# FOREWORD: POST-CHICAGO LAW AND ECONOMICS

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## INTRODUCTION: A NEW ERA OF LAW AND ECONOMICS

This is not another "law-and-econ" bashing symposium. Nor is the symposium's title intended to denigrate Chicago School law and economics any more than the term "Post-Keynesian economics" was intended to denigrate the work of John Maynard Keynes. Instead, this symposium marks the fact that many practitioners of law and economics have moved well beyond the stereotypes familiar to most legal academics. Rather than designating an entirely new school of thought, the term "Post-Chicago law and economics" refers to a new era in which a variety of new questions about law and lawmaking is being asked and a variety of promising economic techniques is being used to answer them.

Yet most legal academics who, like me, are not part of the law and economics movement are generally unaware of these changes. The purpose of this "Symposium on Post-Chicago Law and Economics" is to bring some of these new methods and questions to the attention of mainstream legal academics and others. The hope is that those who have shunned the economic analysis of law in the past may wish to reconsider their stance in light of what Post-Chicago law and economics has to offer. To facilitate this, I will use this *Foreword* to summarize the new directions suggested by each of the symposium contributors, most of whom are practitioners of law and economics.

## I. EXPANDING THE ECONOMIC MODEL

In his symposium article,[1] Robert Ellickson suggests that the time has come for practitioners of law and economics to take seriously Arthur Leff's well-known criticism of the dominant "rational-actor" model employed by law and economics.[2] "Despite the unarguable costs of complexity," Professor Ellickson says, "economists should now seek to

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1. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law-and-Economics*, 65 CHI.-KENT L. REV. 23 (1989) (Professor Ellickson's paper appears in this symposium issue).

2. *See* Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974).



HeinOnline -- 65 Chi.-Kent L. Rev. 3 1989

modify the rational-actor paradigm in order to give it greater power."[3] In particular, he urges that insights provided by psychology and sociology could be integrated into economic analysis. He believes that such improvements would not necessitate "a paradigm shift—like that from Ptolemy to Copernicus—but rather only a paradigm improvement—like that from Copernicus to Kepler."[4]

Professor Ellickson begins by presenting some empirical indications that, while law and economics is hardly in decline, it has ceased to grow in recent years. He reports that both the number of law professors with doctorates in economics at Chicago, Harvard, Stanford, and Yale law schools and the proportion of articles with a law and economics slant published in the law reviews of these four schools have held relatively constant since 1970.[5] He also presents evidence that, while law and economics has spread throughout academia since 1970, even this process of diffusion appears to have slowed or stopped.[6] Moreover, the increased professionalization of law and economics has tended to confine its use to specialists. "Today, when many of the obvious and easy applications have been done," he observes, "a young scholar with only a modest amount of technical training can no longer be as optimistic about being able to make a contribution."[7] Ellickson believes that by enriching its model with insights provided by modern psychology and sociology, law and economics may experience a renewal and growth. Psychology provides information about the internal influences of human behavior, while sociology provides information about the external influences on human behavior.

### A. *Integrating Insights from Psychology*

In his discussion of psychology, Professor Ellickson summarizes the findings of Amos Tversky and Daniel Kahneman that when

> confronted with a choice among a set of prospects, a person is likely to use an arbitrary reference point to judge whether achieving a particular prospect would constitute a loss or a foregone gain. This has consequences because a person is likely to be loss-averse, that is, to regard a loss from a reference point as more momentous than foregoing an apparently equivalent gain from that same reference point.[8]

Professor Ellickson gives two examples of how this insight from psy-

3. Ellickson, *supra* note 1, at 25.
4. *Id.* at 26.
5. *Id.* at 26-27.
6. *Id.* at 30-32
7. *Id.* at 33.
8. *Id.* at 35.

HeinOnline -- 65 Chi.-Kent L. Rev. 4 1989

chology may be usefully applied to law. First, in the takings area this analysis "predicts that an ordinary landowner would feel the loss of a psychologically vested right of a given market value more keenly than he would the loss of a prospect (a psychologically unvested right) of identical market value."[9] The second example is in the area of adverse possession, where "even a knowing adverse possessor would eventually start regarding the possessed land not as a prospect but rather as a vested right"[10] and where "during a period of adverse possession an absent true owner would likely be psychologically pulling up stakes, thereby becoming less likely to frame as a 'loss' the possible relinquishment of the land to the adverse possessor."[11]

Professor Ellickson then summarizes the research of Henry Simon regarding the limitations of human cognitive capacities. "The reality that cognitive limitations impair the learning of law makes legal instrumentalism much more difficult. An analyst must become involved in the messy matter of the extent to which actors will respond to formal legal signals."[12] Professor Ellickson would use this insight from psychology to examine when a legal system should take into account human cognitive limitations,[13] the "legibility" of legal rules to persons whose conduct they are supposed to guide,[14] and the role of such intermediaries as lawyers, reporters, and insurance companies in providing *ex ante* legal information to actors.[15] He concludes his discussion of psychology by briefly considering the possible implications of cognitive barriers to dissonant information for consumer protection and workers compensation statutes,[16] as well as the limitations on a person's ability to "unfailingly execute decisions made about his own future conduct."[17]

