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Foreword: Positive Political Theory in the Nineties

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SYMPOSIUM

Foreword: Positive Political Theory in the Nineties

DANIEL A. FARBER* AND PHILIP P. FRICKEY**

Four years ago, Judge Abner Mikva introduced a Symposium on the Theory of Public Choice, which included articles by several participants in the present symposium. His discomfort with the articles resulted in a foreword that seemed unusually hostile to the body of the publication. "After studying the articles in this symposium," he said, "I realize why I have found it hard to read or to profit from the 'public choice' literature."

He faulted public choice for its cynical view of politicians as "'rent-seeking' egoists," for a lack of real empirical data, for its use of mathematics to describe a very human process, and for what he saw as its claim to be "scientific and therefore infallible." In short, he saw public choice as a dismal enterprise posing a greater threat than potential benefit.

Without necessarily sharing Judge Mikva's views of the specific papers in the earlier symposium, we have previously suggested that "his assessment of public choice, while hostile, is not without basis." In particular, we found some truth to his view that "much of public choice theory is forbiddingly abstract and mathematical, seemingly far removed from the emotions, ideologies, and personalities that dominate the political news." We also found a basis for the charge of cynicism: "public choice theorists often have taken a rather jaundiced view of democracy." Unlike Judge Mikva, however, we also believed that public choice had considerable potential to shed light on important issues of public law, if used with care.

Like the 1988 symposium, the present symposium assays the usefulness to

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** Faegre & Benson Professor of Law, University of Minnesota.
1. 74 VA. L. REV. 167 (1988) [hereinafter Symposium]. Professors Eskridge and Weingast, contributors to this symposium, also participated in the University of Virginia symposium, as did we.
2. Id. at 167.
3. Id.
4. Id. at 170.
5. Id. at 174, 176.
6. Id. at 169.
8. Id.
9. Id.
legal analysis of a growing body of social science literature. As we will see, the linkage between public choice (PC) and positive political theory (PPT) is subject to dispute—indeed, a precise definition of either term is difficult. Nevertheless, there is a clear kinship between the two bodies of work. With Judge Mikva's critique in mind, then, one of the questions we will address is whether PPT—as represented in this symposium—suffers from the flaws that he attributed to public choice. That is, does it offer an excessively cynical view of politics? Is it so heavily abstracted from reality that it cannot provide useful guidance to legal analysts? Before we can address these questions, however, we must begin by defining PPT.

In Part I of the foreword, we explore the conflicting views of the symposium participants about PPT and its relationship to public choice. We then turn, in Part II, to the questions raised by Judge Mikva and other critics of public choice. Our goal is to consider the ability of PPT (as represented in this symposium) to provide information of use to legal analysts about the political process. In Part III, our focus, like most legal analysis, includes the normative as well as the positive. What kind of normative theory corresponds well with PPT? To put it another way, what kinds of normative questions of interest to legal scholars can PPT most usefully help to address? Given the ties between PPT and economics, our answer may surprise some readers, for we believe that the best normative link is not with economic efficiency but with process-based fairness norms.

I. DEFINING POSITIVE POLITICAL THEORY

When we wrote a book about law and public choice, we rapidly discovered—with the help of a quarrelsome group of outside referees—that there was considerable dispute about the meaning of the very term "public choice." We ourselves defined public choice as "the application of the economist's methods to the political scientist's subject."\(^\text{10}\) In our survey of the public choice literature, we addressed one chapter to studies of rent seeking by special interest groups, and another to studies of incoherence and instability in majority voting.\(^\text{11}\) At least one referee believed that rent seeking had nothing to do with "public choice," while another thought that issues such as reapportionment should have been covered. Perhaps evidencing a basis for the adage that in academe the battles are so fierce because the stakes are so low, almost all of the referees seemed to feel very strongly about the correctness of their own definitions.

\(^{10}\) \textit{Id.} at 1. We suspect that economists found this definition more congenial than political scientists, and that we were to some extent caught in an academic turf war between these two departments for control of this area of scholarship.

\(^{11}\) \textit{See id.} chs. 1 & 2.
With that experience in mind, it seemed unwise to us to rely on our own sense of what PPT means. Turning elsewhere, we uncovered a useful discussion of PPT by Jerry Mashaw. He suggested that rather than being a monolith, PPT scholars "work with a host of models, having quite different assumptions and emerging out of different 'public choice' traditions." He found the "familial relationship" of these models "difficult to capture save in a core general presumption that political behavior is to be explained as the outcome of rational (and often strategic) actions by relevantly situated individuals within some set of defined institutional boundaries."

Hoping for further enlightenment, we decided to survey the participants in this symposium. We should stress at the outset—since the audience does contain social scientists, after all—that we make no pretense that the results have any scientific validity. Although our sample is small and far from unbiased, at least it does reflect the views of a set of distinguished and knowledgeable observers. Rather than viewing it as an inept attempt at empirical research, we hope readers will view our survey more charitably as an impressionistic exploration of the views of the contributors to this symposium.

The questionnaire asked the following questions:

1. How would you define PPT?
2. Is PPT different from "public choice"? If so, how?
3. Is PPT most clearly aligned with a particular school of scholarship (Chicago, Rochester, Virginia, Cal Tech, etc.)?

