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LAW AND PUBLIC CHOICE

A Critical Introduction

FIVE

Integrating Public Choice and Public Law

One conclusion to be drawn from chapters 1 and 2 is that knowledge about the legislative process is far more limited than some legal scholars seem to suspect. Easy generalizations and reductionist models have not fared well empirically. If nothing else, we hope to have persuaded the reader of the need for caution in relying on this literature when propounding grand theories of public law. What we do know about the legislative process is that ideology, economic interest, and legislative structures all play roles.[1] Their relative importance is unclear and probably quite variable. Even though the legislative process does not exhibit the chaos to which it is theoretically prone, it is nonetheless too unruly for the sweeping empirical generalizations needed to support comprehensive legal theories. For this reason, in chapters 3 and 4 we rejected general theories that have been proposed to alter fundamentally contemporary judicial approaches to constitutional law and statutory interpretation.

Public law should not be seen, however, as posing a choice between ad hoc decisionmaking and grand theories designed to solve all cases by deductive reasoning from first principles. As it has evolved in Anglo-American law, legal reasoning has often taken a middle ground, that of situational practical reasoning. Legal reasoning frequently involves an analogical and inductive method, resolving new problems by reasoning from well-established, paradigmatic cases. This more modest approach to public law decisionmaking recognizes that decisions are stronger if supported by a range of considerations, rather than simply flowing automatically from first premises. Although "[a] supportable answer may sometimes descend from deductive analysis alone[,] [m]ore often such an answer will ascend from a combination of arguments, none of which standing alone would constitute a sufficient justification. Such 'supporting arguments' are 'rather like the legs of a chair and unlike the links of a chain.' "[2] In short, this pragmatic ap-

1. Political party is obviously another relevant factor that deserves further attention.

2. Farber & Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1645 (1987) (quoting R. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 156 (1982)). In addition to this article, our discussion of legal reasoning is based on Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331 (1988); Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990). For citations to recent legal commentary moving away from grand theory, see Farber & Frickey, *supra*, at 1645 n.129.

proach recognizes that public law must accommodate itself to society's complex, situationally sensitive web of beliefs.

Legal pragmatism, rather than grand legal theory, is the appropriate vehicle through which the lessons of public choice should influence public law. Although public choice cannot support the sweeping empirical generalizations needed to justify grand theory, it does provide fruit for more particularized inquiries about the formulation of public policy. In this chapter, we explain how courts might reform some aspects of public law through practical reasoning informed by the insights of public choice. The goal would be to tip the legislative process toward ideology and structure—and thus, toward legislative ability to formulate public policy—and away from legislative capture by special interests or incoherence.

We do not propose a substantial expansion of substantive judicial review, for the reasons explained in chapter 3. Instead, public choice's emphasis on structure and procedure is congenial to expansion of another judicial function—enforcing structural and procedural constraints on those aspects of the democratic process that public choice suggests are most vulnerable to malfunction. Judicial sensitivity to the forces that warp political outcomes has greater promise to promote legislative deliberation than does stricter scrutiny of the substance of legislation.[3] Consistent with our belief in legal pragmatism rather than grand theory, our case for these reforms is constructed by supplementing current legal doctrines in light of the implications of public choice.

In what follows, it may be helpful to distinguish three different ways in which public choice theory enters the analysis. First, public choice very often highlights problems of the political system. Lawyers may then try to devise workable solutions to those problems, but the solutions themselves may have no direct link with public choice theory. They are lawyers' answers to public choice's questions. Second, on occasion, public choice can also be a source of possible solutions to those very problems. Usually, public choice will not be the only basis for advocating a particular legal doctrine, but it may provide support for some technique intended to reduce rent-seeking or increase legislative stability. In these instances, public choice highlights the problem and also gives clues about a possible solution. Third, when courts

3. Although we have expressed skepticism about Cass Sunstein's suggestions that courts review whether particular legislation is premised upon public values (see chapter 3), we endorse his suggestion that courts play a role in structuring the overall processes of representation to insulate representatives from pressures so that they can better deliberate in the public interest. *See* Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31–35 (1985). Sunstein correctly emphasized that Madisonian notions of the importance of representational structure support this inquiry. *See id.* at 40–45. *See also id.* at 52–53 (noting Supreme Court decisions affecting the structure of representation); Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 247–50 (1986) (discussing constitutional structures designed to impede rent-seeking).

are pursuing other values, public choice may have some insights to contribute about the probable effectiveness of particular techniques. Here, public choice speaks (usually not decisively) to the means, rather than the end.

In any of these settings, we do not claim that public choice is either necessary or sufficient to generate the conclusions. It is possible to be concerned about interest groups or legislative fairness without regard to public choice theory. Public choice theory does, however, add impetus to these concerns. It is also possible to mold judicial remedies with an eye toward legislative structure, using common sense or conventional political science rather than public choice. Public choice may well provide additional insights into the efficacy of such remedies. In any of these guises, to use our earlier metaphor, public choice serves as one leg of a chair, not one link in a chain.

A formalist approach to applying public choice would be quite different. One would begin with a mathematical model of the legislative process, and then formally demonstrate the effect of changing a particular legal rule on legislative outcomes. Next, one would empirically test the theory. Finally, one would apply these validated conclusions to derive specific policy recommendations. We have some general doubts about whether this is the best way to formulate legal policy, but in any event, it is clear that public choice theory in its present state is far too undeveloped to make such applications feasible.

In short, we do not claim to be *deducing* legal doctrines from public choice theory. What we do claim is that public choice can be useful as part of the public lawyer's intellectual tool kit. It can provide insights or reinforce other perspectives. As legal pragmatists, this is as much as we think any theory can truly be expected to provide. But when dealing with problems as difficult as those confronting public law, any source of guidance, however incomplete, is always welcome.

We will begin with an examination of how legislative structure and procedure are treated in current public law. We will then turn to some structural and procedural reforms that seem to follow from public choice. We will also consider how public choice can show courts where to put the burden of legislative inertia in certain hard cases.

I. Existing Strands of "Due Process of Lawmaking"

Courts have sometimes attempted to foster legislative deliberation by more aggressively overseeing the legislative process. Other writers, using the terms "structural due process"[4] or "due process of lawmaking,"[5] have iden-

4. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1673–87 (2d ed. 1988); Tribe, *Perspectives on Bakke: Equal Protection, Procedural Fairness, or Structural Justice?*, 92 HARV. L. REV. 864 (1979); Tribe, *The Emerging Reconnection of Individual Rights and Institutional Design: Federalism, Bureaucracy, and Due Process of Lawmaking*, 10 CREIGHTON L. REV. 433 (1977).

5. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

tified some of the judicial roles involved in this oversight.[6] They have urged attention to "the structures through which policies are both formed and applied"[7] and to the primacy of legislative processes.[8] We agree with Hans Linde that courts seem more capable of constructing "a blueprint for the due process of deliberative, democratically accountable government"[9] than of assessing, in all but exceptional cases, whether legislation properly promotes public values.

Some recent Supreme Court opinions reflect an increased concern with structure and process.[10] Perhaps the most notable example is *Hampton v. Mow Sun Wong*.[11] *Mow Sun Wong* involved a Civil Service Commission regulation dating back to the nineteenth century barring aliens from almost all federal jobs. Because aliens cannot vote and have a history of prejudice, the Supreme Court has considered statutes disadvantaging them as raising serious questions of discrimination.[12] The regulation in *Mow Sun Wong* would have been unconstitutional, as violating the equal protection clause of the fourteenth amendment, if adopted by a state.[13] But the federal govern-

6. In addition to the works of Tribe and Linde, others who have made relevant contributions include A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Bickel & Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957); Conkle, *Nonoriginalist Constitutional Rights and the Problem of Judicial Finality*, 13 HAST. CONST. L.Q. 9 (1985); Dimond, *Provisional Review: An Exploratory Essay on an Alternative Form of Judicial Review*, 12 HAST. CONST. L.Q. 201 (1985); Estreicher, *Judicial Nullification: Guido Calabresi's Uncommon Common Law for a Statutory Age*, 57 N.Y.U. L. REV. 1126, 1147–53 (1982); Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984); Luneberg, *Justice Rehnquist, Statutory Interpretation, the Policies of Clear Statement, and Federal Jurisdiction*, 58 IND. L.J. 211 (1982); Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977); Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 509 (1982). For a thoughtful critique, see Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983).

7. Tribe, *Structural Due Process*, *supra* note 4, at 269.

8. Linde, *supra* note 5, at 255.

9. *Id.* at 253.

