long term view of committee service. In this combined model, special interest goals are not at odds with, but are in furtherance of, the objective of promoting expertise and sound public policy.

Notably, in both the Parisi and Threatt models, the unattractive underbelly of the legislative process, namely the desire for special interest payoffs, which furthers the electoral goal of each member of Congress, facilitates the provision of general interest legislation and policy expertise. Both articles are thus institution reinforcing and sound a note of caution to those who see interest group politicking as a problem demanding wide-ranging institutional reform.

2. Applications to Courts

In \textit{Toward a Theory of the "Meritorious Case": Legal Uncertainty as a Social Choice Problem}, Warren F. Schwartz and C. Frederick Beckner III consider the question of how courts, through their determinations of what

\footnote{Threatt, \textit{supra} note 70, at 791.}

\footnote{Threatt might not adequately consider the significance of unraveling on the apparent prisoners' dilemma between members of Congress and their constituents in the procurement of special interest legislation, and, more specifically, how term limits might alter the relevant payoffs of cooperation versus defection. For an informative discussion, see \textit{generally} Linda Cohen \& Matthew Spitzer, \textit{Term Limits}, 80 GEO. L.J. 477 (1992).}
constitutes a meritorious case, influence certain legally sanctionable conduct. In the present regime, trial judges generally determine the merit of individual cases, even though in many instances, their views might be outliers on the courts on which they serve. The puzzle is to explain why we vindicate the decisions of potential outliers, rather than devise a rule which fits more predictably with the preferences of the median judge.

Schwartz and Beckner begin by noting that the question of how a court determines what constitutes a meritorious case differs in the present regime, in which a given judge might constitute an outlier, and in a hypothetical regime, in which all members of an en banc court together decide each case. In the present regime, there exists an almost random quality to the determination of meritoriousness, while in the hypothetical regime, private actors would try to discern the position of the median judge, which would generally be dispositive.

79 Warren F. Schwartz & C. Frederick Beckner III, Toward a Theory of the “Meritorious Case”: Legal Uncertainty as a Social Choice Problem, 6 Geo. Mason L. Rev. 801 (1998). The authors state that the tort rule in negligence is “the most obvious example of the type of rule” they analyze, but posit that other types of rules, including, for example, the Americans with Disabilities Act of 1989, can fruitfully be analyzed using their approach. See id. at 807 n.14.

80 This article fits well within the framework for analysis of the jury system, set out in an important group of articles by Professors Edward Schwartz and Warren Schwartz. See generally Edward P. Schwartz & Warren F. Schwartz, The Challenge of Peremptory Challenges, 12 J.L. & Org. 325 (1996); Edward P. Schwartz & Warren F. Schwartz, Decisionmaking by Juries Under Unanimity and Supermajority Voting Rules, 80 Geo. L.J. 775 (1992). Schwartz and Schwartz have inquired whether the jury system should be modified to allow for majority or supermajority, rather than unanimity rule. In both contexts, meritorious case determinations and jury decisionmaking, the authors are asserting that if the system’s goal is to ensure that the representative—or median—outcome should prevail, then the present system could be reformed to better meet that objective. Of course, this depends upon an assumption in both contexts that the system’s objective is to ensure representative outcomes. In the jury context, the purpose might instead be to place an intermediary between an executive, seeking to enforce a law that is the product of aggrandized governmental powers, and the criminal defendant. If so, the jury system might seek instead to vindicate the preferences of a significant minority, even at the expense of the median or representative viewpoint.