### *B. Integrating Insights from Sociology*

Next, Professor Ellickson discusses some ways that insights from sociology can improve economic analysis. In contrast to "mainstream economic theory [that] takes tastes as exogenous givens . . . [s]ome economists, and also some critics of economics, have striven to speculate on

9. *Id.* at 37-38.
10. *Id.* at 39.
11. *Id.*
12. *Id.* at 40-41.
13. *Id.* at 41.
14. *Id.* at 40-42.
15. *Id.* at 42.
16. *Id.* at 42-43.
17. *Id.* at 43.

the origin and legitimacy of preferences."[18] Aside from "deepening the normative power of economics," he thinks "a successful theory of taste formation would enable economists better to make positive predictions of shifts in supply and demand curves."[19] After sketching his own "suggestive model" of the internalization of culture,[20] he applies this model to three contexts of human behavior: economic exchange, social exchange, and political behavior.[21] With respect to political behavior, he explains how the inculturation model may enrich public choice analysis[22] of legislative and judicial behavior.[23] "The mark of a true economist," Professor Ellickson concludes, "is not fealty to the classical rational-actor model, but rather openness to any technique that would improve understanding of complex human behavior."[24]

### *C. Judge Posner Replies*

In *The Future of Law and Economics: A Comment on Ellickson,*[25] Judge Richard Posner responds both to Professor Ellickson's empirical claim that the law and economics movement is losing steam and to his suggestion that law and economics could use a healthy dose of psychology and sociology. Although he questions the strength of the evidence supporting Professor Ellickson's claim, assuming the claim is correct, Judge Posner offers four possible explanations for the phenomenon. First, at some point the relative growth of any portion of the law school curriculum must cease.[26] Second, space must be made for new interdisciplinary movements, such as feminist jurisprudence, law and literature, and critical legal studies.[27] Third, given the opportunity costs of economists, it "is cheaper to fill teaching slots with refugees from the humanities, alumni of public-interest firms, and aspiring constitutional

18. *Id.* at 44-45. One of the economists cited by Ellickson as having explored this issue is Lewis Kornhauser, another contributor to this symposium. *See id.* at 45 n.67.

19. *Id.* at 45.

20. *Id.* at 45-48.

21. *Id.* at 48-55.

22. *Id.* at 51-52. "Public choice" analysis is another facet of Post-Chicago law and economics that only recently has begun to receive the widespread attention of legal academics. *See, e.g.*, Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987). The public choice approach is examined in this symposium by Jerry Mashaw and Dan Farber. *See infra* notes 61-106 and accompanying text (summarizing their contributions).

23. Ellickson, *supra* note 1, at 52-55. The use of economic analysis to analyze judicial behavior is represented here by the contribution of Lewis Kornhauser and a comment by Jonathon Macey. *See infra* notes 39-60 and accompanying text (summarizing their contributions).

24. Ellickson, *supra* note 1, at 55.

25. Posner, *The Future of Law and Economics: A Comment on Ellickson*, 65 CHI.-KENT L. REV. 57 (1989) (Judge Posner's comment appears in this symposium issue).

26. *Id.* at 57.

27. *Id.* at 57-58.

HeinOnline -- 65 Chi.-Kent L. Rev. 6 1989

lawyers."[28] Finally, Judge Posner maintains that an empirical discipline can make little headway in the absence of empirical inquiry. Yet "law professors have neither training nor taste for systematic empirical research, which would inevitably involve statistical analysis."[29]

Judge Posner cautions against using other disciplines to "supply a *facile* explanation for every regularity (or peculiarity) in human behavior,"[30] explanations that cannot be tested empirically. "[T]oo many bells and whistles," he says, "will stop the analytic engine in its tracks."[31] Abandoning the simple rational-actor model prematurely may cause economists to overlook straightforward explanations of behavior. Moreover, much of modern sociology and anthropology, he says, is implicitly economic in its methods.[32]

Finally, because the premise of this symposium is that law and economics has moved into a new era, it is significant that at one point Judge Posner implicitly acknowledges this development. Responding to Professor Ellickson's call to broaden the economic model, Judge Posner cites to his own writings and observes that "[t]o some extent . . . Ellickson is preaching to the converted."[33] He notes that economists are already incorporating altruism and information costs, for example, into their analysis.[34]

## II. From Substance to Process

Traditional law and economics has mainly focused its attention on the consequences of what H.L.A. Hart calls the "primary rules" that regulate individual conduct.[35] Post-Chicago law and economics is extending the focus of economic analysis beyond the substance of the law to the judicial and legislative processes that generate and enforce primary rules. This expanded inquiry includes the procedural "secondary rules"[36] that regulate those persons who administer the legal system.

28. *Id.* at 58.

29. *Id.*

30. *Id.* at 62.

31. *Id.*

32. *Id.* at 60.

33. *Id.*

34. *Id.*

35. H.L.A. Hart, The Concept of Law 92 (1961) ("primary rules are concerned with the actions that individuals must or must not do").