We were hoping for a relatively clear consensus on these questions, particularly the second, although we suspected that many of the law professors in our sample might have trouble with the third question. As it turned out, the third question evoked much less disagreement than the first and second.

The diversity of the responses is reflected by the following three responses to the second question:

From an economist

"Public choice" is usually construed to mean the study of social aggregation mechanisms. It includes mechanisms that are not usually considered "political"—e.g., where no government authority is involved (voluntary clubs, for example).

From a political scientist

As I have long argued, PPT is much broader than "public choice." The latter is a subclassification associated with the "Virginia School." Public choice is intellectually and ideologically far more homogeneous than PPT.

From a law professor

13. Id.
PPT is a subset of public choice. Public choice includes a whole branch of abstract theory, as well as more Chicago School type approaches. Note the disagreement about whether PPT is a subset of public choice, or vice versa.

We tabulated the response to get a better feel for the diversity of opinion. (On the assumption that law professors might well have less knowledge than social scientists, we also tried breaking down the responses between “lawyers” and “others,” but there turned out to be no significant differences.) The results of our unscientific survey are shown in Table 1.

<table>
<thead>
<tr>
<th>Answer to Q2</th>
<th>Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>PPT equals PC</td>
<td>0.5</td>
</tr>
<tr>
<td>PC includes PPT</td>
<td>3.0</td>
</tr>
<tr>
<td>PPT includes PC</td>
<td>3.0</td>
</tr>
<tr>
<td>PPT &amp; PC are disjoint</td>
<td>5.5</td>
</tr>
<tr>
<td>PC &amp; PPT overlap</td>
<td>1.0</td>
</tr>
</tbody>
</table>

It seems fair to say that no obvious conclusion emerges from Table 1, except that almost no one thought that PPT is the same as PC, or that the two are distinct but overlapping. The plurality position was that the two are disjoint, but about the same number thought that either PC included PPT or vice versa.

Our results indicate that we have a basis for our initial uncertainty about the relationship between PPT and public choice. There was no clear breakdown between law professors and “insider” social scientists—or, for that matter, between political scientists and economists, or between law professors *simpliciter* and those with a Ph.D. in another field. Interestingly, insiders and outsiders alike had a strong sense of the “school” affiliations of PPT: Cal Tech, Rochester, and Stanford each received five or more votes as PPT territory; Harvard, Washington University, and Carnegie-Mellon each received two or less; and no one voted for Chicago or Virginia. William Riker was mentioned by several respondents as the academic fountainhead of PPT. Thus, while finding it difficult to explain the defining traits of PPT, the respondents apparently had a shared sense of where PPT is institutionally centered. PPT may be unclear as a concept, but it seems to be clearer as a sociological phenomenon.

While the conceptual relationship between PPT and public choice re-

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mained unclear, the participants did have some common ideas about the characteristics of PPT itself, as shown by Table 2. The most common response was that PPT has a distinctive focus on the operation of institutions. As a law professor put it:

By and large, public choice scholarship is more prone to focus on abstract features of political decisionmaking, such as cycling and rent-seeking under majority rule or the formation of interest groups than on specific institutional arrangements such as the committee system or court-congress-executive interaction. (The shortcomings of PC's approach are part of the inspiration for PPT—see, e.g., Shepsle's work.)

As Table 2 shows, the other traits commonly associated with PPT were that it is non-normative and based on the assumption of rational actors.

**Table 2**

<table>
<thead>
<tr>
<th>Attributes of PPT</th>
<th>Number of Respondents</th>
</tr>
</thead>
<tbody>
<tr>
<td>Non-normative</td>
<td>6</td>
</tr>
<tr>
<td>Assumes rational actors</td>
<td>5</td>
</tr>
<tr>
<td>Does not assume self-interested actors</td>
<td>4</td>
</tr>
<tr>
<td>Focuses on the role of institutions</td>
<td>9</td>
</tr>
<tr>
<td>Is not based on the norm of economic efficiency</td>
<td>1</td>
</tr>
<tr>
<td>Utilizes game theory</td>
<td>3</td>
</tr>
<tr>
<td>Does not take a market-based approach</td>
<td>1</td>
</tr>
</tbody>
</table>

If the respondents shared some common understanding of PPT, why did they find it so hard to define its relationship with public choice? Our impression is that the reason is that the meaning of "public choice" is so heavily contested. If public choice is defined to include all applications of economic methodology (including game theory) to political science, then PPT is clearly a subset of public choice. On the other hand, if public choice is identified with the work of specific individuals (particularly at Chicago and Virginia), then respondents had at least two other possible ways of explaining the distinction between public choice and PPT. They could say that PPT includes all rational-actor theories of politics, which would make public choice a subset (consisting of noninstitutional and often normative models). Alternatively, they could define public choice narrowly, but define PPT as the institutional, non-normative alternative, making PPT and public choice disjoint sets.

In short, we believe, the respondents would have achieved a high degree of consensus if they had been asked to sort models into two categories: (1) "PPT but not public choice," and (2) "Public choice but not PPT." What
they disagreed about was simply which of the "but not" clauses was redundant.