81 See Schwartz & Beckner, supra note 79, at 816 (positing that under an en banc determination, the dispositive view is likely “the median view in the distribution. Thus a majority voting rule empowers the centrist, median, position in the distribution to prescribe the controlling substantive rule.”). The Schwartz and Beckner analysis implicitly presents the relevant issue space for determining a meritorious case as unidimensional, which might generally be true in the principal category of cases with which they are concerned, involving the standard of care in a negligence suit. In other contexts, however, this is less certain. It is possible to imagine cases in which one judge or a group of judges wants to hear a case simply to end, once and for all, the possibility of raising what they consider to be a dubious legal claim; a second judge or group of judges wants to hear the same case because they agree to its merits; and a third judge or group of judges, whose views on the merits are less well formed, prefers to wait until a stronger case involving the same issues arises. If so, two groups of judges with opposite views on the merits might join forces in determining that the case is meritorious, even though the ultimate disposition of the case will turn on the views of those centrist judges who did not think the case meritorious. In this context, if the issues of meritoriousness and the underlying merits are resolved simultaneously, as is often the case, then under plausible conditions, the relevant issue space might be two dimensional, such that there is no median judge.
The authors are not actually suggesting that all cases—or even the question of meritiosity—be decided by an *en banc* court. Instead, they are concerned with developing a decisional rule that best emulates the results of an *en banc* court, while continuing to allow isolated judicial panels. Schwartz and Beckner posit that under the real world (single panel) or hypothetical (*en banc*) regime, private actors will try to minimize the product of compliance costs times expected liability. The authors further posit that one rule that might encourage all single panel judges to comply with the views of the median judge is to require a minimum fifty percent chance of success to litigate a claim.

The Schwartz and Beckner approach raises two important questions. First, should we necessarily assume that the relevant benchmark for assessing a meritiosity claim is that of the median judge (assuming one exists)? Indeed, the Rule of Four within Supreme Court practice might represent an opposite precedent. Even though the Supreme Court has nine members, the Rule of Four allows a minority of four to determine meritiosity for the Court as a whole. It is not clear why the median judge in a multi-member trial court should be afforded a greater status in determining meritiosity than the median justice is afforded on the Supreme Court. Second, and more importantly, might appellate review provide a better surrogate for ensuring a consensus on meritiosity than trying to discipline trial judges to identify the median position on their own court? If so, the potential disjuncture between the views of the median and outlier judge—not only in determining what constitutes meritiosity, but also in deciding any number of legal questions—might explain, in part, the evolution of pyramidal courts. In any event, Schwartz and Beckner have raised an important question about the relationship between private party incentives and the aggregation—or norming—of judicial preferences in a multi-member court with single panel decision makers. Hopefully, this article will prompt further study on the question of how best to structure trial level decision making and how to identify a meritiosity case.

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82 See id. at 809-10.
83 See id. at 817-18.
84 See supra note 81 (discussing possibility of two dimensional issue space in determining meritiosity).
85 In the Third Circuit, "any member of the panel may require oral argument," see, e.g., N.L.R.B. v. Local No. 42, 476 F.2d 275, 276 (3d Cir. 1973) (upholding denial of oral argument under Local Rule 12(6)), suggesting an even more deferential approach to determining meritiosity than under Supreme Court practice (assuming, as seems reasonable, that denying oral argument is a viable proxy for identifying a nonmeritiosus case).
86 For a similar analysis, explaining the evolution of pyramidal courts to solve the problem of stare decisis among members of the same level court, see William Landes & Richard Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976); see also STARR, supra note 1, at 546-47.
B. Inter-Institutional Analysis: Charities, Taxation Symmetry, Federalism, and Judicial Independence

While each of the above articles employs positive political theory to edify our understanding of a single institution, each article in the next group explores how institutions, by operating together, can improve the overall quality of collective decision making. The range of issues covered in this group of articles is considerable, and I only highlight some of the more important positive synergies suggested in the analyses.