10. Structural review seems compatible with fundamental concerns involving the separation of powers. *See generally, e.g.*, Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 410–21 (1982); Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 54, 63–70. Consider the holding in Buckley v. Valeo, 424 U.S. 1 (1976), that invalidated a provision of the Federal Election Campaign Act that provided that several members of the Federal Election Commission would be appointed by congressional leadership. Whatever else might be said about other aspects of *Buckley*, in our view the Court there correctly recognized the fear "that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Id.* at 129.

11. 426 U.S. 88 (1976).

12. *See* Bernal v. Fainter, 467 U.S. 216 (1984); Graham v. Richardson, 403 U.S. 365 (1971).

13. *See* Sugarman v. Dougall, 413 U.S. 634 (1973).

ment has legitimate reasons to regulate aliens that states do not. In *Mow Sun Wong,* the federal government defended the regulation as a bargaining chip in negotiations with foreign countries, an incentive for aliens to become citizens, and a guarantee of undivided loyalty for employees in sensitive positions. In striking down the federal regulation, the Court relied upon a due process of lawmaking approach rather than a simple antidiscrimination rule. The Court thereby accommodated the unique federal interests in regulating aliens with the likelihood that the regulation was rooted simply in discrimination or administrative lethargy.

Justice Stevens wrote for the five-member majority in *Mow Sun Wong* that, "[w]hen the Federal Government asserts an overriding national interest as justification for a discriminatory rule which would violate the Equal Protection Clause if adopted by a State, due process requires that there be a legitimate basis for presuming that the rule was actually intended to serve that interest."[14] Justice Stevens dismissed the first two justifications for the rule in question—that it served as a bargaining chip and provided an incentive for citizenship—because neither reason could have influenced either the Civil Service Commission or the government departments where aliens had applied for jobs. These justifications might allow Congress or the President to adopt the rule, Justice Stevens concluded, but neither had required the Civil Service Commission to adopt the rule or explicitly sanctioned it. The third justification—conveniently excluding potentially disloyal employees—was related to the business of the Civil Service Commission, but Justice Stevens found that the Commission had not fairly balanced this goal against the regulation's costs.[15] Thus, even assuming that Congress or the President could have constitutionally adopted the rule, the Court found it violative of due process.

Mow Sun Wong in many ways fits the "remand to the legislature" theory espoused in one form or another by a variety of commentators.[16] In effect, the Court forced the President or the Congress to reconsider a sensitive issue of discrimination. To implement the legislative remand approach, the Court in *Mow Sun Wong,* as Justice Rehnquist's dissent noted, "meld[ed] together the concepts of equal protection and procedural and substantive due process," and used "a novel conception . . . of procedural due process . . . to

14. 426 U.S. at 103.

15. Justice Stevens reached this conclusion because (1) the Commission had never made "any considered evaluation of the relative desirability of a simple exclusionary rule on the one hand, or the value to the service of enlarging the pool of eligible employees on the other"; (2) there was no showing that a narrower exclusionary rule would be onerous to establish or administer; and (3) under "[a]ny fair balancing" the individual interests of the aliens and the public interest "in avoiding the wholesale deprivation of employment opportunities" outweighed the government's interest in administrative convenience. *Id.* at 115–16.

16. *See* the sources cited in note 6, *supra,* by Bickel, Wellington, and Sandalow.

evolve a doctrine of delegation of legislative authority."[17] Although the *Mow Sun Wong* opinion did not discuss the possible motivation behind the civil service rule, its author has recognized elsewhere that restrictions on the employment of aliens are often special interest legislation.[18] *Mow Sun Wong* is a notable judicial attempt to protect against governmental abuses, not by substantive judicial review but by improving the structure of decisionmaking.

Some other recent opinions share this appreciation for structural and procedural concerns. A number of American Indian law cases fit this mold. Long-standing precedent establishes a trust relationship between the federal government and the tribes.[19] The federal government has vast legislative power over Native Americans, but the states have little authority absent an express delegation of authority from Congress, and the tribal governments retain a right of self-determination consistent with federal law.[20] Although federal legislation relating to Indians is subjected to extraordinarily minimal scrutiny,[21] the Supreme Court has endorsed canons of interpretation that promote statutory and treaty interpretation favorable to the tribes.[22] In general, tribal sovereignty may be invaded only by Congress, not by the states, and only where Congress has clearly evidenced the intent to do so.

A particularly important example of structural review is provided by the Court's affirmative action opinions.[23] Justice Powell's pivotal opinion in *Regents of University of California v. Bakke*[24] concluded that the faculty is the wrong entity to decide the question whether past societal discrimination might justify reserving some seats in a medical school for minorities.[25] Next, the Court in the *Fullilove*[26] case agreed that Congress had special authority to enact a public works bill that set aside ten percent of the

17. 426 U.S. at 119, 117. For a useful analysis of *Mow Sun Wong*, see Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, 91 HARV. L. REV. 1373, 1411–24 (1978).

18. *See* Foley v. Connelie, 435 U.S. 291, 307–9 (1978) (dissenting opinion).

19. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).

20. *See generally* FELIX S. COHEN'S HANDBOOK ON AMERICAN INDIAN LAW 207–572 (R. Strickland et al. ed. 1982).

21. *See* Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73 (1977).

22. *See, e.g.*, United States v. Dion, 476 U.S. 734, 737–40 (1986); Wilkinson & Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CALIF. L. REV. 601 (1975).

23. For a now somewhat dated, but still useful discussion, see Note, *Principles of Competence: The Ability of Public Institutions to Adopt Remedial Affirmative Action Plans*, 53 U. CHI. L. REV. 581 (1986).

24. 438 U.S. 265 (1978).

25. *See id.* at 307–10 (opinion of Powell, J.). On the aspects of Justice Powell's opinion related to due process of lawmaking, *see* McCormack, *Race and Politics in the Supreme Court: Bakke to Basics*, 1979 UTAH L. REV. 491; Tribe, *Perspectives on Bakke*, *supra* note 4.

26. Fullilove v. Klutznick, 448 U.S. 448 (1980).

appropriations in question for minority contractors.[27] Dissenting in *Fullilove,* Justice Stevens explicitly adopted even broader aspects of due process of lawmaking.[28] More recently, in *City of Richmond v. J. A. Croson Co.*,[29] the Court held that a municipality could not adopt a minority set-aside program similar to the one enacted by Congress that was upheld in *Fullilove.*[30] The Court also stressed the city's failure to conduct adequate hearings.

Despite their individual quirks, the cases do seem to fall into discernible categories. Of these, the best-established model involves a hierarchy of institutional legitimacy. Under this approach, a court may invalidate a particularly sensitive decision by an entity comparatively unsuited to render it—for example, the Civil Service Commission in *Mow Sun Wong*—leaving open the possibility that the same decision could be reimposed by a more legitimate entity. Another model, one of legislative deliberation, would require not only compliance with formal legislative rules, but also evidence that the legislature actually acted with sufficient deliberation.[31] Both models were present in the *Richmond* affirmative action case.

27. The lead opinion in *Fullilove,* by Chief Justice Burger, repeatedly contrasted Congress's authority to approve affirmative action with decisionmakers he apparently considered less legitimate for that task, such as the federal courts or a school board. *See* 448 U.S. at 472–73, 480, 483–84. Similarly, Justice Powell went to great pains to suggest why Congress has more authority to adopt affirmative action measures than other entities. *See id.* at 497–502, 508–10, 516 (Powell, J., concurring). Justice Powell hinted that state legislatures might completely lack this power. *See id.* at 515 n.14. Neither Justice overtly embraced these kinds of structural considerations in the next affirmative action decision, however. *See* Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

28. Justice Stevens's dissent in *Fullilove* clearly embraced the "suspensive veto" aspects of due process of lawmaking and apparently was influenced by Linde, *supra* note 5, and Sandalow, *supra* note 6. *See* 446 U.S. at 548–54 & nn.24, 26–28. Similarly, he stressed the procedural regularity of the adoption of the affirmative action plan at issue in *Wygant,* the next affirmative action decision, and accordingly voted to uphold it. *See* Wygant v. Jackson Board of Education, 476 U.S. 267, 317–18 (1986) (Stevens, J., dissenting). *See also* Justice Stevens's dissenting opinion in Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 92–97 (1977).

29. 109 S. Ct. 706 (1989).