Because the respondents associated PPT with the work of particular schools—and some identified the use of the term itself with those schools—it is preferable not to define PPT too broadly, for example by defining it to include the entire field of formal models of politics. Given the association between PPT with a particular group (more technically, a "clade" sharing a common academic ancestor, William Riker), defining PPT to include the work of scholars outside this group also might be seen as subordinating the work of those scholars to that of members of the PPT clade. Moreover, we believe that a more restricted definition of PPT better describes the submissions to this symposium.

We would propose, then, the following definition of PPT: PPT consists of non-normative, rational-choice theories of political institutions. The term public choice then remains available, either as a general description of rational-choice theories of politics, or as a description of non-PPT rational-choice theories of politics. For present purposes, we can put aside the question of which definition of public choice is preferable. In other words, we find it unnecessary to address whether the phrase "non-PPT public choice" is redundant. To avoid confusion, we will use "public choice in the broad sense" as a label including PPT, social choice, and so forth.

Each of the terms of our definition of PPT requires a brief explanation. We are reserving the term PPT for non-normative work—that is, work that attempts to explain or predict political events, but not to evaluate their desirability. In a sense, much of the work in this symposium is a mixture of PPT and normative theory. By a rational-choice theory, we mean a theory in which individuals are assumed to choose actions that optimize their preferences about outcomes. Those preferences might be based on self-interest, but they could equally well be based on pure altruism. This assumption of rationality provides the common ground with economic theory and makes both microeconomics and game theory available as tools for building models. At the border of PPT, we might find theories in which the rationality assumption is relaxed, perhaps on the basis of current research in cognitive psychology. By the reference to political institutions, we mean to focus on theories in which the choice of institutional form is a central subject of inquiry. Thus, we are interested in studies that discuss matters such as the effects of bicam-

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15. A clade is a branch on an evolutionary tree, identified by the presence of shared features derived from a common ancestor. See Stephen Jay Gould, Hen's Teeth and Horse's Toes: Further Reflections in Natural History 356-59 (1983).

16. Our own preference would be to retain the term "public choice" as a general description of formal, rational choice models of politics, rather than linking it specifically with the concerns of the Virginia and Chicago schools.
eralism, legislative committees, delegation to administrative agencies, judicial review of agency decisions, and so forth. On the other hand, studies that merely attempt to correlate constituency or contributor interests with political outcomes would not be considered PPT because these studies ignore institutions. Our discussion in Part II of the articles in this symposium will help make this definition more concrete.

II. APPLYING POSITIVE POLITICAL THEORY TO LEGAL ISSUES

Having defined PPT, we must consider whether it has something useful to say about legal problems. To say the least, it would be difficult to defend the view that knowledge about the functioning of political institutions is irrelevant to legal scholarship. On the other hand, there might be several reasons why PPT could be of little utility to legal analysis: PPT might analyze institutional issues in contexts of little significance to public law; it might be an exercise in abstract modeling with little insight to contribute to real-world problems; or it might be based on such a caricature of political behavior that its conclusions are suspect for any practical legal use. The latter two objections are derived from Judge Mikva's critique of public choice (broadly conceived). We raise the first concern sua sponte because we believe that it does apply to some fields of public choice—for example, the considerable body of work on the relationship between political institutions and fiscal policy. In the course of discussing these issues, we will also offer brief summaries of the symposium papers.

A. THE SIGNIFICANCE OF THE TOPICS

Rather than survey all of the papers to establish the significance of their topics for public law, we have chosen four representative papers to establish our point. We believe that the other papers also have utility for public law, but even if our sample is unrepresentative, the conclusion would still hold that a substantial amount of PPT work is on topics useful for public law.

Of all the papers, perhaps the most topical is Linda Cohen and Matthew Spitzer's article on term limits for legislatures. While this Symposium was in preparation, the California Supreme Court upheld a state constitutional amendment sharply limiting legislative terms. The issue has also aroused great interest among political commentators (and, obviously, among legislators). A major argument in favor of term limits is that campaign funding by interest groups tends to lock incumbents into place, with the effect that legis-

17. As we have said earlier, we believe that Mikva's concerns are justified with respect to some public choice work, but not necessarily to the field as a whole.
18. The Journal of Political Economy publishes work of this kind on a regular basis.
lators are less responsive to the public interest. Cohen and Spitzer argue, on the contrary, that term limits make legislators more responsive to special interests and less responsive to the long-term needs of the public. Their basic contention is that term limits give legislators a strong incentive to "front load" their payoffs, so that they will seek immediate short-term rewards. Also, because voters generally make decisions retrospectively, after viewing a legislator's performance, term limits lessen the power of voters relative to special interests simply because reelection is a lower priority for legislators.

In contrast to the "front page" issue of immediate public importance addressed in the Cohen and Spitzer paper, David Post and Steven Salop's article considers a technical legal issue that is virtually incomprehensible to non-lawyers. Consider the following scenario. The issue before the United States Supreme Court is whether, in state courts, a criminal conviction must be supported by a unanimous jury verdict. Eight members of the Court believe that the rule must be the same for both federal and state juries, but these eight are evenly divided about whether the federal jury must be unanimous. The remaining member of the Court believes that federal juries must be unanimous, but that states need not follow the same rule as the federal government. The question—which lawyers must face with greater frequency because of splintered opinions by the Justices over the past two decades—is simply this: what rule does this case establish? Under what Post and Salop term an "outcome approach," the rule is that federal juries must be unanimous but state juries need not (the outcome preferred by the one maverick Justice joined by a different group of four as to each half of the decision). This is the conventional answer.