1. Charities

In Between Markets and Politics: A Social Choice Theoretic Appreciation of the Charitable Sector, Professor Bruce Chapman offers a novel and compelling analysis of the benefits of the charitable sector in providing certain public goods which, on the one hand, legislatures are relatively less well-equipped to provide because of cycling and other problems that plague collective decision making, and which, on the other hand, private markets are ill equipped to provide due to the classic free rider problem. Operating together, legislatures and charitable institutions, assisted by favorable tax treatment, can encourage a relatively superior provision of public goods. The critical benefit of charitable organizations, relative to legislatures, according to Chapman, is that the voluntary status and united mission of the membership significantly increases the probability that the preferences of the membership will be "value restricted," and thus not prone to cycling, in contrast with legislative preferences, which are less likely to be value restricted, and thus more prone to cycling. As Chapman explains, value restrictedness is a characterization of group, rather than individual, preferences:

[If all concerned individuals agree as a matter of fact that for every set of three alternatives, x, y, and z, at least one of these alternatives is not the best alternative of the three, not the worst of the three, or not between the other two, then a majority voting paradox cannot occur.]

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87 Chapman, supra note 63.
88 Id. at 841-42; see also AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 168, 176-79 (1970).
89 Chapman, supra note 63, at 842. Value restricted preferences imply that range is relaxed, meaning that none of the group members possess preferences that, when combined with the remaining preferences of the group, are conducive to cycling. The critical point of Chapman's analysis is that one can achieve value restrictedness not only though a mandatory rule, but also through voluntary organizational status, in which those joining share a common viewpoint or set of objectives.
Relying upon the work of Amartya K. Sen, Professor Chapman observes that to avoid appointing a dictator as the vehicle for providing a collective set of transitive outcomes, it is necessary to ensure that the preferences of the group are value restricted. Chapman’s principal thesis, then, is that the voluntary organization of and contributions to, charities conduce the necessary value restrictedness, which is essential in producing a stable collective preference ordering that can facilitate the provision of certain public goods.90

Chapman further explains how and why affording tax exempt status to a charitable organization can induce a greater than one-to-one ratio of contributions to taxes saved. Chapman suggests that for certain individuals (those who are perhaps most prone to significant charitable giving) for each tax dollar saved through a tax deductible contribution, the combined increase in the probability in public goods procurement, which the tax exempt status creates, and the donor’s identification with the charitable provision of that public good,91 actually encourages a greater-than-one-dollar contribution. Whether or not this is correct—and any attempt to use economics to derive a personal utility function does come precariously close to economics-as-psychology—it is certainly an interesting and seemingly plausible explanation of the success of certain charities in the provision of public goods. It also is consistent with the standard practice of charitable organizations of publishing varying levels of contribution. More importantly, however, the analysis suggests how the combined operation of a hybrid organization, namely charitable institutions, operates between private and legislative markets to improve the overall output of public goods.

2. Taxation Symmetry

In *Redistribution Through Discriminatory Taxes: A Contractarian Explanation of the Role of the Courts,*92 Professors Erin A. O’Hara and William R. Dougan explore another dimension of tax law and policy. The authors consider a fascinating question about a seemingly counter intuition in tax law, which, once explained, fits comfortably with the economic theory of regulation. O’Hara and Dougan inquire why courts generally tend to uphold tax laws that produce asymmetrical benefits, for example, that redistribute wealth from rich to poor, even though such transfers not only create a deadweight loss associated with the costs of legislative procurement, but also might be wealth reducing;93 while, at the same time, such

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90 See id. at 843-44.
91 For example, through the published status of patron, sponsor, or donor.
93 If we assume that persons with relatively little wealth have a higher consumption-to-savings
cases tend to strike down transfers between groups of roughly equal wealth and power, even though the aggregate losses such laws produce are generally limited to the costs of the transfer.\textsuperscript{94}