36. *Id.* ("secondary rules . . . specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined").

### A. *The Economic Analysis of the Judicial Process*

In discussing the potential contribution of inculturation models on the law and economics model, Robert Ellickson observes that recognizing the role of ideology in judicial decision-making is "a conspicuous break from the Chicagoan orthodoxy that ideas don't matter."[37] Law and economics scholars, he says, have "yet to confront the murky issues that arise once one admits the influence of ideology on judges."[38] Jonathan Macey notes that "[e]conomists have had virtually nothing to say about judicial decision-making in general or stare decisis in particular."[39] Lewis Kornhauser begins his symposium article by observing: "To the normative question 'How *ought* judges to decide cases?' some economic analysts, though not all, respond: Judges ought to decide cases to promote efficiency. To the positive question, . . . 'By what principles or practices of reasoning do judges in fact decide cases?'—economic analysts of law have remained silent."[40]

#### 1. Professor Kornhauser's Analysis of Stare Decisis

Professor Kornhauser brings the tools of economic analysis to bear on an aspect of judicial decisionmaking that has, until now, been considered the turf of legal philosophy: what is the nature of legal reasoning? He seriously examines the requirement of formal justice that "like cases should be treated alike." He frames his inquiry as follows: "Phrased in its starkest form, stare decisis 'requires' a judge, once she has determined that the instant case is governed by a prior decision, to adhere to that prior decision even when she believes that prior decision to have been wrongly decided."[41] In sum, he asks: "What justifies adherence to a decision known to be wrong?"[42]

Although I cannot fairly summarize Professor Kornhauser's intricate analysis here, I can explain how, in addition to its focus on the secondary rules governing lawmaking, it exemplifies three other distinctive features of Post-Chicago law and economics. First, the manner in which he frames the issue requires a close consideration of the possibility of judicial errors. In other words, Professor Kornhauser's analysis does not assume that judges have "perfect information" of either the law or facts

37. Ellickson, *supra* note 1, at 53.
38. *Id.* at 53-54.
39. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 CHI.-KENT L. REV. 39, 39 (1989) (Professor Macey's comment appears in this symposium issue).
40. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 CHI.-KENT L. REV. 63, 63 (1989) (citations omitted) (Professor Kornhauser's article appears in this symposium issue).
41. *Id.* at 66.
42. *Id.*

HeinOnline -- 65 Chi.-Kent L. Rev. 8 1989

of disputes and, instead, identifies four potential sources of erroneous judicial decisions: changes in values, changes in the world, improvements in information, and incompetence.[43] He then uses this analysis to critically assess three "jurisprudential" justifications of adhering to erroneous decisions: fairness, competence, and certainty.[44]

Second, at a crucial juncture of the analysis, he employs the techniques of game theory to explain how participants in a legal system may find it in their interest to agree to a regime of stare decisis even when they disagree over the more basic values of the system.[45] Although long known to economists and philosophers, the use of game theory to assess problems of coordination in the absence of perfect information is new to legal analysis and is one of the distinctive analytic methods associated with Post-Chicago law and economics.

Third, in contrast to what he terms "the standard assumptions of the economic analysis of accident law,"[46] Professor Kornhauser presents a model which attempts to incorporate an element of uncertainty created by a changing world.[47] Indeed, it is impossible even to consider stare decisis without taking time and change into account, for the doctrine requires that a rule announced at one point in time be adhered to at some later time.[48]

### 2. The Value of Process: Professor Macey's Comment

Professor Kornhauser concludes his analysis of stare decisis with the intriguing observation that "the paradox of stare decisis most often emerges only when the substantive values of the judges differ from the criteria that determine when two cases are equivalent."[49] This potential discrepancy between the substance of legal decisions and the formal process that produces legal decisions provides Jonathan Macey with a point of departure from Professor Kornhauser's analysis of stare decisis. By stressing the relationship between substantive and procedural concerns,

43. *Id.* at 68-73.

44. *Id.* at 73-78.

45. *Id.* at 78-82.

46. *Id.* at 82, n.31.

47. To this end, he modifies a model presented in Blume & Rubinfeld, *The Dynamics of the Legal Process*, 11 J. LEGAL STUD. 405 (1982).

48. For a discussion of how standard economic methods inadequately take time into account, see G. O'DRISCOLL & M. RIZZO, THE ECONOMICS OF TIME AND IGNORANCE 2-3 (1985).

49. Kornhauser, *supra* note 40, at 91. I discuss the usefulness of these different perspectives in Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI.-KENT L. REV. 37, 41-47 (1988). I examine the value of distinct, competing modes of analysis in Barnett, *Foreword: Of Chickens and Eggs—The Compatibility of Moral Rights and Consequentialist Analyses*, 12 HARV. J. L. & PUB. POL'Y 611, 634-35 (1989) (hereinafter *Chickens & Eggs*).

HeinOnline -- 65 Chi.-Kent L. Rev. 9 1989

Professor Macey's analysis of the doctrine of stare decisis further elaborates this important dimension of Post-Chicago law and economics.