30. The essential difference between Congress and a city council in this context, according to Justice O'Connor's opinion in *Croson,* is provided by the language and structure of the fourteenth amendment. Section 1 of the fourteenth amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Justice O'Connor contrasted this explicit constraint on state power with the grant of legislative authority provided to Congress in section 5 of the amendment, which states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Although both the Congress and a city council have a compelling interest in assuring that public funds "do not serve to finance the evil of private prejudice," Justice O'Connor said that a city has the authority to use racial quotas in allocating public contracting only when it has a solid basis for concluding that it "had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." 109 S. Ct. at 720. (After this book went to press, the Court decided Metro Broadcasting v. FCC, 110 S.Ct. 2997 (1990), which recognized an even broader power of Congress to adopt affirmative action measures than Justice O'Connor posited in *Croson.*)

31. This model is the most controversial. Justice Stevens has embraced it occasionally, how-

These two forms of structural review are innovative. Their limits, let alone their ultimate judicial acceptance, are highly unclear.[32] One obvious question is how to discern which decisionmakers are more legitimate than others. Here, *Mow Sun Wong,* the affirmative action cases, and the American Indian law cases provide some guidance. They suggest that Congress is at the peak of the legitimacy hierarchy, presumably because of its popular responsiveness as well as its central policy-making role in the constitutional scheme. Another question is whether the showing of deliberation in the second model should be a general requirement, or limited to decisions that are in some sense constitutionally sensitive, like discrimination against aliens. The cases again provide some guidance, and they suggest the narrower of these views.

Perhaps the most critical question remains whether either form of structural review has a sufficient constitutional basis. The suspensive veto at the heart of this theory may seem to flow from the absolute veto power established in *Marbury v. Madison.*[33] After all, if the Court can strike down a law entirely, why can't it send the law back to Congress for further consideration? Yet, simple arguments that "the greater includes the lesser" do not always work in constitutional law.[34] In our view, however, "due process of lawmaking" does have a sufficient basis in constitutional structure[35] and the Madisonian constitutional ideal of deliberative legislative policy-making,[36] with perhaps some added help from the federal common law.[37]

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ever. *See* Fullilove v. Klutznick, 448 U.S. 448, 548–54 (1980) (Stevens, J., dissenting); Delaware Tribal Bus. Comm. v. Weeks, 430 U.S. 73, 91–98 (1977) (Stevens, J., dissenting). *See also* Comment, *The Emerging Jurisprudence of Justice Stevens,* 46 U. CHI. L. REV. 155, 217–32 (1978).

This model of due process has also been suggested occasionally by other Justices. *See, e.g.,* Rostker v. Goldberg, 453 U.S. 57, 72–83 (1981) (upholding exclusion of women from military draft because, *inter alia,* Congress carefully deliberated on the issue); Fullilove v. Klutznick, 448 U.S. 448, 456–67, 477–78, 490 (1980) (opinion of Burger, C.J.) (noting similar rationale in upholding federal affirmative action legislation). *See also* Shapiro v. Thompson, 394 U.S. 618, 674 (1969) (Harlan, J., dissenting) (complaining that statute held unconstitutional had been the product of appropriate legislative deliberation). This approach is somewhat similar to the "articulated purpose" requirement proposed in Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972). *See also* Sunstein, *supra* note 3, at 69–72. Trenchant criticisms of this suggestion include Linde, *supra* note 5, at 201–35; R. POSNER, ECONOMIC ANALYSIS OF LAW 586–87 (3d ed. 1986).

32. *See generally* Tushnet, *supra* note 6.

33. 5 U.S. (1 Cranch) 137 (1803).

34. *See, e.g.,* Frickey, *The Constitutionality of Legislative Committee Suspension of Administrative Rules: The Case of Minnesota,* 70 MINN. L. REV. 1237, 1267–76 (1986) (form of legislative veto under which a legislature delegates to one of its committees the authority to suspend administrative rules cannot be considered constitutional merely because courts will not invalidate legislative delegation of essentially standardless rulemaking authority to executive agency).

35. *See* C. BLACK, *supra* note 6.

36. *See* Sunstein, *supra* note 3.

37. *See* Monaghan, *supra* note 6.

Much of constitutional law turns on the degree of deference to be given to various governmental actions.[38] We see no reason why, for example, the views of the Civil Service Commission on a matter of foreign policy should be given the same deference that a presidential or congressional decision would receive. The model of institutional hierarchy is an attractive way to force more legitimate reconsideration of sensitive decisions. Even so, thorny questions remain to be resolved, including those about the effects of the federal constitution upon the distribution of lawmaking power in a state.[39]

We have somewhat greater doubts about the utility of the model of legislative deliberation. This model may underestimate both the role of political compromise and the need for legislative flexibility and speed. For example, consider *Fullilove*, the case in which the Court upheld a Federal minority set-aside program. That set-aside could be seen as an effort to obtain spoils by inserting a last minute floor amendment in a pork barrel bill that was already "greased to go." Another plausible story, however, would explain the set-aside provision as an attempt to insure that the benefits of a Keynesian spending measure were fairly distributed.[40] A model of legislative deliberation might have required that Congress reopen committee hearings to consider the desirability of a set-aside provision. In addition to delaying legislation for which time was of the essence, this requirement might have enhanced legislative consideration only marginally. As Chief Justice Burger's opinion in *Fullilove* reveals, in the 1970s Congress had been presented with substantial information from which it could have reasonably concluded that some sort of set-aside was appropriate.[41] It seems pointless to require

38. *See* Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

39. For an interesting discussion, see United Beverage Co. v. Indiana Alcoholic Beverage Comm'n, 760 F.2d 155 (7th Cir. 1985) (Posner, J.).

40. *See* Brief for Respondent Secretary of Commerce at 26–51, *Fullilove v. Klutznick;* Amicus Brief of NAACP Legal Defense and Educ. Fund et al. at 15–30, *Fullilove v. Klutznick*. The provision at issue in *Fullilove* was adopted in 1977 amendments to a 1976 public works legislation. According to the briefs cited above, the 1976 act can be conceptualized not as mere pork barrel spoils, but as a curative measure attacking the recession of that era, which featured high unemployment in the construction industry. The 1977 amendments were initially proposed to pump additional money into the struggling economy, and from the outset supporters urged quick adoption of the amendments so that the money would be spent while the economy was stagnant, not later when, if the economy heated up, the appropriations would have the unintended effect of refueling inflation. The limited information available at the close of the committee consideration of the 1977 amendments suggested that, although unemployment was far higher for minorities than for whites, contracting under the 1976 program had been distributed in a manner disproportionally disadvantaging minorities. One black congressman, testifying on the last day of committee hearings, noted this newly documented problem, suggested its linkage to historical discrimination in the construction industry, and announced that he might introduce an amendment to attack it. The minority set-aside followed in due course.

41. *See* 448 U.S. at 456–72. *See also* Brief for Respondent Secretary of Commerce at 32–

Congress to go through the motions of deliberating again about the same issue.

Despite its weaknesses, the model of legislative deliberation may sometimes have a useful role to play. The prima facie unconstitutionality of some classes of legislation perhaps should be rebuttable, if at all, only by clear and persuasive congressional deliberation. Or at least, where the evidence shows that Congress did not make a deliberate choice, otherwise "suspect" legislation should receive even less judicial deference. Thus, at the constitutional margin, this model might have some utility. As an overall principle of judicial review, however, it may well be insufficiently sensitive to institutional reality. Legislative deliberation is important and should be encouraged by the courts, but indirect methods may work better than demanding evidence of deliberation about particular laws.

A third model of due process of lawmaking is also available, one focusing on procedural regularity rather than on institutional legitimacy or deliberation.[42] Under this approach, courts would merely require legislatures to follow their own rules. At the federal level, respect for a coordinate branch has inhibited judicial intrusion into legislative processes except in compelling circumstances. Yet the Court has occasionally required compliance with congressional procedural rules.[43] In addition, federal judges sometimes favor the construction of a statute most consistent with legislative procedural rules.[44]

The principal federal case enforcing legislative rules is *Powell v. McCor-*

43, *Fullilove v. Klutznick;* Amicus Brief for the Lawyers' Committee for Civil Rights Under Law at 27–69, *Fullilove v. Klutznick.* Would the model of legislative deliberation allow Congress to compile an adequate record merely by having committee staff aggregate this diverse collection of documents, or would planned colloquies in hearings and other boilerplate also be mandated? Neither requirement would make much sense.

42. This is what Hans Linde had in mind when he coined the phrase "due process of lawmaking." *See* Linde, *supra* note 5, at 235–55.