O'Hara and Dougan offer an ingenious explanation for this seeming counter intuition. The authors suggest that in cases involving “asymmetrical expectations,” including, most notably, those of persons with disparate wealth, courts recognize that their efforts to invalidate tax laws producing wealth transfers are unlikely to succeed in the long term. Precisely because the asymmetry will long outstrip the relevant case or group of cases, if a particular form of wealth transfer is struck down, the same interests will persist in securing the transfer through some less obvious—and perhaps more costly—means. In turn, the long term effect of striking down asymmetrical wealth transfers is not to prevent the transfer, but rather is to force it into a less cost-effective form. As stated above,\textsuperscript{95} this is fully consistent with the economic theory of regulation, which holds that regulation is most often acquired, rather than imposed. To the extent that there exists a silver lining, it might be this: Inevitable rent seeking of this sort is most likely procured though the most cost-effective form of wealth transfer. In turn, if we accept the premise that such regulation will be conferred, we can at least have some confidence that the legislative marketplace will compete away unduly costly forms of wealth transfers. In contrast, O'Hara and Dougan argue, symmetrical expectation transfers, those that transfer wealth from and to groups of roughly equal wealth and power, might result from short term coalition structures that will break down once the courts invalidate the transfer. Symmetrical coalition structures, unlike more stable asymmetrical coalition structures, might form due to any number of arbitrary phenomena, including, most notably, empty core bargaining problems coupled with arbitrary legislative cutoffs. In turn, when courts invalidate symmetrical wealth transfers, a strong possibility exists that the coalition which produced

\textsuperscript{94} The cost of the transfer is the cost of rent seeking itself. In Gordon Tullock’s seminal work, he debunked the then-prevalent notion that the seemingly elusive welfare loss triangle represented the entire cost of monopoly. See generally Gordon Tullock, \textit{The Welfare Costs of Tariffs, Monopolies and Theft}, 32 W. ECON. J. 5, 224-32 (1967). Instead, Tullock posited that interest groups rationally will spend up to the entire amount of the difference between Ricardian competitive rents and monopoly rents to secure the gains associated with regulatory conferral of private market power. This loss, which is potentially more significant than the loss associated with marginal revenue pricing, provides a strong normative basis for caution in allowing the political process to facilitate such wealth transfers. O'Hara and Dougan provide the additional insight that for industries with high start-up costs, it might prove unnecessary to expend the full value of the transfer to secure rents from the political process. Instead, other groups will be inhibited in their efforts to compete for the transfer by the costs of market entry. In the O'Hara and Dougan model, the high start-up costs render such groups asymmetrical.

\textsuperscript{95} See supra note 38 and accompanying text.
the tax law will not reconstitute itself, and thus, striking the law down might produce a net societal benefit.

While the analysis might not provide a satisfactory explanation of every case, it does provide a valuable framework for thinking through a significant question of public law and policy. Most notably, the authors do not seek to advocate a change in existing case law on symmetrical and asymmetrical transfers. But their analysis might prove quite fruitful in assessing related policy proposals to change tax law in the future.

3. Federalism

In Economic and Public-Choice Forces in Federalism, Professor Thomas S. Ulen extends the theme issue's inter-institutional analysis to consider not only how different branches of government operate together, but also how different levels of government operate together. In this thoughtful article, Ulen engages us in an analysis of several questions, including how we determine the optimal size of government, when we would seek to have more than one sovereign, and why we might want multiple and competing sovereigns in the form of federalism. Ulen's analysis represents what I hope and expect will become a growing trend within the law and economics literature, namely the deliberate combination of more traditional economic tools, and especially price theory, with various tools growing out of public choice, to address multiple facets of the same policy question. This article not only illustrates the benefits of such a synthesis, but also provides a frank acknowledgment that no single set of tools, standing alone, provides all answers to the more pressing, and thus more interesting, questions of law and public policy.

Ulen begins by noting that, in recent decades, there has been a substantial shift in authority over certain policy issues from state and local government to the federal government, and more recently still, an effort among political conservatives fundamentally to shift such powers—and perhaps even some powers that rightly belong with the federal government—back. Rather than accepting the traditional political explanations, grounded in usurpation of authority, Ulen tries to identify "real factors" that might explain this persistent trend in economic terms. Ulen considers three,