Professor Macey begins by questioning whether Professor Kornhauser's evaluation of the procedural characteristic of stare decisis takes substantive uncertainty seriously enough. "[C]entral to Professor Kornhauser's model is the assumption that judges actually *know* what the socially desirable outcome is. . . . By phrasing the question in this way, however, Professor Kornhauser presumes that judges enjoy a far greater degree of certainty about the socially desirable outcome in a particular case than they actually do."[50] Professor Macey thinks that, by adopting this assumption, Professor Kornhauser overlooks three significant advantages of stare decisis. First, it "enables judges to leverage a single skill—the ability to tell when like cases are alike—into a facility for deciding a wide variety of cases that involve substantive legal issues about which the judges may know next to nothing."[51] Second, it enables judges to "allocate their human capital in such a way as to become expert in a particular field, such as admiralty, criminal procedure, or securities regulation, confident that they can rely on other judges' expertise in the areas in which they have not specialized."[52] Third, the ability of fallible judges to check their conclusions against those reached by other judges helps them to avoid errors of judgment.[53]

While traditional law and economics typically assumes that the substantively correct outcome can readily be discerned for individual cases, each of the advantages of stare decisis identified by Professor Macey only accrues if judges (and even academic commentators) often are unable to make a "substantively" correct decision in individual cases. Professor Macey concludes that the "idea of stare decisis requires that we appreciate the intractable problem of uncertainty that plagues judges when they decide cases. . . . In other words, stare decisis can be justified only on the grounds that it provides a basis for judicial decision-making when judges *don't know* what the correct answer is."[54] In a world of perfect decision-making, adhering to such procedural constraints as stare decisis would be unnecessary and irrational, but Post-Chicago law and economics does not assume such a world.

To evaluate Professor Kornhauser's thesis, Professor Macey presents his own four-fold economic analysis of stare decisis—an analysis

50. Macey, *supra* note 39, at 94-95.
51. *Id.* at 95.
52. *Id.*
53. *Id.*
54. *Id.*

HeinOnline -- 65 Chi.-Kent L. Rev. 10 1989

that explores the relationship between substance and process. First, Professor Macey analyzes the doctrine's ability to assist judges in making substantively correct legal decisions.[55] Second, he considers how stare decisis increases information concerning the substance of the law, thereby decreasing the incidence of litigation.[56] Third, he suggests that stare decisis helps appellate courts identify when trial judges have "decide[d] cases in ways that are more consistent with their own preferences than with the preferences of society as a whole."[57] Stare decisis also makes it possible for a judicial system to establish much-needed conventions in situations where it matters less which rule is adopted than it does that some rule be adopted uniformly.[58]

Employing Professor Kornhauser's distinction between strong and weak versions of stare decisis,[59] Professor Macey concludes his comment by offering a "public choice" account of why judges may find it in their interest to adhere to a weak form of the doctrine rather than abandon the doctrine or adopt a stronger version.[60] Professor Macey often uses public choice analysis in his writings in public law fields, and it is to this dimension of Post-Chicago law and economics that I now turn.

### B. *The Economic Analysis of the Legislative Process*

Although Jerry Mashaw acknowledges in his symposium article the "rich history of law and economics talk in public law fields,"[61] he observes that only in the last decade has public choice theory begun to appear in legal scholarship. "And only within the last four or five years have debates about the relevance of such things as 'interest group theory' and 'Arrow's Theorem' begun to achieve prominence in legal academic discussions of constitutional and administrative law and statutory interpretation."[62] For Professor Mashaw, this application of economic analysis to public law is distinctive from previous efforts insofar as "the issues posed and sometimes answered by the new political economy are almost exclusively issues of institutional structure and decisionmaking process rather than issues of substantive policy."[63] Thus, Post-Chicago law and

55. *Id.* at 102-106.
56. *Id.* at 106-107.
57. *Id.* at 108.
58. *Id.* at 108-109.
59. Kornhauser, *supra* note 40, at 73-74.
60. Macey, *supra* note 39, at 112-13.
61. Mashaw, *The Economics of Politics and The Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 124 (1989) (Professor Mashaw's article appears in this symposium issue).
62. *Id.* at 124-25.
63. *Id.* at 125.

HeinOnline -- 65 Chi.-Kent L. Rev. 11 1989

economics' shift of focus in the legislative sphere from substance to process parallels its shift in focus from the substance of judicial decisions to the process of judicial decision-making.

### 1. Public Choice Analysis of Politics and Legislation

Professor Mashaw begins his article by describing the issues that currently divide scholars who take public choice analysis seriously. He identifies two strands of the public choice approach: decision theory and interest group theory.