43. *See, e.g.*, Gojack v. United States, 384 U.S. 702 (1966) (subcommittee conducted legislative investigation unauthorized by congressional rules). Consider the views of Hans Linde: "Fear of legislative resentment at judicial interference is not borne out by experience where procedural review exists, any more than it was after the Supreme Court told Congress that it had used faulty procedure in unseating Adam Clayton Powell. It is far more cause for resentment to invalidate the substance of a policy that the politically accountable branches and their constituents support than to invalidate a lawmaking procedure that can be repeated correctly, yet we take substantive judicial review for granted." Linde, *supra* note 5, at 243 (discussing *Powell v. McCormack,* which is analyzed in the text shortly). *See also* Fullilove v. Klutznick, 448 U.S. at 548–54 (1980) (Stevens, J., dissenting).

44. An example is TVA v. Hill, 437 U.S. 153 (1978), in which the Court refused to find a repeal of substantive legislation by subsequent appropriations legislation. In reaching this result, the Court took account of House and Senate rules declaring out of order any provision of appropriations legislation that changes existing law. *See id.* at 190–91.

mack.[45] At the beginning of the 90th Congress in January 1967, the House established a special committee to inquire whether Adam Clayton Powell should be allowed to take his seat. The committee eventually recommended that he be sworn into office, seated as a member, and then sanctioned. After a floor debate, a motion to bring the committee's recommendation to a vote was defeated by 222 to 202. An amendment was then offered calling for the exclusion of Powell from the House. The Speaker ruled that a simple majority would be sufficient to pass the amended resolution, and the amendment was adopted by a vote of 248 to 176. The House then adopted the resolution, as amended, by a vote of 307 to 116.

The Constitution has some specific things to say about the qualifications of House members, the way in which the House may sanction misbehaving members, and the manner in which the House may terminate membership. The Constitution expressly requires only that House members be at least twenty-five years old, citizens for at least seven years, and inhabitants of the state from which they were elected.[46] Powell met each requirement. The Constitution also says that each House shall be the judge of the elections, returns, and qualifications of its own members,[47] and more generally that each House may determine the rules of its proceedings.[48] But the Court concluded that these were general grants of housekeeping authority, which did not allow the House to add to the qualifications expressly set forth in the Constitution.

Each House has the constitutional authority to punish members for disorderly behavior and to expel a member "with the concurrence of two thirds."[49] The final vote to exclude Powell exceeded that margin. But the Court refused to allow the House to rely on its expulsion power. Why? Because Powell had not been expelled, he had been denied a seat in the first place. The difference between exclusion and expulsion seems like the kind of technicality that only a lawyer could love. After all, Powell was "excluded" by a vote of 307 to 116, more than a two-thirds vote, so why make anything of the technical distinction between exclusion and expulsion?

Public choice, however, supports the Court's willingness to attach significance to this seemingly technical distinction. The two votes before the final vote showed that most members wanted to punish Powell but were deeply divided about how much punishment was appropriate. There were probably fewer than two-thirds whose first preference was keeping Powell out of his seat. The strongest evidence is the motion to amend the resolution to exclude

45. 395 U.S. 486 (1969).
46. *See* U.S. Constitution, art. I, § 2, cl. 2.
47. *See id.* art. I, § 5, cl. 1.
48. *See id.* art. I, § 5, cl. 2.
49. *See id.* art. I, § 5, cl. 2.

Powell, which passed by less than a two-thirds vote. As a member of the House himself put it:

> Only on the final vote, adopting the Resolution as amended, was more than a two-thirds vote obtained. . . . On this last vote, as a practical matter, members who would not have denied Powell a seat if they were given the choice to punish him had to cast an aye vote or else record themselves as opposed to the only punishment that was likely to come before the House. Had the matter come up through the processes of expulsion, it appears that the two-thirds vote would have failed, and then members would have been able to apply a lesser penalty.[50]

Powell v. McCormack demonstrates what public choice theorizes—that agendas and procedural rules can make an enormous difference.

The point is not that the Court should enforce procedural rules whenever it is unhappy with outcomes. Rather, we believe that uniform enforcement of procedural rules will tend to produce better results on the average.

The model of procedural regularity suggested by *Powell* is better established at the state than the federal level.[51] State constitutions routinely give detailed rules of legislative procedure. In reviewing whether laws were validly enacted, some state courts will not look beyond the enrolled bill, while others will also examine the legislative journals.[52] State constitutions commonly limit legislative sessions to specified periods,[53] and some state supreme courts invalidate legislation passed after the constitutional deadline, even if they have to rely on newspaper accounts and other unofficial sources for proof.[54]

One legislative rule that seems trivial, but whose significance is shown by public choice,[55] is the "single subject" rule—a common state constitutional requirement that legislation may embrace only one subject, which must be expressed in its title.[56] This rule has at least three purposes: (a) to limit logrolling, (b) to keep surprises from being hidden in bills, and (c) to prevent

50. Eckhardt, *The Adam Clayton Powell Case*, 45 TEX. L. REV. 1205, 1209 (1967), quoted in Powell v. McCormack, 395 U.S. at 511. See also *Powell*, 395 U.S. at 511 n.32, for remarks of other members who felt boxed in by the procedures that were being followed.

51. *See generally* Williams, *The Politics of State Constitutional Limits On Legislative Procedure: Legislative Compliance and Judicial Enforcement*, 48 U. PITT. L. REV. 797 (1987).

52. *See generally* 1 SUTHERLAND STAT. CONST. §§ 15.01–.18 (N. Singer 4th ed. 1985); Comment, *Judicial Review of the Legislative Enactment Process: Louisiana's "Journal Entry" Rule*, 41 LA. L. REV. 1187 (1981).

53. *See, e.g.*, MINN. CONST. art. IV, § 12.

54. *See, e.g.*, Dillon v. King, 87 N.M. 79, 459 P.2d 745 (1974); State *ex rel.* Heck's Discount Centers v. Winters, 147 W. Va. 861, 132 S.E.2d 374 (1963); 1 SUTHERLAND STAT. CONST., *supra* note 52, at § 14.10.

55. *See* chapter 2, part III.

56. For an overview, see SUTHERLAND STAT. CONST., *supra* note 52, at §§ 17.01–.06.

use of irrelevant riders to dilute the governor's veto power.[57] The problem of the "Christmas tree" bill was recognized as long ago as Roman times, before Christmas trees themselves were invented. Beginning in 1818, state constitutions began to include the single subject rule.[58] Many state courts construe the rule flexibly to avoid interfering with legislative processes.[59] Yet the purposes of the rule are worthy, and more vigorous enforcement may well be in order. Enforcement of the rule is particularly attractive when substantive riders have been attached to appropriations legislation.[60]

Even under a single subject rule, the complexity of many bills leaves room for legislative cycling. Nevertheless, if multiple, unrelated subjects are covered in the same bill, the possibility of cycling is greatly enhanced. Hence, the single subject rule promotes stability.

Some commentators question whether any form of structural review can affect the ultimate legislative decision.[61] Pluralists may well believe that the legislative process is too mechanical for "legislative remands" to serve any useful purpose. Yet, as chapters 1 and 2 demonstrated, Congress is not merely the reflection of private political power. Faith in congressional deliberation about sensitive issues is not entirely misplaced, particularly when courts stand ready to assist the deliberative process through structural and procedural review. By requiring legislative reconsideration, courts can shift the burden of inertia, highlight moral concerns about the decision, and—because of the passage of time—often return the issue to a legislature with changed membership. Considering the ease of killing legislation and the difficulty of passing it,[62] these consequences should not be underestimated.

Although the remand in *Mow Sun Wong* did not affect the ultimate outcome,[63] *Kent v. Dulles*[64] is a more successful example of a suspensive judicial veto. In *Kent,* the Supreme Court held that the executive branch

57. *See* Simpson v. Tobin, 367 N.W.2d 757 (S.D. 1985); Ruud, *"No Law Shall Embrace More Than One Subject,"* 42 MINN. L. REV. 389 (1958).

58. *See* Ruud, *supra* note 57, at 389–90.

59. *See, e.g.,* Bernstein v. Comm'r of Public Safety, 351 N.W.2d 24, 25 (Minn. App. 1984), suggesting that a "strict adherence to [the rule's] letter would seriously interfere with the practical business of legislation."

60. For a good discussion, see Department of Education v. Lewis, 416 So. 2d 455 (Fla. 1982). A related issue is whether the executive should have a line item veto in these circumstances. *See* Robinson, *Public Choice Speculations on the Item Veto,* 74 VA. L. REV. 403 (1988).

61. *See, e.g.,* Tushnet, *supra* note 6, at 826.

62. *See* chapter 1, part II, text at note 28.

63. President Ford subsequently issued an executive order reinstating the rule, and the lower courts upheld it. *See* Mow Sun Wong v. Hampton, 636 F.2d 739 (9th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981).