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96 For example, I find implausible the explanation that a tax commissioner is assumed to enact a tax law to benefit his grandmother, and thus the law is struck down, when essentially the same law, created by a legislature, is upheld. See O'Hara & Dougan, supra note 92, at 907-08.
98 See id. at 923.
99 See id. at 923-24 ("Rather than blame politics or ideology, we should be far better served by trying to understand the dynamics of federal-state relations and the part played therein by real forces..."
sometimes complementary and sometimes competing, sets of costs that might account for such developments: (1) substantial economies of scale in having a national government; (2) "substantial costs in having duplicate governmental entities at both the national and state levels;" and (3) "costs of having competing jurisdictions within a federal structure." What renders Ulen's approach fruitful is his explicit recognition that, while the Constitution's text has largely remained unchanged, changed economic forces might explain the manner in which the relevant constitutional framework of governance, as it relates to federalism, has changed over time.

Rather than tour each of the relationships between these sometimes complementary, sometimes competing, factors, I will discuss just two of the many interesting insights offered in Ulen's article. First, consider Ulen's explanation as to why, counter to the most recent welfare reform initiatives, welfare programs might be undersupplied if the process is decentralized. Extending the analysis most commonly associated with Charles Tiebout, that individuals can vote with their feet when choosing state, but not national, governments, Ulen observes that decentralized welfare might place the states in a "race to the bottom" in which, to attract business, they try to minimize welfare programs, thus lowering the required tax base. Ulen explains: "Indeed, the best strategy for a state to pursue may be to reduce the level of its benefits below that of its neighbors, thereby attracting high-income taxpayers and encouraging the out-migration of its poor to the more generous neighbors." Because, holding all else constant, all states have an incentive to engage in similar behavior, the result is a significant undersupply of welfare benefits relative to a centralized regime.

The second example grows out of Jonathan Macey's valuable analysis of federalism, and specifically, his explanation of why, despite its national—indeed international—significance, corporate law is decentralized. Macey posited that in certain areas of substantive legislation, decentralization affords politicians the opportunity to reap double payoffs, first a payoff
to members of Congress for allowing local decision making, and second a payoff to state legislators, for quality local decision making. In the context of corporate law, this analysis proves especially compelling. As virtually all commentators on the subject have observed, Delaware has achieved national and international prominence in the area of corporate law. This is so even though some state jurisdictions have essentially replicated Delaware's substantive corporate law to attract business. In a seminal article on the subject, Professor Roberta Romano offered what is perhaps the most compelling explanation of why such efforts by other jurisdictions have failed. Specifically, because Delaware, a tiny state, receives fully sixteen percent of its revenues from corporate chartering, the state has effectively bonded itself not to embark on unpredictable changes in its corporate law. Other states, even states with substantively identical laws, cannot make as effective a guarantee against unpredictable change because of their substantially lower dependence upon revenues from corporate chartering. Macey extended the Romano analysis to explain why Congress, which has the apparent authority to take over this field, has elected to allow states to regulate corporations. Macey posited that by allowing states to regulate the field, Congress benefits from having made a necessary facilitating decision in favor of state regulation, and the states, and most notably Delaware, benefit from achieving the payoffs for their investment in corporate law.

Ulen views this example as a special case in his larger treatment of the competing costs that influence the size, level, and number of sovereigns. Specifically, Ulen observes that the Romano-Macey thesis of Delaware control of corporate law might at first appear to pit two theories of federalism against one another, albeit in terms that are overstated:

The economic theory of federalism suggests that state regulation would dominate where there are no cross-border externalities, where there are no economies of scale to be realized from moving the activity to a higher level, and where interstate competition is a preferable method of minimizing the monopoly distortions of governing. But, state regulation—at least in the case of corporate-chartering laws—sometimes predominates even where there are cross-border externalities . . . . Prudence dictates not necessarily choosing one theory to the exclusion of the other but rather keeping both theories ready at hand to explain whatever division of authority we observe that does not fit neatly into either theory alone.

It is precisely this pragmatic approach in combining law and economics with law and public choice that promises to enrich our collective understanding of institutions and rules.