> The first is a branch of decision theory symbolized and much-informed by Kenneth Arrow's general possibility theorem. This literature is concerned predominantly with the structure of voting rules and with the effect of voting structures on the outcome of collective decision-making. . . . The second branch . . . [is] unified by a basic axiom: Political actions are to be explained in terms of a simple hypothesis concerning human behavior—people act to further their own material interests.[64]

Although his paper deals primarily with the second of these two branches, interest group theory, Professor Mashaw maintains that both are "essential for an overall theory of political action. We need to understand both how individuals behave, or are likely to behave, and how their resulting collective action may be shaped or influenced by the institutions and decision rules through which that action is mediated."[65]

Because early efforts to apply interest group theory to public law have become controversial, Professor Mashaw examines two principal criticisms of this branch of public choice theory. First is the normative criticism that public choice insights obstruct the effort to construct an ethically attractive public law. Second is the criticism that public choice theory is an inaccurate depiction of the real world of public law. His aim is not to refute all criticism of public choice, but to show that it is premature to kill the public choice baby in its crib.

#### *a. The Normative Merits of Interest Group Theory*

Professor Mashaw summarizes the normative critique as follows:

> According to this view, the purpose of collective action is not just to *do* something that has already been determined to serve the individual ends of the participants, but instead to discover and express collective or public purposes. Hence, the institutions of public or collective choice must be constructed to facilitate collective or public discovery and expression of public ideals and public demands. Public choice the-

64. *Id.* at 126.
65. *Id.*

HeinOnline -- 65 Chi.-Kent L. Rev. 12 1989

> ory's view of collective choice mechanisms as mere techniques for preference aggregation, and of individual participation in public choice as aimed merely at achieving the most advantageous bargain given preexisting individual preferences, cannot possibly lead to an appropriate understanding of how citizens or officeholders should behave in their public roles or of how public institutions should be understood or designed.[66]

Mashaw suggests that critics have mistaken the positive claims of interest group theory for normative claims. Public choice is offered as a potentially valuable explanatory technique in a world where assertions of public-interest by political actors are not easily assessed and are often insincere. Public choice adherents do not claim that all public institutions *should* be nothing more than mechanisms of interest group satisfaction; instead they think that the interest group assumption illuminates the legislative process. To quarrel with this response, however, requires an assessment of the descriptive merits of the public choice method.

Deserving of more serious consideration, Mashaw thinks, are the potentially adverse effects of the public choice way of thinking on public morality. This criticism is analogous to the claim that judges who accept the teachings of legal realism end up debasing the judicial process when they act consistently with these teachings. It also resembles the claim that acceptance of the philosophy of legal positivism by German judges contributed to the perversion of their legal system. These criticisms all share the assumption that, when they are internalized by individual actors, descriptive theories can be self-fulfilling prophesies with normatively unattractive implications. An irony occurs when those who offer this criticism of public choice "realism" in the legislative process simultaneously embrace a realist perspective on the judicial process.

Mashaw responds by examining the impact that interest group theory appears to have had on institutional reform.[67] Although he thinks interest group theory has heavily permeated the reform efforts of the past three decades, "[t]he activist optimism of the 1960s has been replaced by pessimism bordering on the cynical. . . . For some, the only public purpose worthy of respect seems to be the elimination of the public sector itself."[68] With the increasing cognizance of public choice insights among legal academics, Professor Mashaw sees this attitude carrying over to the domain of statutory interpretation. In place of a presumption of public interest, statutes may be viewed as compromise bargains between contending factions. Professor Mashaw explains why "one should expect

66. *Id.* at 128-29.
67. *Id.* at 131-33.
68. *Id.* at 133.

HeinOnline -- 65 Chi.-Kent L. Rev. 13 1989

that this new learning would induce courts to be positivist in their legal philosophy, formalist in their approach to constitutional legitimacy and literalist in their interpretive technique."[69] He then presents evidence indicating that "the jurisprudence of the Burger court, as well as its Rehnquistian successor, . . . is at least congruent with the public choice perspective."[70]

Professor Mashaw also relates the reply to this normative criticism offered by Nobel laureate James Buchanan, the father of modern public choice ("Virginia School") economics. According to Professor Buchanan, the model is constructed to enable the discovery of mechanisms that can effectively guard against the very type of self-aggrandizing behavior it assumes.[71] Professor Mashaw thinks this puts Buchanan on the same side of the dispute about whether politics is simply the way that wholly exogenous preferences are satisfied "as people like Steven Kelman, Cass Sunstein and Mark Kelman."[72] With the dispute over preference endogeneity largely settled, Professor Mashaw thinks it is time for "republicanish" theorists to confront the reality of preference or taste formation.[73] He suspects that when they do they will find that the "strategic control of self-interest through institutional design may be essential both to the achievement and the maintenance of a fully rational polity."[74] He concludes that a:

> Kirkegardian leap of faith into didactic republicanism may be a good strategy, but it may also be folly. And in any event, it is a faith that I cannot will myself into. I, at least, am going to need some more persuading that acting *as if* the republican story were true will make it so.[75]

### *b. The Descriptive Merits of Interest Group Theory*

After rejecting the idea that public choice should stop telling harmful truths, Professor Mashaw turns his attention to those who condemn public choice for telling lies. He picks up where Daniel Farber and Philip Frickey's 1987 article, *The Jurisprudence of Public Choice,*[76] leaves off. Although in general agreement with their analysis, Professor Mashaw fears that their article "may have given too much comfort . . . to those who would respond to its debunking of some of public choice's

69. *Id.* at 135.
70. *Id.*
71. *Id.* at 138.
72. *Id.* at 139.
73. *Id.* at 140.
74. *Id.*
75. *Id.* at 140-41 (emphasis in original, citations omitted).
76. *See* Farber & Frickey, *supra* note 22.