64. 357 U.S. 116 (1958).

lacked the needed express statutory authority to deny passports to "subversives." President Eisenhower immediately sent an urgent message to Congress demanding legislative action. "It is essential," he said, that the government be given the power to deny passports to travelers whose actions threatened the national security. "Each day and week that passes" without such legislation "exposes us to great danger."[65] Nevertheless, despite continued pressure from the White House, Congress refused to enact even a limited form of the legislation the President sought. Thus, the Court's decision ended a widespread and pernicious government attempt to control foreign travel.[66]

These three models of due process of lawmaking—structural, deliberative, and procedural—are not mutually exclusive. Nor should they be, if they are to perform the kinds of pragmatic roles suggested at the beginning of this chapter. Indeed, the Court's landmark legislative veto decision, *Immigration & Naturalization Service v. Chadha,*[67] neatly demonstrates how these theories can combine to give a pretty clear answer to what might otherwise be a hard public law problem. For half a century, Congress had used a technique called the legislative veto. Under this scheme, Congress would delegate authority to the executive branch but reserve the right to veto—sometimes by both Houses, but other times by one House or even by a committee—later executive actions taken pursuant to the delegated power. Defenders of the legislative veto saw it as the only way to give sufficient authority to executive agencies to handle complex problems, without abdicating the legislative role to the executive. In fact, though, the legislative veto ran afoul of all the components of due process of lawmaking.

Even the deliberative model of due process of lawmaking, which has the weakest support in American law, is hard to brush aside in *Chadha*. Mr. Chadha was an East Indian who had been lawfully admitted to the United States but overstayed his student visa. An Immigration Judge had suspended his deportation, because Chadha had resided in the United States for over seven years, was of good moral character, and would suffer extreme hardship if deported. The federal statute under which the judge acted allowed one House of Congress to veto a suspension of deportation.[68] Eighteen months after the Immigration Judge acted in Chadha's case, the House of Representatives vetoed the suspension of deportation for Chadha and for five other aliens—but did not disturb 334 other suspensions of deportation. The resolution to this effect was introduced by the chair of the House subcommittee

65. 104 CONG. REC. 13,046, 13,062 (1958).

66. The history is examined in detail in Farber, *National Security, The Right to Travel, and the Court,* 1981 SUP. CT. REV. 263, 278–82.

67. 462 U.S. 919 (1983). *See generally* B. CRAIG, CHADHA (1988).

68. *See* 8 U.S.C. § 1254(c)(1).

just as the session of Congress was about to end. The resolution was introduced and adopted by the House in a matter of a few days, had not been printed, was not available to members when they voted, and was passed without debate or recorded vote. So far as we know, to this day no one has explained why Chadha and the other five were singled out. Whether or not Chadha deserved to be deported, he clearly did not get a fair hearing.

This is truly a lousy, arbitrary, and mean-spirited way to make a decision profoundly affecting the personal liberty of a human being.[69] By this we do not simply mean that we regard the outcome as unjust, although it may have been. More than that, we mean that even the rudiments of due process were lacking in a situation essentially involving adjudication rather than rulemaking. So far as the record shows, no one in Congress gave serious thought to Chadha's case. The Court did not rely on lack of legislative deliberation in *Chadha,* and neither need we do so, for the structural and procedural arguments are extremely strong. The total absence of legislative deliberation does, however, highlight the structural and procedural flaws of the legislative veto.

The Constitution says that laws are supposed to pass both Houses of Congress and go to the President for signature; the legislative veto, as exercised in *Chadha,* allowed subunits of Congress—the House, and in effect merely a subcommittee chair—to make law. If this deviation from the constitutional framework were truly necessary for meaningful legislative oversight, perhaps it could be justified. But, as public choice would predict, quite the contrary was true.[70] In a nutshell, the legislative veto allowed Congress to avoid hard questions of public policy. The legislative veto made it simultaneously easier to pass a controversial bill and harder to implement the bill. Members of Congress could vote in support of virtue and later veto any effort to be virtuous. In practice, the veto decision was controlled by the committees, which often cared more about their own current political interests than the original congressional intentions for the statute. Thus, the legislative veto encouraged "responsiveness to a changed legislative intent that may be

69. Indeed, in *Chadha* Justice Powell concurred in the judgment on the ground that the House had improperly assumed an adjudicatory function in making its own determination whether the six persons in question met the statutory criteria for suspension of deportation. He reasoned: "Unlike the judiciary or an administrative agency, Congress is not bound by established substantive rules. Nor is it subject to procedural safeguards, such as the right to counsel and a hearing before an impartial tribunal, that are present when a court or an agency adjudicates individual rights. The only effective constraint on Congress' power is political, but Congress is most accountable politically when it prescribes rules of general applicability." 462 U.S. at 966 (Powell, J., concurring in the judgment).

70. The legal literature on the legislative veto is legion. The analysis that follows is a summary based on Frickey, *supra* note 34, which in turn relied heavily upon Brubaker, *Slouching Toward Constitutional Duty: The Legislative Veto and the Delegation of Authority,* 1 CONST. COMM. 81 (1984).

prompted by nothing more profound than a momentary shift in the mood of the public, the proximity to an election, an altered composition of the overseeing committee, the rise of a new and committed interest group—a change of intent that would not be sufficient to stir the passage of a law, but that would be adequate to affect administrative rules under the threat of a legislative veto."[71]

The Court struck down the legislative veto in *Chadha,* largely justifying its decision with a rather wooden approach to the constitutional language requiring bicameral Congressional action and presentment of bills to the President. The Court did note, however, that bicameralism and the President's veto power protect against the "fear that special interests could be favored at the expense of public needs."[72] An elaboration of this perspective based on the insights of public choice,[73] rather than formalistic constitutional interpretation, could have strongly bolstered the Court's decision. The effect of the ruling was to require the observance of appropriate legislative procedures. Public choice theory suggests that strict adherence to a preordained lawmaking format can limit the opportunities for strategic behavior on the part of legislators, moderate the influence of interest groups, and reduce the possibility of arbitrary outcomes.[74]

71. Brubaker, *supra* note 70, at 94.

72. 462 U.S. at 950.

73. Professor Harold Bruff made the argument succinctly when he explained that the legislative veto "subverted primary controls on the fairness of legislation in two ways. The first is to vitiate the effectiveness of the bicameralism and presentment requirements in raising the size of coalitions needed for collective choice. Retention of veto authority systematically favored interest groups having advantages in one or both houses of Congress because of their distribution throughout the nation. Second, the veto device allowed Congress to select its decision rule at the operational stage of policymaking rather than at the constitutional stage. A check on the fairness of selecting decision rules is the difficulty of determining who will profit from their later use in specific cases. Yet at the operational stage it is much easier to predict the winners and losers from a change in the decision rules." Bruff, *Legislative Formality, Administrative Rationality,* 63 TEX. L. REV. 207, 221 (1984) (footnotes omitted).

74. For an example older than *Chadha* that is supported by a cumulative assessment of due process of lawmaking principles, consider United States v. Lovett, 328 U.S. 303 (1945). In an appropriations bill, Congress forbade the expenditure of federal funds for the salaries of three named employees of the executive branch who were suspected of being subversives. This provision violated all the norms of due process of lawmaking. Under our constitutional separation of powers, Congress is not the appropriate entity to fire executive branch employees (except through the mechanism of impeachment). Melding a substantive provision into an appropriations measure is bad legislative form. Indeed, the Senate refused to go along with the provision five times, until it became apparent that without it the House would not pass the appropriations measure. The President signed the bill reluctantly, stating that he did not consider the employees subversives and that he wanted to retain them. The President said: "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional." In summary, the procedures Congress followed in enacting the

II. Expanding the Influence of Public Choice in Public Law

What follows are several examples of how the insights of public choice could enrich public law. The illustrations are intended to show how a sensitivity to public choice can inform decisions in concrete cases. If enough cases are eventually decided this way, they may provide sufficient fodder for modifying public law theory in a more general fashion. Building general theory from the ground up, so to speak, is the most likely way in which public choice might influence broad areas of public law.