107 Ulen, supra note 97, at 942 (emphasis in original).
4. The Independent Judiciary Revisited

In Interest Groups and the Courts,¹⁰⁸ Professors William F. Shughart II and Robert D. Tollison return us to the earlier discussion of the independent judiciary and its relationship to legislative interest group bargains, which grows out of the landmark 1975 article by Professors William Landes and Richard Posner, The Independent Judiciary in an Interest-Group Perspective.¹⁰⁹ Shughart and Tollison begin by noting that the interest group theory of the independent judiciary presents courts as one of two sets of bonding mechanisms, which increase the value of legislative interest group bargains:

The first is composed of the constitutive rules in the legislature itself. Procedural norms on such matters as bill introductions, committee hearings, floor action, and filibusters serve to increase the continuity, regularity, and stability of the legislature's operations. By making it more difficult to enact legislation in the first place, such measures also make it more difficult to amend or repeal existing laws.

The existence of an independent judiciary also enhances the durability of legislative contracts . . . . If judges act at the behest of the sitting legislature in interpreting previously enacted legislation, decide cases with an eye toward protecting otherwise under-represented interest groups, or simply indulge their own personal preferences, they might refuse to enforce the bargained-for statute.¹¹⁰

In the remainder of the article, the authors review a large number of studies, including several articles written by one or both authors, to provide a comprehensive overview of what they consider to be the testable implications of the Landes and Posner thesis. I will comment upon two of these studies here.

In one study, Professors Mark Crain and Robert Tollison posited that, based upon the Landes and Posner thesis, one would expect an inverse correlation between the frequency of state constitutional amendments and the independence of state courts.¹¹¹ In a regime in which judges are routinely subject to immediate political pressures, the demand for constitutional reform as a bonding mechanism for enforcing long term interest group bargains will be higher than in a regime in which an independent judiciary provides much of that bonding function. Their review of amendments to

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¹⁰⁹ See Landes & Posner, supra note 40.
¹¹⁰ Shughart & Tollison, supra note 108, at 961-62 (citations omitted).
state constitutions proved consistent with their intuition. As then-Judge Abner Mikva, reviewing the Crain and Tollison argument, rightly observed, other factors, including, perhaps most notably, the age of the state constitution and the level of constitutional specificity, might also account for the frequency of state constitutional amendments. Nonetheless, the Crain and Tollison insight provides an important and testable extension of the Landes and Posner thesis, which treats judicial independence as a bonding mechanism for legislative interest group bargains.

In a second article, Professors Gary M. Anderson, William F. Shughart, and Robert D. Tollison studied the effect of state court decisions applying state constitutions to strike down statutes based upon economic substantive due process, after the Supreme Court handed down West Coast Hotel v. Parrish, which signaled a federal judicial retreat from the Lochner era. Reviewing this study, Shughart and Tollison observe that the authors found a positive correlation between judicial reliance upon economic substantive due process to strike down statutes and higher judicial salaries. In turn, Shughart and Tollison conclude that the higher salaries might result from the apparent "willingness [of courts] to intervene to protect existing legislative contracts from being reneged upon by the sitting legislature." In this case, the theory might prove a bit more ambitious than the evidence to support it. Judicial decisions that strike statutes based upon economic substantive due process have the ultimate effect of preserving private market contractual arrangements at the expense of legislative interest group bargains. Ironically, perhaps, at least if we accept the economic theory of regulation, the willingness to strike down legislative bargains based upon economic substantive due process actually reduces the value of legislative interest group bargains, relative to the regime associated with West Coast Hotel.