HeinOnline -- 65 Chi.-Kent L. Rev. 14 1989

more extravagant claims, 'Thank God. Another field of social science we can safely ignore.' "[77]

Professor Mashaw agrees with Professors Farber and Frickey that studies establishing the beneficial effects of legislation on particular interest groups "demonstrate neither that the legislation investigated is without public interest effects, nor that it was adopted because of private interest pressures or concerns."[78] Yet, according to Professor Mashaw, "such studies are one useful element of the 'old' law and economics approach to public law."[79] Knowing who wins and who loses and by how much is not only "a necessary part of strategic public management, it is crucial to a normative consideration of whether the legislation is in the public interest."[80] And the fact that such studies are not dispositive does not mean that they fail to support, to some degree, the newer public choice perspective on public law.

> A demonstration that legislation has big wealth distribution effects, combined with a demonstration that it has large costs and few benefits, and was enacted through a process that was highly likely to have promoted nefarious forms of rent seeking by benefited groups, would provide a pretty strong indictment of a particular statute (or statutory provision) on public policy grounds.[81]

Professor Mashaw is concerned that some readers are likely to conclude from Professors Farber and Frickey's praise of ideology as a predictor of legislator behavior that the factor of self-interest can safely be dismissed. He considers some of the difficulties of constructing models of behavior based solely on ideology,[82] and of some of the methodological weaknesses of ideology-based studies performed to date.[83] He notes that Professors Farber and Frickey were careful to claim that "models containing ideology *and* economic factors outperform *purely* economic models. . . . There is no claim here that pure ideological models outperform pure economic models. Nor can any conclusion be drawn from these studies about which sorts of factors are more substantial."[84] He also attempts to place in perspective Professors Farber and Frickey's discussion of the empirical evidence on voter behavior,[85] a discussion which he fears "easily could mislead those looking for reassurance that public choice

77. Mashaw, *supra* note 61, at 143.
78. *Id.* at 145.
79. *Id.*
80. *Id.*
81. *Id.* at 146.
82. *Id.* at 147.
83. *Id.* at 147-48.
84. *Id.* at 148.
85. *Id.* at 148-49.

HeinOnline -- 65 Chi.-Kent L. Rev. 15 1989

can safely be ignored."[86]

Finally, Professor Mashaw discusses the limits of the public choice approach. In particular, he criticizes the efforts of Jonathan Macey and Judges Frank Easterbrook and Richard Posner to infer a normative theory of statutory interpretation from public choice's positive account of legislation. Public choice insights lead each to urge a different mode of statutory interpretation, and Mashaw offers brief criticisms of each. He concludes that the best of public choice research in this area and others tells us "to be skeptical of our prior Panglossian presuppositions concerning the structure and dynamics of political action, but also to be skeptical of the public choice approach's capacity to make definitive findings."[87]

2. Public Choice in Perspective: Professor Farber's Comment

In his comment on Professor Mashaw's article,[88] Daniel Farber discusses both the role of self-interest and ideology in the political process and the implications of decision theory, the other branch of public choice theory that Professor Mashaw describes but does not assess. Professor Farber re-emphasizes that, since public choice theory is "far from mature,"[89] it is too early to assess its full implications for public law. In his view, however, "it is not too early . . . to reject the profoundly pessimistic implications of the early public choice theories."[90]

One connection between self-interest and ideology is that because legislators have an interest in being re-elected, it matters to them why voters vote the way they do. Therefore, the failure of public choice theory to explain voting behavior is significant. As Farber explains:

> If the policy espoused by one of the candidates would be in . . . [a voter's] self-interest, she might vote for that person, but she would have little reason to do so, since for all practical purposes there is no causal link between her individual vote and that candidate's election. On the other hand, since something other than self-interest evidently motivated her to drive to the polls, that same motivation might quite plausibly continue to influence her in her choice of candidates.[91]

However, if voters vote for ideological reasons, then the self-interest of legislators would make ideology relevant to the legislative decision-making process. For this reason, Professor Farber discusses recent studies

86. *Id.* at 149.
87. *Id.* at 160.
88. Farber, *Democracy and Disgust: Reflections on Public Choice*, 65 CHI.-KENT L. REV. 161 (1989) (Professor Farber's comment appears in this symposium issue).
89. *Id.* at 162.
90. *Id.*
91. *Id.* at 164.