Although we have rejected the radical constitutional solutions proposed by Richard Epstein and others, we agree with them that the rising influence of special interests on the political process is very troubling. This influence is unfortunate in at least three respects. First, some people are not members of any organized interest group. Interest group politics redistributes wealth and political power away from these segments of the population. Second, apart from the distributional effect, there is also the "Pogo effect" ("We have met the enemy and he is us"). Even if everybody belonged to a "special interest" group, so that special interest politics did not affect the distribution of wealth, interest groups would still direct resources to socially unproductive programs. Some reason exists to blame our current problems in controlling the federal budget on the Pogo effect. More generally, the Pogo effect can potentially do substantial long-term economic damage. Third, and perhaps most important, the activities of special interest groups tend to undermine the democratic ethos. The successful functioning of a democracy requires voters and sometimes government officials to act in ways that are economically irrational. Because these behaviors are not reinforced by economic incentives, they depend on a somewhat fragile public adherence to a social code. Special interest groups, by creating the impression that government is simply an arena of self-interest, foster an atmosphere of cynicism that is incompatible with a healthy democracy.

Unfortunately, identifying the problems posed by special interests is easier than finding a solution. We do not claim to have discovered any "miracle cure," but we do have a few suggestions.

One way of reducing the power of special interest groups is to limit their role in the political process. We believe that a strong case can be made for

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provision seemed more like a witch-hunt than a careful deliberation about the loyalties of the individuals involved.

The Court invalidated the provision on the ground that it was an unconstitutional bill of attainder, in that it constituted a legislative punishment of ascertainable persons without any judicial trial. Justice Frankfurter, in a separate opinion, more squarely invoked due process of lawmaking principles. He relied on the maxim that judges should interpret statutes to avoid constitutional issues if possible, and he interpreted the statute as simply saying that the named employees could not be paid out of certain specifically appropriated moneys.

limiting campaign expenditures by business and labor PACs. Contributions from these PACs are clearly linked to a legislator's performance on legislation favoring these groups. Eliminating such "economic" PACs would reduce the tendency of legislators to favor these special interests in gratitude for past contributions or in the hopes of future contributions. It would also help combat unhealthy public cynicism about government.[75]

Ironically, on those rare occasions when legislatures have attempted to curb special interests, the Supreme Court has intervened on behalf of the special interest groups themselves.[76] In particular, the Supreme Court has struck down limitations on campaign expenditures as violations of the first amendment.[77] Our proposal, however, is much narrower than those the Court has invalidated. The intrusion on free speech would be minimal, since individuals could divert their PAC contributions to noneconomic PACs.[78] A full discussion of the first amendment issues would take us far afield.[79] A

75. The argument for such a restriction is persuasively made in Sorauf, *Caught in a Political Thicket: The Supreme Court and Campaign Finance*, 3 CONST. COMM. 97 (1986). *See also* F. SORAUF, WHAT PRICE PACs? (1984). For a much more benign view of PACs, see A. MATASAR, CORPORATE PACs AND FEDERAL CAMPAIGN FINANCING LAWS (1986).

76. *See* FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985); First National Bank v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976). A recent case, Austin v. Michigan Chamber of Commerce, 110 S.Ct. 1391 (1990), is a welcome break from this pattern.

77. FEC v. National Conservative Political Action Comm., 470 U.S. 480 (1985) [*NCPAC*], invalidated a federal statute limiting the amount of money a PAC group can spend supporting a candidate who is also receiving federal campaign financing. We believe that *NCPAC* is distinguishable from our proposal in several regards. First, the Court suggested that the outcome might have been different if the statute had not been so broad as to include even small neighborhood groups. *Id.* at 500–501. Second, combined with the limits on direct contributions to candidates and parties upheld in *Buckley*, the effect of the PAC restriction considered in *NCPAC* was to limit the total amount of campaign speech. Our proposal, however, would leave noneconomic PACs open, and thus would rechannel rather than limit speech.

78. As a result, the legislation we propose would be less likely to prevent challengers from raising enough money to successfully challenge incumbents.

79. For an introduction to the voluminous literature, see Sorauf, *supra* note 75; BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CALIF. L. REV. 1045 (1985); Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1; *The Supreme Court—1985 Term*, 99 HARV. L. REV. 223 (1985). Much of the argument has focused on whether Congress may properly use restrictions on campaign financing as a means of equalizing political influence. *See, e.g.*, Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982). In *Buckley*, the Court held this to be a constitutionally impermissible purpose, 424 U.S. at 48–49.

More recent information indicates that PAC contributors are more representative of the general population than campaign contributors in general, so that equality may not be as great a concern as some commentators feared. On the other hand, PACs are strongly skewed in terms of the types of interests they reflect. For example, of the nearly 3,000 PACs, only seventeen are concerned with environmental preservation and energy, and only one represents consumers.

carefully tailored ban on economic PACs could probably be defended, however, as a means of channeling (rather than limiting) speech.[80] The objection to economic PACs is not based on the content of their speech, which would be a highly suspect motivation under the first amendment. Rather, it is based on the secondary effects of that speech on the legislative process and the democratic ethos. Even if the same individuals gave the same amount of money through other PACs, the contributions would be less clearly linked to votes on specific issues. Hence, the ban on economic PACs seems valid under the Court's recently formulated *Renton* test.[81]

Unlike most proposals to limit campaign contributions, ours is not aimed at limiting the role of money in politics as such. Rather, it is directed at a much more limited problem: the collection and disbursement of campaign money from groups defined by narrow economic interest rather than party or ideology. When a PAC group of dairy farmers supports a candidate, the candidate is clearly on notice that future support depends on votes for dairy subsidies. If the farmers gave the same amount of money through some other

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See K. Schlozman & J. Tierney, Organized Interests and American Democracy 247–52 (1986). Of course, the extent to which PAC contributions influence legislators is itself controversial. *See* Sorauf, *supra* note 75, at 109–12, for a review of the literature. In addition, as Sorauf argues, *id.* at 112–19, economic PACs undermine the fragile set of values necessary for a healthy democracy. Our own view is that economic PACs do raise serious concerns about the health of the political process.

The Framers themselves seem to have been concerned about these matters, under the broad rubric of what they called "corruption." (Their concept of corruption was obviously far broader than even the "appearance of corruption" discussed in the Supreme Court opinions, for the Court seems to have in mind bribery rather than the pursuit of private interests at the expense of the public). *See* Sunstein, *supra* note 3, at 35–45. Thus, present-day concern about PACs can lay claim to a tradition embodied in the Constitution itself.

80. Presumably, many of the same individuals would still make contributions to non-economic PACs.

81. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). *Renton* upheld a severe zoning restriction on adult theatres, a context admittedly far removed from campaign financing. For our purposes, the importance of *Renton* is that it refined the test for content neutrality. According to the Court, a statute is content-neutral if it is "*justified* without reference to the content of the regulated speech." *Id.* at 48 (emphasis in original), quoting *Virginia Pharmacy Bd. v. Virginia Citizens Consumers Council,* 425 U.S. 748, 771 (1976). This test is satisfied, the Court said, if the government's justification relates to the secondary effect of the speech on its surroundings, rather than any objection to the viewpoint expressed. *Id.* at 49–50. Regulations of this kind may be upheld if they serve a substantial government purpose and do not unreasonably restrict the available channels of communication. *Id.* at 46–50. In short, *Renton* appears to adopt the view that the government may generally take the content of speech into account when channeling speech, but only rarely when the purpose is censorship. We believe that in doing so *Renton* merely states explicitly what was implicit in a long line of prior cases. *See* Farber & Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication,* 70 Va. L. Rev. 1219 (1984). In restricting expenditures by economic PACs, the legislature is not objecting to the viewpoint expressed by the PAC's speech, which is simply that a certain candidate should be elected.

PAC (an ideological group, for example), or directly to a political party, the linkage would be less clear. Moreover, if the successful candidate did vote for dairy subsidies, the effect on public confidence in the democratic process would be less, because there would be a smaller appearance of impropriety. Finally, because economic PACs exist to protect the special economic interests of their members, their effect on the legislative process is likely to be to promote rent-seeking rather than any arguable public interest. American political life would be improved without these economic PACs.

Admittedly, making economic PACs illegal would not by itself radically diminish the power of special interest groups. It would, however, be a step in the right direction. Certainly, a reduction in the number of PACs to which people may contribute seems far less radical than imposing new substantive limitations on legislation of the kind discussed in chapter 3. In any event, despite the potential first amendment problems, we believe that reforms of campaign financing and perhaps greater control of lobbying[82] can be useful means of controlling special interest groups.

The power of special interest groups, according to many political scientists, is also likely to be weakened by strong political parties. The party system has not been very strong in the last decade or so, but there has been a more recent tendency for campaign financing to be funneled increasingly through the party organization.[83] It would not be difficult to amend the tax laws so as to encourage this trend by giving preferred tax treatment to contributions to political parties. By providing a tax credit with a cap for large contributions, we could also encourage small donations by lower income individuals, thus fostering egalitarianism as well as undermining the special interests.