After reviewing these and other studies, Shughart and Tollison conclude:

[F]ar from operating under a constitutional system of checks and balances that limits the extent to which one branch of government can encroach on the territories of the others or, ultimately, on the rights of the citizenry at large, the executive, the legislature, and the judiciary act cooperatively to promote the

112 See id.; see also Shughart & Tollison, supra note 108, at 968.
115 300 U.S. 379 (1937).
117 See Shughart & Tollison, supra note 108, at 966.
118 Id.
functioning of a political marketplace where well-organized interest groups obtain benefits for themselves at the expense of the less well-organized taxpayers. Judicial review of legislative action in this sense acts not as a counterweight to the tyranny of the majority, but as a prop to the tyranny of the minority. 119

My own view is that public choice provides the foundation for a more benign vision of our system of checks and balances and separation of powers, and that this more benign view finds considerable support in the contributions to this theme issue, perhaps even including the contribution by Professors Shughart and Tollison. Perhaps judicial independence, per Landes, Posner, Shughart, and Tollison; the power of Congress to package legislation, per Parisi; and the combined operation of unlimited terms and the seniority system, per Threalt; all operate together to increase the value of payoffs from interest group bargains. If so, these structural aspects of our constitutional government do so not because special interest payoffs are a desired end in their own right, but rather because they are the vehicles through which we facilitate the provision of desired general interest legislation. 120 At a minimum, I hope that by providing this opposing thesis, I will encourage further analysis of the sometimes elusive benefits of these structural aspects of our constitutional democracy.

C. Normative Law and Economics Revisited: From Richard Posner to John Rawls

At the beginning of this Introduction, I characterized the intellectual history of law and economics as positive-to-normative, and of law and public choice as normative-to-positive. Of course, characterization demands simplification, and mine was no exception. The normative and positive uses of both law and economics and law and public choice are ongoing, even if, as I would suggest, the above characterization remains largely accurate. It is also true, however, that we should force ourselves, from time to time, to step back and consider whether the questions we are asking are good ones, and whether in choosing our tools of analysis for answering those questions, our premises are sound. Fortunately, the contributions by Charles Rowley and Mark Stein force us to consider these foundational inquiries.

In his extremely provocative essay, Wealth Maximization in Normative Law and Economics: A Social Choice Analysis, 121 Professor Charles K. Rowley offers a two-part challenge to normative law and economics as practiced by the Chicago School. Fortunately, many of the questions he

119 Id. at 970.
120 See Landes & Posner, supra note 40.
121 Rowley, Wealth Maximization, supra note 23.
raises apply with equal force to the positive literature in law and public choice. Rowley asserts that the difficulty with the wealth maximization thesis employed, most notably, by Richard Posner, is that it is incapable of overcoming the same problems that have plagued all other attempts to devise an internally consistent and satisfying social welfare function. The problem is one of social choice because, until Arrow, no one had formalized the conceptual difficulty in devising a set of constitutive rules that would satisfy a seemingly noncontroversial set of fairness criteria for collective decision making, while simultaneously ensuring collectively rational results. Among Arrow’s fairness criteria was unanimity, which is more commonly understood as the Pareto criterion in welfare economics: If a move from the status quo to an alternative state benefits at least one person without harming others, the legal regime must go there. The initial problem with governmental regulation is that rules satisfying the Pareto criterion work a seemingly insurmountable barrier to the provision of public goods. With apparently few exceptions, it is difficult to characterize any significant public policy in Pareto terms. In opening borders across states or nations, in deregulating industries, in determining whether to establish minimum wages or maximum hours and in what amounts, and in setting ceilings on emissions, to choose but four of countless questions of public policy, some will win and some will lose, regardless of how the policy issue is resolved.

Employing the so-called Kaldor-Hicks criterion, in which we posit that if the winners gain enough to compensate the losers, then the move is efficient (even though no such compensation takes place), not only compromises Arrow’s conditions, but in doing so, also complicates the normative foundation for a social welfare function. And yet, unless we make this tradeoff, we allow any single individual to veto even the most benign products of majority rule. Another problem, which lies at the core of social choice, is that of measurement: Other than through revealed preferences in a decentralized marketplace, it is impossible for an economic system to evaluate whether one person’s utility offsets the disutility of another. In an earlier era in which common law rules furthered the ex ante expectations of private market participants, we could have some confidence that outcomes were likely efficient. In his essay, Professor Rowley expresses considerably less confidence, however, in the ability of judges, employing the Chicago School approach to law and economics, to facilitate the same results through judicial fiat. The problem is that judges, no less than legislators, are deficient central planners. Neither group of actors has the

\footnote{The impossibility of engaging in interpersonal utility comparisons was why Arrow included the Independence of Irrelevant Alternatives criterion.}

\footnote{Rowley, Wealth Maximization, supra note 23, at 995-96.
feedback mechanisms with which to ensure that today’s outcomes actually will further their intended objectives tomorrow.