HeinOnline -- 65 Chi.-Kent L. Rev. 16 1989

examining the role of ideology in explaining voter behavior.[92] In addition, he considers some evidence that the personal ideology of legislators influences their roll call votes, and some studies of particular statutes suggesting that their passage cannot be explained solely on grounds of interest group influence.[93]

> Thus, we have three bodies of evidence that seem to point to the same conclusion: the most careful econometric work, the findings of traditional social scientists, and historical investigations of the public choice accounts of particular legislation. . . . Only a fool would deny the importance of self-interest in the political process, but we can also be reasonably sure that self-interest is not the whole story.[94]

Professor Farber then turns his attention to "social choice" or decision theory, the "branch of public choice theory suggests the . . . unpleasant possibility that legislation is random and arbitrary."[95] Farber concedes that, "[m]ajoritarianism rests on the assumption that legislation is linked to majority views, but public choice theory seems to deny any such causal connection: outcomes are either random or driven by legislative features such as agenda rules, but in any event majority preferences do not translate into a meaningful collective choice."[96]

Along with Professor Mashaw, Professor Farber rejects as "unrealistic if not unpalatable"[97] the answer suggested by the more utopian strands of neo-republican thought,[98] which is to avoid the problem of deciding among conflicting policies by using the political process to render individual preferences substantially uniform and harmonious. Instead, Professor Farber identifies certain institutional features of legislatures that promote coherence and stability.[99] He explains how behavioral norms such as fairness may stabilize voting outcomes even when voter preferences contain massive cycles.[100]

Assuming that legislatures are not wildly unstable or unpredictable, Professor Farber then considers the possibility that using institutional constraints to achieve this stability may result in a moral arbitrariness of legislative results. He considers the normative appeal of some of these constraints, such as majority rule, single-subject votes, and gatekeeper

92. *Id.* at 164-65.
93. *Id.* at 165.
94. *Id.* at 165-66.
95. *Id.* at 166.
96. *Id.* at 167.
97. *Id.*
98. *Id.*
99. *Id.* at 168-70.
100. *Id.* at 169-70.

HeinOnline -- 65 Chi.-Kent L. Rev. 17 1989

committees, the norm of fair division.[101] Moreover, although individual preferences may vary widely, people may still "share a common cultural perspective which makes their disagreements coherent and understandable to each other . . . [enabling them] to identify the source of disputes, and to reach coherent and consistent decisions."[102] He concludes that "despite the possibilities of abuse, these stability-enhancing devices have important normative virtues."[103]

Professor Farber notes that, ironically, the decision theory dimension of public choice theory supports the neo-republican instinct that "arbitrary preferences in themselves are likely to be insufficient to generate coherent social choices. Rather, preferences have to be processed through the legislative machinery, applying norms such as fairness and using committees and other stability-enhancing devices."[104] He is careful to add that good process does not guarantee good substance in either legislation or adjudication. Still, although the responsibility for making good choices rests with participants, a good decision-making process makes good substantive decisions possible.[105] He concludes that "while public choice methodology requires careful handling, it is potentially very useful."[106]

## III. Beyond Collective Welfare: Rational Choice Theory

It is a very short step from the institutional constraints supported by a careful treatment of interest and decision theory to the rules that are recommended by a rational choice approach. Rational choice theory, moreover, opens up significant new territory to economic analysis. As Jules Coleman notes in his *Afterword*:

> Within the rational choice framework, legal rules are elements in a scheme of rational cooperation. The traditional economic analysis, which focuses entirely on the efficiency of perfect competition and the inefficiency of market failure, blinds us to the ways in which the distributive and productive dimensions of legal and political constraints are united in rational cooperation.[107]

Rational choice views legal rules as a way of closing the gap between the results of private maximizing behavior and the gains that can accrue

101. *Id.* at 171-72.
102. *Id.* at 171.
103. *Id.* at 172.
104. *Id.* at 173.
105. *Id.* at 174.
106. *Id.* at 175.
107. Coleman, *Afterword: The Rational Choice Approach to Legal Rules*, 65 CHI.-KENT L. REV. 177, 179 (1989) (Professor Coleman's *Afterword* appears in this symposium issue).

HeinOnline -- 65 Chi.-Kent L. Rev. 18 1989

from cooperative behavior. Professor Coleman offers the following distinction between rational choice and traditional economic analyses:

> In the traditional economic analysis, legal rules rectify market failures by encouraging efficient or Pareto optimal allocations of resources. This is another way of saying that legal rules have a productive dimension. The one difference is that within the rational choice perspective, legal rules must be both collectively and *individually* rational. . . . The individual rationality condition imposes the constraint that legal rules be mutually advantageous in a way in which the collective rationality or Pareto optimality condition does not.[108]

For this reason, unlike traditional law and economics, a rational choice framework views distributional concerns as an aspect of the problem of productivity.[109] The movement toward the Pareto frontier (collective rationality) is only possible with cooperation, and cooperation requires a distribution that is in the interest of those from whom cooperative behavior is desired (individual rationality). For Professor Coleman, achieving individual rationality is as much a part of economic analysis as achieving collective rationality. This leads him to incorporate into the economic analysis of law a normative component that has traditionally been associated with social contract theory and which is championed today by philosophers such as David Gauthier.[110] "Once we *embed* the claim that the law ought to promote efficiency or rectify market failure in a political or moral theory which makes that claim plausible or defensible, that is, the rational choice framework, the normative significance of the analytic distinction between efficiency and distribution evaporates."[111] Rational choice theory, unlike classical law and economics, views the problem of distributing the surplus created by cooperation as stemming from the need to motivate persons to act in the ways that make such cooperative gains possible.