82. Although direct sanctions against the lobbyists themselves raise serious first amendment problems, *see* United States v. Harriss, 347 U.S. 612 (1954), the Court has indicated that the first amendment conveys no right to have an official listen to a speaker. In Minnesota State Board v. Knight, 465 U.S. 271 (1984), the Supreme Court held that the state could constitutionally prohibit administrators from listening to the views of dissident teachers. The Court's broad language seems to indicate that legislators could be prohibited from listening to lobbyists: "However wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation. . . . Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id.* at 285. The Court also recognized that Congress was free to "enact bills on which no hearings have been held or on which testimony has been received from only a select group." *Id.* at 284. This suggests that the *Knight* holding is not limited to administrative officials, but also encompasses legislators. If so, then the first amendment would not bar legislation restricting contacts between legislators and lobbyists.

83. *See* M. Fiorina, Congress: Keystone of the Washington Establishment 144–55 (2d ed. 1989). On the desirability of strong political parties, see text accompanying notes 50–51 in chapter 2.

Special interests might also be better controlled if courts were to police covert delegations by legislatures. Although we have rejected attempts to police delegations of authority to administrative agencies,[84] other delegations of legislative authority might warrant increased judicial scrutiny. For example, in *Chadha* the legislative veto amounted to a delegation to a small coterie of legislators—those on the relevant committee or subcommittee—of the authority to thwart the implementation of legislation.[85] This delegation violated all the norms—structural, deliberative, and procedural—of due process of lawmaking. It is one thing to delegate power to administrators chosen by the President. It is another to delegate to a handful of legislators chosen on the basis of seniority or party loyalty.

Another troublesome form of covert delegation results when a legislature essentially cedes its authority to private interests. A good illustration is *U.S. Railroad Retirement Board v. Fritz.*[86] Retirement benefits for railroad workers come from the railroad retirement system, not the social security system. This causes problems in coordinating the two systems. To illustrate the issue in *Fritz,* assume that someone working for the railroad for ten years qualified for $300 in monthly railroad benefits, while someone with equivalent nonrailroad work likewise qualified for $300 in social security benefits. Twenty years of railroad work increased the benefits to $500, just as twenty years of nonrailroad work increased social security to $500. Many workers spend part of their employment years working for the railroad and another part working elsewhere. The formula used prior to 1974 gave some of these people a windfall; a worker with ten years inside and ten years outside the railroad industry received $600 ($300 railroad benefits, $300 in social security) rather than $500 in benefits.

In 1974 Congress restructured the retirement system to eliminate this windfall, but did not make the change effective across the board. Retirees who were already receiving the windfall continued to get it. For persons still working in 1974, Congress adopted complicated rules. To simplify, in general people working in the railroad industry would get the windfall if they had already had ten years of railroad work by 1974; people currently employed outside the industry, however, lost most or all of the retirement windfall unless they had already completed twenty-five years of railroad work by 1974.

At first glance, this seems like a strange compromise. To be sure, leaving intact the benefits of persons already retired seems fair, even if their pensions may be excessive compared to those of other retirees. But what about the favorable treatment of current railroad workers versus former railroaders

84. *See* chapter 3.
85. *See* notes 67–74, *supra,* and accompanying text.
86. 449 U.S. 166 (1980). *See* Sunstein, supra note 3, at 69–72.

holding other jobs? This odd distinction becomes explicable when we consider its source. The bill embodied a proposal from a joint labor-management negotiating committee, which had formed at the request of Congress. The members of this committee were not appointed by public officials, and no one on the committee represented the workers who bore the brunt of the bill—nonrailroaders who had earlier worked between ten and twenty-five years in the railroad industry.

The statute is also suspect for other reasons. It actually raised the benefits for current union members, apparently at the expense of the former railroaders. In addition, the House and Senate committee reports contained some false statements that no one would lose vested benefits under the bill (although other portions of the reports accurately reflected the bill's impact). Nowhere in the legislative history did any legislator note, much less justify, the potential unfairness of the bill. Moreover, members of the joint labor-management negotiating committee may have misled Congress at the hearings about the bill's effect on vested benefits. Not only did Congress fail to demonstrate any deliberation about the potential unfairness of the bill, there are some reasons to doubt whether Congress even understood what the bill would accomplish.

In *Fritz,* however, a majority of six Justices upheld the constitutionality of the statute by applying the weakest sort of rational basis inquiry. The Court asked only whether it was possible to imagine a plausible reason for what Congress did. The Court concluded that preferring those currently connected to the railroad industry was a sufficient reason. For the Court, it was constitutionally irrelevant "'whether this reasoning in fact underlay the legislative decision.'"[87] The majority said:

> [W]e disagree with the District Court's conclusion that Congress was unaware of what it accomplished or that it was misled by the groups that appeared before it. If this test were applied literally to every member of any legislature that ever voted on a law, there would be very few laws which would survive it. The language of the statute is clear, and we have historically assumed that Congress intended what it enacted.[88]

Thus, the Court in *Fritz* strongly repudiated a deliberative model of due process of lawmaking. For reasons explained earlier, we agree that an inquiry about legislative deliberation, standing alone, is insufficient to justify invalidating the statute in *Fritz*. But, contrary to the Court, the absence of deliberation—indeed, the positive evidence of legislative confusion—in *Fritz* should not be constitutionally irrelevant, for it should reduce the degree of deference given the statute. When this concern about deliberation is

87. 449 U.S. at 179 (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1960)).
88. 449 U.S. at 179.

woven together with a due process of lawmaking inquiry about structure and procedure, a strong argument can be made that *Fritz* is wrongly decided.

What Congress did in *Fritz* was to delegate the resolution of a public problem—the financial difficulties of the railroad retirement fund—to a committee made up only of private interests, indeed a committee that did not represent even all of the private groups that had an interest in the problem. The private committee decided to balance the retirement fund's budget by stripping an unrepresented group of vested benefits. Had Congress then articulated some justification for the resulting bill, that bill might have deserved judicial deference. As it was, however, Congress apparently simply deferred to the equilibrium of power in an unrepresentative committee made up solely of private interests. Striking down the bill in *Fritz* would have done no more than discipline Congress to avoid covert delegations to interest groups, or at least to deliberate about the proposals that come from such entities. Requiring some measure of legislative due process seems especially proper when Congress seeks to deprive individuals of vested benefits, which are not technically property rights but are very similar as a practical matter.

On the surface, the disadvantaged class in *Fritz* might seem to deserve little sympathy. They are left no worse off than persons who never worked in the railroad industry and must rely upon Social Security retirement benefits. Did the plaintiffs in *Fritz* deserve a windfall simply because Congress gave a windfall to others who were similarly situated? When vested benefits are involved, there is a real likelihood that workers have relied on those benefits in making career decisions and retirement plans. Even a "windfall" should not be too readily subject to retroactive destruction. More fundamentally, the essence of equal protection is that the government must treat similarly situated people similarly, not just out of fairness, but also to discipline the policy-making process against undue influence.[89] Similarly, the essence of due process goes beyond the opportunity to participate in a governmental process affecting one's interests.[90] The rest of us, who are not directly af-

89. The classic overall justification for equal protection scrutiny was written by Justice Jackson: "Invocation of the equal protection clause . . . does not disable any governmental body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

90. The conventional context for this point is in adjudication or regulation, rather than the

fected by the statute, have a stake in whether retirement laws are the product of a fair process. These norms of equal protection and due process were flouted by the covert delegation of authority and the resulting discrimination in *Fritz.*

Covert delegations are probably not uncommon. Due process of lawmaking could attack only the most obvious errors of decisional structure or procedure, and might be limited to cases where vested benefits or other particularly important individual interests were at stake. Due process of lawmaking, like any other public law theory, cannot solve all public choice problems. But this is no reason not to do what can be done to improve the policy-making process.

Considerations related to public choice might also help encourage legal evolution. When most legal doctrines were of common law origin—that is, created by judges on a case-by-case basis—the law had the built-in capacity to evolve over time, as society changes and necessitates a rethinking of legal rules. In twentieth-century America, most important legal rules, particularly in public law, are rooted in statutes or administrative regulations. Because legislatures are not particularly good at updating statutes, contemporary American law is prone to obsolescence.[91]

We have already seen some illustrations of how due process of lawmaking can encourage legal evolution. In *Mow Sun Wong,* the Court threw out an old administrative regulation and prodded the other branches to consider the issue from a contemporary perspective. Similarly, in several gender discrimination cases, the Court has struck down statutes that purported to help women but seemed rooted in outdated sexist stereotypes.[92] In contrast, the Court

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legislative process. Considering its virtues, however, should not at least some minimal aspect of it be applied in a context like *Fritz?* For a recent extended discussion of the value of due process, consider Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980): "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."