In Rawls on Redistribution to the Disabled, Mark S. Stein approaches the same problem from a different direction. Stein seeks to determine whether John Rawls’s famous minimax hypothesis, that behind a veil of ignorance, members of society would seek rules that leave the least well off members in the best position, rightly excluded the severely disabled, in favor of the poor, as those most in need of redistribution. What is most interesting about Stein’s analysis is that it struggles with the inevitability of employing a utilitarian calculus to address these questions, even though Rawls’s approach is deliberately nonutilitarian. Consider, for example, Stein’s assertion that if we apply Rawls’s general approach, which requires redistribution to the least well off until redistribution no longer produces any gains (defined as “insatiability”), but treat the severely disabled, rather than the poor, as the least well off, then there is virtually no stopping point to the potential redistribution:

[It would presumably take a lot of money to bring the disabled to a level where they would derive no benefit whatsoever from additional resources, including resources devoted to medical research, however speculative. Certainly the point of satiation would not easily be reached if the disabled themselves were allowed to determine whether additional resources would benefit them; people rarely believe that they have no use at all for additional material resources.]

As Stein suggests, some form of utilitarian calculus is essential to the creation of sound public policy, even though as Rowley recognizes, in the absence of a truly spontaneous ordering, with outcomes based solely on revealed preferences, the best efforts of economists to devise an appropriate social welfare function to facilitate that utilitarian calculus is destined to fail. And today, these problems are exacerbated by the fact that we live in a well developed hybrid economy, which combines private markets with a considerable regulatory state. Whatever the merits of spontaneous order, it does not appear that we are going to turn the clock back any time soon. What, then, can we do? Should we assume, per Richard Posner, that judges have the intellectual wherewithal, and incentive, to engage in the necessary analysis to devise some proxy for efficient outcomes, even knowing, per

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125 Id. at 1002 (citations omitted).
126 Intuitively, we would prefer any scheme of redistribution to stop at least prior to the point where the recipient would prefer the next dollar in the form of cash to the next dollar devoted to a particular specific function, e.g., medical research. At that point, we would presumably determine that the next dollar is better devoted to some other purpose altogether. But the problem is that absent the bribe, there is no incentive for the beneficiary to be honest and admit that for the next dollar spent, she is receiving a benefit worth only ninety-nine cents to her.
Kenneth Arrow, that any social welfare function is either inherently prone to producing irrational outcomes or is in some fundamental respect unfair? Or should we simply assume that our complex set of institutions and rules probably is operating as well as can be expected—as if a latter day spontaneous order?

CONCLUSION

While, for some, these questions might be a bleak—or at least terribly indeterminate—place to end this Introduction, my own view is the opposite. The benefit of asking seemingly intractable questions, like how to devise an optimal social welfare function, meaning one that is systematically rational and fair, is that our very inability to answer them forces us to formulate more modest questions. Such questions include, for example, which manifestations of fairness or rationality a given institution can relax without undermining its ability to meet its principal objectives, how two or more institutions can improve their collective fairness and rationality by operating together, and how two or more rules can improve a single institution’s functioning when operating together. And it is the answer to these more modest questions that likely will provide the basis for a true understanding of our existing institutions and rules and for developing less ambitious, but more benign, proposals for reform. The articles that follow ask such questions. My hope is that when the JBC moves alongside the GMUSL, we will all force ourselves, each other, and the rest of the law and economics community, to continue to ask more.