In contrast, under the "issue approach" favored by Post and Salop, the case establishes quite a different rule. The first issue is whether the standard is the same for federal and state juries; the answer is "yes" (eight to one). The second is whether federal juries must be unanimous; the issue is again "yes" (five to four). The final issue is whether state juries must be unanimous, and the answer is "yes" (by logical implication from the first two rules). Post and Salop argue in favor of this approach, largely because the alternative method (outcome voting) makes the results of cases depend on

22. Compare Apodaca v. Oregon, 406 U.S. 404 (1972), which has similar facts and almost the same array of judicial preferences.
23. The "swing" Justice's views are decisive because his reasoning regarding state juries is based on narrower grounds than the other four members of the majority on that issue. See Marks v. United States, 430 U.S. 188, 193-94 (1977); Linda Novak, Note, The Precedential Value of Supreme Court Plurality Opinions, 80 COLUM. L. REV. 756, 761-67 (1980).
the historical accident of the order in which the cases reach the Court for
decision. While non-lawyers may find this to be an abstruse technical dis-
pute, lawyers who have had to unscramble the precedential value of frag-
mented judicial decisions will have a different view.

The McNollgast article also discusses a "lawyer's issue," but one of more
obvious public significance. Their paper involves the topic of statutory in-
terpretation, which has become one of the hot areas of public law scholarship
after some decades of desuetude. They argue that statutes are often bargains
reached by opposing coalitions and should be interpreted like contracts.
Specifically, they suggest, courts should pay more attention to the views of
the pivotal supporters (as opposed to the most ardent advocates) of
legislation.

Robert Katzmann's article also addresses the relationship between judges
and legislators. His empirical finding is that the two groups are relatively
ignorant of each other's work. In particular, he suggests, legislators do not
craft legislation or legislative history with an eye toward later judicial inter-
pretation to nearly the extent postulated by some observers. As to whether
these observations are significant for public law, we need only think of Jus-
tice Scalia's argument that the main task of judges is to adopt methods of
interpretation that legislators can readily use to communicate their intent.
If Katzmann is right, Justice Scalia may be assuming an unrealistically high
level of legislative interest in and knowledge of judicial implementation.

The issues discussed in these papers are admittedly not the most burning
issues in our legal system, like abortion and affirmative action. Nevertheless,
they are of genuine significance for lawyers and the public as well. More-
over, because they concern ongoing institutional issues, they demonstrate
that PPT may have enduring significance for public law.

B. THE ISSUE OF ABTRUSENESS

One of Judge Mikva's charges was that public choice theory was too math-
ematical and abstract. None of the symposium papers requires any more

24. Post & Salop, supra note 21, at Part IV. Another problem with the conventional approach is
that the "swing Justice" is left with sole discretion whether to defer to the majority of other Justices
or determine the outcome by him or herself.
25. McNollgast, Positive Canons: The Role of Legislative Bargains in Statutory Interpretation, 80
26. Id. at Part I; see also Daniel A. Farber, Legislative Deals and Statutory Bequests, 75 Minn. L.
Rev. 667 (1991), for an earlier discussion of the contractual perspective.
27. McNollgast, supra note 25, at 711.
29. Id. at Part III.
than a knowledge of elementary algebra or the simplest of geometric concepts (such as identifying which of two points on a line is closer to a third point). Few of the papers use even that much mathematics, and the papers that have some mathematical content can be profitably read even by mathephobes simply by skipping formulae and diagrams. As to the papers in this symposium, at least, Judge Mikva's fear about the use of mathematical analysis would not be well founded.

Nevertheless, while the articles are short on the apparatus of mathematics, many of them contain fairly formal models, in which the implications of a rigorously simplified set of assumptions are worked out in careful detail. Although the lack of mathematics makes these articles more approachable for the ordinary lawyer, formalized models are subject to attack for lack of realism, even if described in English rather than mathematical formula. We believe, however, that even though the assumptions in some of the models are markedly unrealistic, the models have interesting, novel, and relevant implications.

The article by William Eskridge and John Ferejohn illustrates how unrealistic assumptions can spotlight overlooked aspects of a problem. They begin by assuming complete rationality and perfect information. They also take a severely legal-realist view of how judges review an administrative agency's interpretation of a statute: "judges have exogenous preferences about the statutory policy and try to impose them on the statute in place of the agency's preferences . . . ." It would be easy to fault these assumptions as unrealistic. Yet, Eskridge and Ferejohn produce an important and far from obvious conclusion: even if judges are completely outcome-oriented and care nothing about the original legislative intent or other conventional sources of statutory meaning, independent judicial interpretation of statutes may help strengthen the hand of Congress as against the executive branch. The reason is that administrative agencies can hide beyond the presidential veto and, within a wide zone, rewrite statutes to suit presidential policy. If courts then enter the process, they are likely to move policy closer to that preferred by Congress because any attempts to move farther away from Congress than the President's position will be checked by new legislation. This analysis has obvious implications with respect to the debate over the *Chevron* doctrine.