91. This theme is developed at length in G. Calabresi, A Common Law for the Age of Statutes (1982); Eskridge, *Dynamic Statutory Interpretation,* 135 U. Pa. L. Rev. 1479 (1987). We considered some aspects of the problem in chapter 4, part IV.

92. *See* Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (all-women's nursing college); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (widows, but not widowers, entitled to death benefits under worker's compensation statute without having to

has upheld newer statutes that granted women special benefits clearly designed to remedy gender discrimination.[93]

Public choice suggests some ways to sharpen this judicial interest in encouraging legal evolution. Public choice provides some rich insights into why legislatures, if left undisturbed, do not revisit obsolescent statutes, and how courts might stimulate appropriate legal evolution without invading legitimate legislative prerogatives. The doctrine of statutory *cy pres* discussed in the previous chapter is one way to do so. Another method is illustrated by *Moragne v. States Marine Lines, Inc.*[94]

Understanding *Moragne* requires a brief introduction to personal injury law. Historically, almost all the tort doctrines that govern personal injury cases were of common law origin—made by judges on a case-by-case basis. Under British tort law, transplanted to America, it was considerably better to kill people than to maim them. A maimed accident victim could recover hefty damages, but the family of a dead victim got nothing. The historical reasons for this idiotic rule are obscure. In the nineteenth century, American state legislatures abolished this rule by establishing a statutory right to sue for wrongful death. For wrongful deaths of seaworkers, Congress also enacted remedial legislation in 1920. The federal Jones Act[95] provides a cause of action for the negligent death of a seaman, and the federal Death on the High Seas Act[96] (DOHSA) establishes a cause of action for wrongful death of workers on the high seas—outside the territorial waters of the United States—"caused by wrongful act, neglect, or default."

The situation in *Moragne*, somewhat simplified, was that a widow attempted to bring an action for the wrongful death of her husband. He had died from injuries suffered in American territorial waters. The basis of the suit was that the vessel was "unseaworthy." Unseaworthiness does not fit the Jones Act (which is limited to negligence actions).[97] DOHSA does encompass the unseaworthiness theory but does not cover accidents in

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demonstrate dependence upon deceased spouse); Califano v. Goldfarb, 430 U.S. 199 (1977) (widows, but not widowers, entitled to federal survivors' benefits without having to demonstrate dependence upon deceased spouse); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (widowed mother, but not widowed father, entitled to social security benefits based on earnings of deceased spouse).

93. *See* Califano v. Webster, 430 U.S. 313 (1977) (retired women workers received higher monthly social security benefits than "similarly situated" men); Schlesinger v. Ballard, 419 U.S. 498 (1975) (women naval officers granted longer period in which to attain promotion than men).

94. 398 U.S. 375 (1970).

95. 46 U.S.C. § 688.

96. 46 U.S.C. §§ 761, 762.

97. Also, the Jones Act provides relief only for "seamen," and Mr. Moragne was a longshoreman.

American territorial waters. In short, the widow Moragne had fallen into a hole in the statutes. The only other law to apply, federal maritime common law, would preclude her action as well, because of the old rule that there can be no recovery for wrongful death.[98]

What was obviously needed in *Moragne* was some way to update federal law, either by reinterpreting the Jones Act to accommodate the modern tort of unseaworthiness, or by abandoning the old, draconian rule of the common law. We have some doubts about free reinterpretation of statutes, though,[99] and in this case the statutory language was not easily amenable to any construction that would allow her recovery. Perhaps statutory cy pres could have been used, since Congress had not foreseen the growth of the unseaworthiness doctrine. The more obvious solution is to abandon the old common law rule.

The Supreme Court, in a well-crafted opinion by Justice Harlan, changed the federal maritime law so that it embodied a general principle of recovery for wrongful death. The Court concluded that Congress in 1920 was simply fixing the problems squarely presented to it, not comprehensively addressing an area of law and freezing it from judicial creativity.

The *Moragne* setting illuminates how public choice can provide rich insights for the judicial role. The interest groups lobbying for statutes like the Jones Act and DOHSA are likely to focus on particular problems, not across-the-board inquiries that may complicate passage of legislation. Ms. Moragne and similarly situated persons have no idea that they are without remedy until they suffer the loss of a loved one; they have no incentive to organize before the fact to lobby for remedial legislation. Such large, diffuse, unorganized groups are, according to public choice, the least likely to lobby successfully for legislative action. Consider also the nature of the defendants in a case like *Moragne*. Shipping companies have the problem of compensating work-related injuries every day, in contrast to the one-shot tragedy suffered by Ms. Moragne. These companies are small in number, easily identified, and have the resources to lobby Congress—in short, public choice would predict that they can organize and protect themselves in the legislative arena. The industry, in short, is well positioned to obtain congressional relief from any harshness resulting from the application of *Moragne* to future injuries; the Ms. Moragnes of the world are unlikely to obtain legislative relief before their respective losses occur.

98. Note the obvious unfairness of denying her recovery. Had her husband survived his injuries, he could have brought an unseaworthiness action under federal common law. Had her husband's fatal injuries occurred a little further from shore, on the "high seas," she could have brought an unseaworthiness wrongful death action under DOHSA. But because of the combination of two factors—his death, and where he had been injured—all readily applicable sources of law were unavailing.

99. As we explained in chapter 4, part IV.

A more recent decision is less adept than *Moragne*. In *Boyle v. United Technologies Corp.*,[100] a military supplier was sued after a marine was killed in the crash of a defective helicopter. Over a strong dissent, the Court established a new defense for military contractors, freeing them from liability so long as they warned the government about product defects. As the dissent pointed out, government contractors had conducted a vigorous but unsuccessful lobbying campaign to get this exemption from Congress.[101] Public choice suggests that the burden of legislative inertia was properly placed on these firms, which are well-organized, politically powerful, and wealthy. Unfortunately, the Court instead placed the burden of seeking new legislation on the widows and orphans of soldiers.

Judges are not infallible, and encouraging legislatures to reconsider judicial holdings seems compatible with norms of legislative supremacy. As we explained in chapter 3, judges cannot simply discard statutes because they have lost majority support or are incompatible with the legal landscape. That would conflict too sharply with supremacy of the legislature in making public policy. Legislative supremacy is not, however, a barrier to judicial relief in situations like *Moragne*, where statutes do not address the precise problem before the judge. As we have seen, the appropriate reach of the congressional intent concerning a statute can be informed by public choice. Moreover, legislative silence about a problem under litigation can often be explained by public choice as well. Public choice, therefore, provides insights about the proper limits of legislative supremacy and about where the legislative burden of inertia should fairly be left in some cases.[102]

In this chapter, we have not tried to offer any grand design for revamping public law in light of public choice theory. In the previous two chapters, we have considered a number of unsuccessful attempts along those lines. As legal pragmatists, we are skeptical that any such grand design is feasible. There are many points at which public law depends on some conception of the political process. Beyond the topics we have considered in this book, for example, are questions such as the application of the antitrust laws to government bodies, the design of appropriate administrative procedures, judicial oversight of legislative districting, and the use of judicial review to protect politically powerless minorities. It seems inherently unlikely that any general theory can speak equally to such a diverse set of problems.

Public choice may have little relevance to some of these issues, while it may have varying lessons about others. Moreover, in redesigning legal doctrines, we need to keep in mind not only the teachings of public choice, but a

100. 108 S. Ct. 2510 (1988).

101. *Id.* at 2520 (Brennan, J., dissenting).

102. For another illustration similar to *Moragne*, see Selders v. Armentrout, 190 Neb. 275, 207 N.W.2d 686 (1973) (updating a nineteenth-century wrongful death statute to encompass modern tort principles).

multitude of other considerations relating to the legal process. Consequently, bringing public choice to bear on legal issues will require a long process of thoughtful reappraisal of existing doctrine. Our goal in this chapter has been only to initiate that process.

The major role of public choice in this process, as to some extent its role has been in political science, may be to reawaken the Madisonian interest in issues of institutional design and procedure. The "New Institutionalism" in public law probably will not take the form of directly translating public choice results into legal rules. Rather, public choice may be most important simply in sensitizing lawyers and judges to the kinds of institutional issues that so interested the Framers. Perhaps it should not have taken advanced mathematical models and econometric studies to remind us of the sage perspective of Madison & Company. In the twentieth century, however, wisdom comes much easier when it comes in technocratic garb—one reason being, of course, that we have painfully learned how important it is to be rigorous, both in empirical and theoretical work.