Professor Coleman then explains the tripartite rationality that rational choice requires. The first or search phase requires the identification of a possible cooperative gain—what he calls collective rationality; the second or division phase requires a way to divide the gain—what he calls concession or bargaining rationality; the third or monitoring phase requires the investment of resources to secure compliance with the bargain—what he calls individual rationality.[112] Each phase of rational choice corresponds to a different kind of transaction cost: search costs,

108. *Id.* at 181.
109. *Id.* at 181-82.
110. *See* D. GAUTHIER, MORALS BY AGREEMENT (1986).
111. Coleman, *supra* note 107, at 182.
112. *Id.* at 185-86.

HeinOnline -- 65 Chi.-Kent L. Rev. 19 1989

division costs, and monitoring costs. The ability to achieve choice that is rational in all three ways depends upon the transaction resources that are available to manage the three kinds of transaction costs. These transaction resources include social institutions—such as closely knit groups—that reduce these costs, and Professor Coleman discusses the ways that such resources can be provided by parties to agreements. When these resources are provided by legal rules rather than the parties themselves,

> what in the absence of the "state" is a two party contracting problem, becomes, in its presence, a three party problem. That fact alone increases search, division and defection problems. . . . Thus legal rules are *never* taken as given. Their explanation depends upon their relative costs and benefits especially in comparison with endogenous transaction resources upon which the parties can draw.[113]

In Professor Coleman's opinion, "Chicago-style law and economics" is mistaken in a way that Ronald Coase was not. Instead of doing an analytic end-run around them, "[t]ransaction costs are a black box that needs to be filled in. It is distinctly unhelpful always to reconstruct a legal rule as a solution to a market failure caused by transaction costs."[114] The way to fill in the "transaction cost box" is (a) to identify the context or environment of the problem being addressed, (b) to identify both the factors in this environment that, by increasing uncertainty, create each of the three kinds of transaction costs (search, division, and monitoring) and the resources that may be available to the persons involved to reduce these costs, and finally, (c) to determine whether the problem that a legal rule allegedly is needed to address concerns a shortfall of resources to reduce coordination, division, or defection uncertainty.[115] "Only in this way is the view of law as a response to transaction costs meaningful and informative, for only then can we understand which sort of transaction cost is involved and which sort of endogenous transaction resource is in inadequate supply."[116] Professor Coleman concludes his *Afterword* by suggesting how the analytic framework of rational choice is useful in understanding the law of contract.[117]

## IV. CONCLUSION AND ACKNOWLEDGEMENTS

The rational choice perspective described by Jules Coleman suggests that Post-Chicago law and economics may be seen as a limited partnership between economic and philosophical methods. A few years ago I

113. *Id.* at 188.
114. *Id.* at 188-89.
115. *Id.* at 189.
116. *Id.*
117. *Id.* at 189-90.

HeinOnline -- 65 Chi.-Kent L. Rev. 20 1989

described the reemergence of legal philosophy as a rival to (and also a reaction against) the prevailing mode of law and economics.[118] Rather than one movement vanquishing the other, what seems to have occurred is that each has learned from the other so that the gap between them is rapidly narrowing.[119] I also observed that the philosophical criticisms of law and economics may make "possible a challenge to the orthodoxy of Posnerian efficiency. . . ."[120] Post-Chicago law and economics appears to represent this challenge. However, by now it should be evident that Post-Chicago law and economics is neither a wholesale rejection of the older law and economics nor a single school of thought, but instead consists of a variety of fresh approaches to both old and new questions. This symposium does not include every dimension of Post-Chicago law and economics, but I hope that it conveys enough of its promise to intrigue readers to cast aside their stereotypes of economic analysis and to learn more.

I am deeply grateful to my co-editor, Jules Coleman, whose tremendous efforts on behalf of this symposium issue entitle him to a lion's share of the credit for its success. Jules and I both thank the symposium contributors for their excellent papers and the Illinois Institute of Technology, Chicago-Kent College of Law for graciously providing us with a forum for what we hope is an important and provocative discussion. Finally, we are most appreciative to the student members of the *Chicago-Kent Law Review* for doing the "real" editing of this issue. In particular, we thank Editor-in-Chief Steve Wood for his unstinting enthusiasm and cooperation. Let those who doubt that students and faculty can amicably collaborate in an important scholarly endeavor come to Chicago-Kent.

118. Barnett, *Contract Scholarship and the Reemergence of Legal Philosophy* (Book Review), 97 HARV. L. REV. 1223, 1225-33 (1984).

119. Another indication of this is the interest in rendering moral rights and consequential analysis compatible. *See Chickens & Eggs*, *supra* note 49. *See generally*, *Symposium on the Compatibility of Rights and Consequentialist Analyses*, 12 HARV. J. L. & PUB. POL'Y 713 (1989).

120. Barnett, *supra* note 118, at 1233.

HeinOnline -- 65 Chi.-Kent L. Rev. 21 1989

HeinOnline -- 65 Chi.-Kent L. Rev. 22 1989