The Eskridge and Ferejohn analysis is noteworthy for at least two reasons.

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32. *Id.* at 529.

33. *Id.* at 549.

First, it is intuitively obvious that if judges seek to enforce the original congressional intent, they will assist Congress in maintaining the original statutory bargain against executive interference. But it is far from obvious that judges can play the same role even if they actually care nothing about legislative intent. Second, their analysis introduces a new factor. Lawyers have a tendency to view the Supreme Court as the last actor in the process of statutory implementation, but the Eskridge and Ferejohn analysis highlights the extent to which the decisionmaking power of judges is constrained by the ability of Congress to respond.

The article by Warren Schwartz and Edward Schwartz about juries also combines a lack of realism with an important insight about a previously overlooked factor. Their model of juries could hardly have less resemblance to the everyday world of the jury room, which is noticeably lacking in the perfect information, complete rationality, and calculational dexterity assumed in their paper. Indeed, they admit themselves that some of the predictions of the model are unrealistic (such as a ninety-seven percent rate of hung juries). Nevertheless, their analysis highlights an important factor previously overlooked in discussions of whether unanimity should be required of jurors. As they point out, to decide whether a voting rule favors defendants, we cannot merely examine whether a jury is more likely to convict in a given case. We also need to consider how any change in jury behavior affects the prosecutor's decision of what charges to bring. A change in rules that decreases the odds of conviction on any given charge, but leads prosecutors to bring much more serious charges, has the net effect of disadvantaging defendants. The rationality and information assumptions in the model are unrealistic, but they force the analyst to keep in mind that a change in rules has indirect effects because its direct impact will lead other players to change their own strategies. This insight about prosecutors is more important than the specific conclusions of the paper, some of which may be driven by the artificial modeling assumptions.

Gillian Hadfield's article about the evolution of legal rules also brings to light an unrecognized factor. She returns to the debate about whether judges seek economic efficiency and points out that, even if they seek to do so, they face a serious informational barrier. If the status quo is a rule regulating a certain activity, judges will have no way of knowing what the level of that activity would be in the absence of the rule. For that reason, they will be able to assess the efficiency benefits of shifting to more stringent regulation more readily than the benefits of relaxing the rule. In short, their informa-

36. Id. at 783.
tion base is biased in the direction of greater regulation. For example, if the status quo is a rule in which surrogate motherhood is allowed only under limited circumstances, judges will have no way of knowing the extent of unfulfilled demand for surrogate mothers (assuming that enforcement of the rule is effective). Finding a relatively small level of demand, they may be more likely to shift toward more stringent rather than more lenient regulation. Similarly, in assessing tort liability for drug manufacturers, the court is unlikely to take into account the extent to which existing liability rules deter the marketing of useful drugs and may instead take the current supply of drugs as a given.

Bruce Hay's article on products liability has a similar unexpected twist. He considers the argument that the state courts engage in a "race to the bottom" in product liability law, attempting to favor their own resident plaintiffs over out-of-state producers. Hay points out that the incentives to adopt a pro-plaintiff liability doctrine depend on the range of cases in which that doctrine will be applied. That, in turn, depends on choice-of-law rules. Hay argues that pro-plaintiff choice-of-law rules may offset the incentives for pro-plaintiff substantive doctrines. The reason is that a choice-of-law rule favoring plaintiffs will allow out-of-state plaintiffs to have the benefit of the state's pro-plaintiff rules in suits against the state's own manufacturers. As Hay points out, the empirical record regarding his theory is mixed, but his model does at least show that the "race to the bottom" theory is too simplistic.

In this section, we have deliberately focused on the papers that could be most readily criticized for overly stylized (or quite unrealistic) assumptions. Even if the criticism is accepted, however, these papers still have important insights to contribute to legal analysis.

C. IS PPT TOO CYNICAL ABOUT POLITICAL MOTIVATION?

One of Judge Mikva's most vehement charges against public choice was that it took an unrealistically cynical view of politicians, portraying them as unremittingly greedy and self-interested rather than public spirited. Perhaps Judge Mikva was too charitable toward his former colleagues in the Congress, but we ourselves have been troubled by some of the public choice literature for this reason. In any event, the articles in the current symposium portray a much different attitude toward politicians.

The difference is most notable in the work of Barry Weingast, who contributed to both symposiums. In the 1988 symposium, his article with Wil-

39. Id. at 648-49.
William Riker (the "godfather of PPT," don't forget) seemed to take a very jaundiced view of the legislative process. The legislator, he and Riker said, is a "placeholder opportunistically building up an ad hoc majority for the next election." Moreover, there is a "fundamental inescapable arbitrariness to majority rule." Because legislative decisions are mainly determined by the agenda used by legislative leaders to determine the order of votes, they said, "the notion of a 'will of the people' has no meaning."42

Weingast's article with John Ferejohn in the present symposium has a much different tone.43 That article explicitly disowns the premises that "all members of Congress are venal and concerned only with gaining and holding power," that "real deliberation does not take place" in the legislature, and that "good laws are not enacted." Rather, Ferejohn and Weingast contend only that the political system does "create significant incentives on legislators to shirk their policy-making responsibilities in favor of electoral pursuits."44 Even so, "not every legislator succumbs to these temptations," only "enough" to make the office-seeking theory a powerful explanation.45 And taking the analysis a step further, they conclude that Congress has evolved features that tend to counter the problem.46 They then offer an insightful analysis of how judicial review can reinforce these features of the process. This is a far cry from the seemingly cynical attitude of the earlier Riker and Weingast article.

The McNollgast article (in which Weingast participated as the "gast" in the collective authors' name) also reflects a more benign attitude toward the legislature. The Riker and Weingast article, like that of some public choice writers of the period, reflected a great concern with the implications of Arrow's Theorem for legislatures.47 As Jerry Mashaw has explained, the main implication seemed to be that either anything at all could happen in the legislative process, so that outcomes are arbitrary, or the results are dictated by agenda setters, so that outcomes are dictatorial.48 But the recent McNollgast

40. Symposium, supra note 1, at 396.
41. Id. at 374.
42. Id. at 385, 395.
44. Id. at 566.
45. Id.
46. Id.
47. As defined by Riker and Weingast themselves, Arrow's Theorem states that "given some reasonable conditions of fairness in the method of amalgamation, it is possible for any method, for some configurations of individual preferences, to fail to produce an order." William H. Riker & Barry R. Weingast, Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures, 74 VA. L. REV. 373, 381 (1988).
paper focuses on the role of pivotal voters by using a "median voter" model. In such a model, incoherence, cycling, and agenda order are simply not problems.\textsuperscript{49} This does not mean that McNollgast believe that actual legislatures operate in one-dimension decision spaces with uni-peaked preferences (the technical requirements for the median voter model), but they apparently do believe that this model captures important qualities of the legislative process.

The one paper in the symposium that continues to take a notably jaundiced view of legislative motivation is Jonathan Macey's analysis of separation of powers.\textsuperscript{50} Unlike most of the other participants, Macey remains very concerned about rent-seeking, as the following passage illustrates:

\begin{quote}
[E]ven the executive, whose actions are more politically motivated than the judiciary's, serves a salutary role in my analysis by reducing the benefits that legislators obtain from passing interest group oriented legislation, thereby raising the costs of rent seeking. Viewing agency enactment legislation as a "deal" between interest groups and lawmakers, it is obvious that the value the interest group places on the legislation will increase symmetrically with the "deal's" durability. However, interference with the power of Congress to control administrative agencies impedes the ability of politicians to make credible commitments to interest groups. This in turn lowers the price politicians can demand for providing legislation to favored groups by reducing the willingness of such groups to pay for new laws.\textsuperscript{51}
\end{quote}

This is the kind of language that drove Judge Mikva up the wall. Nevertheless, we believe that the role played by "rent seeking" in Macey's analysis is less central than it may appear. Viewed as a positive description of how the three branches operate, Macey's analysis requires only that the three branches have different policy preferences; how those preferences are generated is irrelevant. For example, legislators might perfectly reflect the preferences of their constituents, but their preferences would still differ from the President's, who reflects a national power base. Viewed more normatively, Macey's analysis does not really turn on the pejorative implications of "rent-seeking" and "interest group," or the laudatory implications of the "public interest" which he hopes courts will represent. Indeed, an earlier article suggests that, for Macey, an "interest group" is simply any interest that is well-enough organized to achieve legislative recognition, while the public interest is the residuum of unorganized diffuse interests.\textsuperscript{52} We believe that Macey's

\textsuperscript{49} See Dennis Mueller, Public Choice II 64-66 (1989).
\textsuperscript{50} Jonathan R. Macey, Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies, 80 Geo. L.J. 671 (1992). The Cohen and Spitzer article begins with a self-interested model of legislative motivation, which turns out to be not too crucial to their results. See Cohen & Spitzer, supra note 20, at Part I.A.1.
\textsuperscript{51} Macey, supra note 50, at 674.
\textsuperscript{52} See Jonathan Macey, The Role of the Democratic and Republican Parties as Organizers of
argument would survive intact if the normatively loaded language he uses were replaced by references to “interests represented within the legislative process,” “interests represented in presidential decisionmaking,” and “residual interests represented by the judiciary but not the other two branches.”

In short, we view some of Macey’s language as a reflection of the early period of public choice analysis. In any event, it is remarkable how little of such language is found in the other articles in the symposium. As with the other points we have raised, Judge Mikva (if he is reading this) ought to feel reassured. PPT today is capable of delivering novel insights about significant legal issues; it is not overwhelmed with mathematical esoterica; and it embodies a realistic but not cynical perspective on politics.

III. THE NORMATIVE SIDE

In our unscientific survey about the meaning of PPT, one of the points on which there was general agreement was that PPT was not normative. As lawyers, as well as citizens, however, our interest in PPT ultimately relates to its normative implications. PPT may be more suited to assisting the analysis of some normative questions than others. If there is to be a Normative Political Theory to be matched with PPT, what kind of normative theory would be appropriate?

In Part I of this foreword, we defined PPT as consisting of “non-normative, rational-choice theories of political institutions.” This definition has some implications about the appropriate normative pairing. First of all, PPT is not likely to have much to say about irrational influences on political behavior. Indeed, as implemented in economics, rational-choice theory takes preferences as given, seeking to understand how they are implemented given various constraints and opportunities. Accordingly, PPT is not likely to have much to say, at least directly, about the formation of values.

Because of its linkage with economics by way of rational-choice theory, PPT might be expected to share the norm of economic efficiency. This norm does not seem especially appropriate, however, for the kinds of policy choices about which PPT can be expected to provide information. If PPT tells us anything, it will be about the effects of various institutional designs on outcomes. Adopting economic efficiency as the normative standard would mean excluding distributional norms. Since distributional decisions are basic to politics, it would be odd to assess outcomes without considering their distributional effects.

Shadow Interest Groups, 89 Mich. L. Rev. 1, 24 (1990) (distinguishing “individual, disaggregated voters” who do not find it rational to become politically informed on issues, with “shadow interest groups,” which differ only in that they find it rational to become informed on particular issues).
There is little reason, moreover, to expect PPT to generate strong predictions about what kinds of institutions will create economic efficiency. PPT provides no reason to assume that any of the participants in the process have any particular view regarding economic efficiency. Neither voters nor politicians can be assumed to pursue efficiency. For that reason, there is no reason to think that any particular set of institutions will be more likely to create efficiency than some other set of institutions—insti-tutions may shift the balance of power among various groups, but without some knowledge of the content of the preferences of these groups, we have no way of knowing whether these shifts will advance or retard economic efficiency. For example, if the President takes a more laissez-faire attitude than Congress (e.g., President Reagan), and if governmental regulation is bad, the cause of efficiency will be served by a powerful presidency. On the other hand, if the President is more interventionist then Congress (e.g., President Truman), then the contrary will be true.

Similarly, there is little reason to expect PPT to tell us very much about preserving individual rights. Without knowing anything about the distribution of preferences, for example, we cannot be sure whether property rights will be better protected by a strong President or a weak one, nor can we expect PPT to tell us much about whether property rights should receive greater or less constitutional protection than other rights.

More generally, without a more detailed knowledge about preferences or about the formation of interest groups, we cannot expect to make firm predictions linking outcomes with some independent substantive norm. Rather, we have to expect normative judgments to be process-based and relational. The potential contributions of PPT will be along these lines: “If you want outcomes to reflect the views of the median voter, the following institutional designs will be effective.” Or, on a more detailed scale, we can ask what kinds of enforcement structures will lead to outcomes closest to those desired by the median enacting legislator, or what methods of judicial interpretation will provide legal stability and give legislators an incentive to devote their attention to passing substantive legislation rather than constituent service.53 Interestingly enough, Ferejohn and Weingast explicitly assume that courts are procedurally rather than policy motivated, with the goal of “enhancing the efficacy of law in a democratic system.”54

Ferejohn and Weingast do raise some serious questions, however, about the fundamental value of “law in a democratic system.” They argue that, as a result of Arrow’s Theorem, statutes “must generally be either empty or

53. These norms are either stated in or implicit in the McNollgast, Macey, and Ferejohn & Weingast articles. Similar norms are implicit in other papers.

54. Ferejohn & Weingast, supra note 43, at 574.
incoherent,”55 and that laws neither have nor can be deemed to have a “coherent purpose.”56 Yet, when they present an actual model of legislation, they use a median voter model in which the incoherence issue does not arise. Notably, median voter models are the dominant form of PPT in the symposium. For example, while paying lip service to the complexities of the multidimensional issue space,57 McNollgast’s positive theory of statutory interpretation is entirely based on a median voter model, and gives particular weight to the view of moderate legislators who are the key to the legislation’s passage.58

If the symposium is an indication of the current state of PPT, incoherence concerns have become submerged in the adoption of median voter models. Indeed, the symposium might well have been titled, The Triumph of the Median Voter. One reason for the popularity of median voter models is that they are so much more tractable, both analytically and expositionally, than multidimensional models. But this would hardly explain their popularity unless they were also felt to have serious explanatory power.

From the point of view of positive theory, median voter models capture a key aspect of political institutions that is more difficult to capture in multidimensional models: they provide stable outcomes. In simple multidimensional models, outcomes are unstable, and thus prediction is known to be highly unrealistic.59 In more complex multidimensional models, stable outcomes emerge that are somewhat analogous to the median voter outcome. In particular, sophisticated multidimensional models tend to provide outcomes that are in some sense near the center of the voters’ group preferences, just like the median.60 If multidimensional models produce results that are analogous to median voter models, but with much more technical complexity, the median voter model becomes highly attractive. This attraction is strengthened by the fact that there is actually some empirical evidence for the existence of unidimensional (liberal to conservative) policy space in Congress.61 Normatively, the median voter model also captures some of the appeal of the multidimensional solution sets; because they are near the center of voter preferences, they have some claim to recognition as an articulation of “group sentiment” or as a fair compromise among competing interests.

Ferejohn and Weingast are skeptical of claims that the deliberative process can identify any “common good” or “public interest”:

55. Id. at 568.
56. Id. at 571.
57. See McNollgast, supra note 25, at 741.
58. Id. at 711.
59. FARBER & FRICKEY, supra note 7, at 48.
60. Id. at 50-51.
61. Id. at 48.
While theories of this sort are enjoying something of a revival, they all seem to rest on the belief that some sort of common good can be discovered by the legislature. This ontological commitment to the existence of an independent common good, while it may seem plausible in a homogenous community, seems less and less available to modern citizens, who are chronically faced with what John Rawls has called the "fact of pluralism." Once we come to accept and even to embrace the idea of multiple and radically incomparable notions of the good, and to see that interpretive approaches cannot be counted on to create order out of chaos, it is hard to see how an "epistemic" conception of democracy can be defended.  

In the background of this assertion, once again we find the lurking presence of Arrow's Theorem, which seems to deny the possibility of any rational method of combining conflicting individual preferences into a group choice, so that the group can be treated as a collective rational actor.

But Arrow's Theorem may be the answer to the wrong question. Instead of asking whether there is a "rational" way of combining group preferences, perhaps we need to ask if there is a fair way of reaching social decisions in the face of substantial disagreement. Indeed, one way of interpreting Arrow's Theorem is as a finding that people who want a "rational collective choice" are making a category mistake: rationality applies only to individuals, not to collectivities. Certainly, there is nothing in Arrow's Theorem that rules out fairness as an achievable goal.

A fair decision technique should have several traits:

1. It should encourage the disputing parties to search for common ground. Although Ferejohn and Weingast are correct that such common ground may not exist, we never know until we try.
2. It should allow all of the disputants to participate in the process, and treat all of their views as worthy of consideration.
3. It should provide some stability over time and some predictability of outcomes.
4. It should provide solutions that are "central" given social preferences, and which therefore correspond to general social norms of fairness. By producing moderate or compromise outcomes, such a procedure encourages social stability and cohesion, rather than the sort of social unrest that results when some groups are consistently complete losers in the legislative process.

64. Note that such central solutions tend to emerge in voting experiments because of the social norm of fairness. Farber & Frickey, supra note 7, at 50.
These norms can be used to evaluate particular institutions or decision-making techniques. For example, one might inquire about what methods of statutory interpretation would best reinforce these norms. These norms are not limited to legislation; the judicial system delivers some of these norms through formal decisionmaking and others through settlement or alternative dispute resolution methods.

One of the attractions of median voter models is that they capture many of these norms. The implicit assumption of many of the symposium articles is that they also capture some of the basic behavior of the political system; unless such models had explanatory power, they would have little real-world significance. In other words, besides being a convenient technical device, the median voter model provides the basis for both a positive and normative vision of the political system.

CONCLUSION

The linkage of PPT and public law theory is largely nascent. Nonetheless, the contributions to this symposium provide promising evidence that PPT is more compatible with conventional public law theory, and more revealing concerning public law problems, than the public choice literature reflected in the Virginia symposium.

At least at their most simplistic, certain strands of public choice ignore the importance of institutions and reduce legislators to single-minded seekers of reelection and legislation to either rent seeking or incoherence. These assumptions cannot be easily meshed with the dominant strand of conventional public law theory, as elegantly reflected in *The Legal Process* materials of Henry Hart and Albert Sacks. For Hart and Sacks saw public law as made in an institutionally rich environment in which process-based norms govern. They also assumed that legislators are “reasonable persons pursuing reasonable purposes reasonably” and that statutes are “purposive” acts in the public interest. These charitable assumptions can surely be criticized as counter-empirical, but that ignores the possibility that Hart and Sacks were not so much panglossian empiricists as savvy normativists—crafters of assumptions that provide useful judicial and administrative side-constraints upon the less attractive features of politics.

65. Median voter models also hold forth the promise of rational collective decisionmaking, by providing a transitive nondictatorial method of making social decisions given uni-peaked, unidimensional preferences. It is clear, however, that this aspect of the models is probably misleading because it turns out not to be robust.


68. *Id.* at 1415.

69. *Id.* at 1156.
Hart and Sacks have been subjected to withering criticism in recent years, but their vision has demonstrated a strong staying power at the center of public law scholarship. If their analysis is used as a starting point for evaluating the utility for law of positive theory in the social sciences, it should be apparent that PPT—institutionally focused, process based, and unc- colored by generous assumptions about lawmakers and lawmaking—seems to have far better potential than more reductionist versions of public choice.

Generalizations about political institutions provide a basis for analyzing many traditional legal process issues, such as deference to agencies, the role of stare decisis, the significance of legislative inaction, and the sources of interpretative coherence. In the past, those generalizations have been founded on “fireside intuitions.” PPT may provide a framework of formal theory and empirical testing for legal process theory. The articles in this symposium are a promising beginning to this venture.


71. We have earlier suggested that, if public choice does influence public law outside the area of economic regulation, it would be primarily because of its insights regarding structure, procedure, and institutional setting. See Farber & Frickey, supra note 7, at ch. 5 & epilogue. On the other hand, stripped of the ideologically loaded rhetoric of “rent-seeking,” we do believe that studies of interest-group influence can also illuminate public law issues. See Daniel A. Farber, Free Speech Without Romance: Public Choice and the First Amendment, 105 Harv. L. Rev. 554 (1991).